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| Judge: | Philip Nyamu Waki, William Ouko, Stephen Gatembu Kairu |
| Citation: | Linet Kemunto Nyakeriga & another v Ben Njoroge & 2 others [2014] eKLR |
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| County: | Nairobi |
| Docket Number: | - |
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| Case Outcome: | Appeal Dismissed |
| History County: | Nairobi |
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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & GATEMBU JJ.A)

CIVIL APPEAL NO. 266 OF 2013

BETWEEN

LINET KEMUNTO NYAKERIGA 1ST APPELLANT

HAROLD KIMUNGE KIPCHUMBA 2ND APPELLANT

AND

BEN NJOROGE 1ST RESPONDENT

GODLIVER NANJIRA OMONDI 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

(Being an appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Rose Ougo, J.) delivered in Nairobi on 27th September, 2013)

HIGH COURT PETITION NO. 14 OF 2013)

JUDGMENT OF THE COURT

The issues involved in this appeal are fairly straight forward and largely uncontroverted as is evident from the issues framed by the parties before the election court and as will emerge from the following summary.

Pursuant to the provisions of **Articles 90 (1)** and **98 (1) (d)** of the Constitution, **Sections 34 (1)** and **36 (1) (d)** of the Elections Act and Regulation 54 (1) (2) of the Elections (General) Regulations, 2012 and in accordance with the Party List Formula & Rules of Submission made by the Independent Electoral & Boundaries Commission (IEBC), the two main parties in the 2013 General Election, the National Alliance Party (TNA) and the Orange Democratic Movement (ODM), which were proportionally entitled to one special seat each in the Senate for representatives of persons with disabilities submitted the following names to the IEBC:-

TNA

| | | | |
|----------------|------|---------------------------|---------------|
| 1. Ben Njoroge | Male | Physically handicapped | Nakuru County |
|----------------|------|---------------------------|---------------|

| | | | |
|--|--------|--------|--------------|
| | Female | Visual | Kisii County |
|--|--------|--------|--------------|

2. Linet Kemunto Nyakeriga

ODM

| | | | |
|----------------------------|--------|------------------------|-----------------|
| 1. Godliver Nanjira Omondi | Female | Physically handicapped | Kakamega County |
|----------------------------|--------|------------------------|-----------------|

| | | | |
|--|------|------------------------|----------------|
| | Male | Physically handicapped | Baringo County |
|--|------|------------------------|----------------|

2. Harold Kimunge Kipchumba

When the IEBC issued Kenya Gazette Notice No. 3508 on 20th March 2013, however, the above positions were reversed with Linet Kemunto Nyakeriga, who was listed No. 2 (1st appellant) in the TNA list and Harold Kimunge Kipchumba also No. 2 (2nd appellant) in the ODM list gazetted as duly elected to represent persons with disabilities in the Senate. This turn of events, no doubt aggrieved the 1st and 2nd respondents who petitioned the election court (Ougo, J) to nullify the election of the appellants, to declare that the IEBC contravened the law in nominating the two, nullify the gazette notice No. 3508 of 20th March 2013 and to direct the IEBC to elect the 1st and 2nd respondents as the representatives of persons with disability to the Senate.

In answer to the petition the IEBC deposed that it was not in contravention of the Constitution or statute as the election of the appellants was conducted in accordance with the Constitution, the Elections Act and the relevant rules and regulations; that in order to achieve the principle of diversity and to ensure that the two disabilities (physical and visual) are represented it became necessary to redistribute the seats so as to have one physically disabled member and one visually disabled member. It was further explained that if the only visually disabled nominee on the list was picked it would follow that nominee No. 1 on the ODM list, being a woman like the visually disabled nominee, had to be dropped in favour of a male nominee from the ODM list. The appellants in their affidavits maintained that as they met all the nomination requirements under the law and their respective parties' rules, they were therefore validly elected.

The learned Judge was persuaded by the respondents' arguments that the IEBC violated both the Constitution and statute by interfering with the party lists submitted by TNA and ODM.

The following passage in the judgment summarizes her findings:-

“I note that IEBC did not return the list (sic) and therefore they considered them valid. Under Article 90 (1) (b) it had to look at the proportional representation coupled with the requirement of sub Article (b) that the candidates were qualified and that they were alternates of men and women in priority of which they were listed. The parties complied by submitting male and female candidates and they prioritized them. The wording of Article 98 (2) (c) (sic) in my view is mandatory in that IEBC’s mandate was to consider the party lists in order of priority in which the nominees were listed. To argue that they had to achieve the principle of diversity and to ensure the two disabilities of physical and visual were represented and that they had to strike a balance in my view was wrong in light of Article 90 (2) (b) (sic) of the Constitution.....

I therefore declare that the election of the 2nd and 3rd respondents contravened the provisions of Article 90 (2) (a) (b) (c) of the Constitution as representatives of persons with disability in Senate.”

With that the learned Judge ordered that Gazette Notice No. 3508 in respect of the appellants be nullified, declared that the 1st and 2nd respondents were duly nominated and ordered IEBC to publish a gazette notice to effect this decision. It was the appellant’s turn to complain. They have challenged the judgment and decree in this Court listing several grounds which we have condensed as follows:-

i. That the learned Judge erred in usurping the functions of the IEBC by directing the IEBC to gazette the 1st and 2nd respondents in place of the appellants.

ii. That the impugned judgment and the judgment in H.C. Petition No. 13 of 2013, although similar in many respects and adjudicated simultaneously before the same Judge lack doctrinal cohesion due to difference in their conclusion.

iii. The decision of the election court is discriminatory to the appellants and contrary to the spirit of **Articles 27** and **54** of the Constitution.

iv. There was no basis for reaching the decision recorded by the election court, the court having found that the appellants were validly elected and that the IEBC had the discretion to harmonize the list to reflect gender, regional and ethnic diversity.

v. The learned Judge failed to consider the issues framed for determination.

vi. The learned Judge misapprehended the role of the IEBC under **Articles 88 (1) (4)** and **90 (2)** of the Constitution and **Section 34** of the Elections Act.

- vii. The learned Judge erred in relying on **Article 98 (2) (c)** of the Constitution which does not exist.

- viii. Although parties relied on certain international treaties and conventions in their submissions, the learned Judge misdirected herself in their application.

- ix. The learned Judge was biased towards the appellants in the award of costs.

- x. It was in error for the election court to hold that no disability is superior yet disabilities are not similar.

Those grounds were argued before us by both Mr. Ondieki and Mr. Mwenesi representing the 1st and 2nd appellants, respectively. They were supported by Mr. Murugu for the IEBC. The combined effect of their submissions is that the election court misapplied the relevant provisions of the Constitution, statute and international conventions thereby reaching an erroneous conclusion. The court having found as a fact that the 1st appellant was a member of TNA and that there was no evidence that the 2nd appellant had run for an elective post but lost, the only two grounds advanced in the petition against the appellants, it was illogical for the court to find that their election was invalid. The IEBC acting in conformity with the principles of the Constitution to balance ethnic diversity, regional balance and the various categories of disability adjusted the party lists. This, it was argued, the IEBC had power to do by dint of **Article 90 (2)** of the Constitution and **Section 36 (4)** of the Elections Act.

Mr. Arwa for the 1st and 2nd respondents opposed the appeal and submitted that the IEBC exceeded its mandate by choosing candidates for the parties thereby interfering with popular choices of the electorate; that the role of the IEBC as outlined in **Articles 88** and **90** of the Constitution does not extend to interfering with the party lists on the ostensible ground of balancing various interests and that there is no requirement in law that the various categories of disabilities be balanced or harmonized. Counsel finally submitted that the election court had the power under **section 75 (3)** of the Elections Act to issue the order directing the IEBC to publish a gazette notice to give effect to the judgment.

We have considered these able submissions by counsel in this appeal together with cited authorities and publications. We reiterate what we said at the beginning that the appeal raises fairly straight forward issues which are largely not in controversy.

For instance, it is not in doubt that the two parties in this matter, TNA and ODM submitted a list each, containing two persons with disability; that, without recourse to the parties the IEBC rearranged the list by reversing the order of priority. The parties before the election court framed the following three

issues:-

"1. Whether the 2nd and 3rd respondents were validly elected within the meaning of Article 98 (1) (d) as read with Article 90 of the Constitution.

2. What is the mandate of the 1st respondent under Article 90 as read with Article 98 (1) (d) of the Constitution"

3. Who shall bear the costs of this petition""

In our view, the determination of issue 2 which was at the centre of the dispute in the High Court and which, in our view, is the crux of this appeal will provide the answer to the other two issues. That is where must start.

Persons with disabilities are often excluded from the mainstream of the society and denied rights enjoyed by others. It is often forgotten that they are merely differently abled. Because of their conditions they have suffered discrimination in education, employment, access to public places, services and in politics.

One of the dominant features of the legal thinking in the twentieth century has been the recognition of law as a tool of social change. Though legislation is not the only means of social progress, it represents one of the most powerful vehicles of change, progress and development in society. While it is now recognized that international conventions and treaties play an important role in the promotion of the rights of persons with disabilities, it is equally accepted that domestic legislation remains the most effective means of facilitating social change and improving the status of persons with disabilities.

All international human rights instruments provide for the protection of the rights of persons with disabilities, as they apply to all persons. This principle of universality is reinforced by the principle of equality and non-discrimination, also included in the human rights instruments. While there are several international and regional instruments that apply to persons with disabilities, such as:-

- i. Universal Declaration of Human Rights (1948)

- ii. International Covenant on Civil and Political Rights (1966).

- iii. African Charter of Human and People's Rights (1981), all ratified by

Kenya, we consider the Convention on the Rights of Persons with Disabilities (2006) as the most comprehensive, more recent and relevant. It declares as its objective the promotion and protection of all

human rights and fundamental freedoms by all persons with disabilities and to promote respect for their dignity. The convention sets out international standards of human rights of persons with disabilities. It has been hailed as a great landmark in the struggle to reframe the rights of persons with disabilities. It enjoins States Parties to ensure, by adopting appropriate legislative, administrative and other measures, the full realization of all human rights and fundamental freedoms of persons with disabilities.

Article 29 of the Convention specifically provides for a guarantee by States Parties to persons with disabilities equal opportunity to effectively and fully participate in political life on equal basis with others, directly or through freely chosen representatives. Kenya ratified the Convention on 19th May 2008 and has since then been submitting its report under **Article 35 (1)** of the Convention to the Committee on the Convention of the Rights of Persons with Disabilities. By dint of that ratification and application of **Article 2 (6)** of the Constitution, the convention now forms part of the Laws of Kenya.

Even before these developments, the independence Constitution in Chapter V guaranteed the protection of rights and fundamental freedoms of persons without disability in the general provisions without making specific reference to them. **Section 33** made a lukewarm recognition of persons with disability in the political sphere as follows:-

“33 (1) Subject to this Section, there shall be twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests.

2. **The persons to be appointed shall be persons who, if they had been nominated for a parliamentary election, would be qualified to be elected as members of the National Assembly.**

3. **The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality.**

4. **The proportions under sub section 3 shall be determined by the Electoral Commission after every general election and shall be signified by the chairman of the Commission to the leaders of the concerned parliament parties, the President and the Speaker.**

5. **The names of the nominees of parliamentary parties shall be forwarded to the President through the Electoral Commission who shall ensure observance of the principle of gender equality in the nominations.” (Emphasis supplied).**

“*Special interests*” in **Sub Section (1)** was not defined and from the appointments made pursuant to this provision it is clear the term, “*special interests*” was understood to be synonymous to women (perhaps due to reference in the section to “*the principle of gender equality*”).” It is of significance to note that, under that law, once political parties submitted the list of their nominees to the Electoral Commission, it was for the President to appoint the nominated member by ensuring “*observance of the principle of gender equality in the nomination*.”

It may be recalled how this provision was used to reward friends, kinsmen, relatives, election losers and other least deserving categories. In the same breath, the enactment of Persons with Disability Act, No. 14 of 2003 makes reference only to voting rights but says nothing on the representation in Parliament.

Today, following the enactment of the 2010 Constitution, domesticating the provisions of international legal instruments signed and ratified by Kenya, persons with disabilities have renewed hope in the opportunities presented by the new law.

Chapter Eight of the Constitution provides for the Legislature; the establishment of Parliament of Kenya, consisting of the National Assembly and the Senate, both deriving their legislative authority from the people. Apart from the speaker, an *ex officio* member, the Senate consists of 47 members elected by the registered voters, 16 women nominated by political parties, 2 members being one man and one woman representing the youth and 2 members being one man and one woman representing persons with disability. The members representing the youth and persons with disabilities are elected in accordance with **Article 90**. Because of its importance in the determination of this appeal, we reproduce **Article 90**:-

90. (1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

a. **each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;**

b. **except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and**

c. **except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.**

(3) The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.” (Emphasis added).

In accordance with **sub-Article (3)** above, the IEBC, guided by a formula, determined that the two parties (TNA and ODM) were each entitled to one seat. For their part, the parties, whatever method of election they adopted to identify the candidates, settled on two persons each and submitted the names to the IEBC, in accordance with **Article 90 (2) (b)**, observing gender balance and priority emphasized in **Sections 34 (5) and 36 (2)** of the Elections Act, as follows:-

“34 (5) The party list under subsection (2), (3) and (4) shall be submitted in order of priority.....”

36. (2) A party list submitted under sub section (1) (a), (c), (d), (e) and (f) shall contain alternatives between male and female candidates in the priority in which they are listed.” (Emphasis ours).

The IEBC issued guidelines to political parties, *“The Party List Formula and Rules of Submission,”* to, among other things, help the parties in the compilation of the party lists. It prescribed the following requirements:-

“(b) Each party list comprises of the appropriate number of qualified candidates; and alternates between male and female candidates in the priority in which they are listed. However, this criterion does not apply to Senate (Women) Party List (Article 98 (1) (b) of the Constitution) as all 16 nominees are women.

(c) The names in the party list shall be in the order of priority.

(d) The party list shall be a closed list, that is, the list may not be amended after it has been submitted to the Commission.” (Emphasis ours).

Two new concepts have emerged in our electoral laws; party list and priority of the names in the list. Party list voting systems are widely used elsewhere in the world (particularly in Western democracies) and are designed to ensure that parties are represented proportionally in the legislature and all groups are also fairly represented. There are two broad types of party list system; closed list and open list. Whatever the case, in the party list, as the name suggests, each party lists its candidates as it may be entitled.

In an open list system the voters have the freedom of expressing their preference for a particular candidate in the list. The names in the list are not in any order of priority but are randomly arranged. The order of the final list will depend on the number of votes received by each candidate in the list, with the most popular candidate rising to the top of the list thereby enhancing his/her chance of being elected. In contrast, in a closed list system the party fixes the order in which the candidates are listed and ultimately elected and the voter simply casts a vote for the party as a whole as opposed to an individual candidate in the list. Winning candidates are selected in the exact order they appear on the list. A closed list system has been used in Algeria, Angola, Belgium, Burundi, Eritrea, France, Israel, Mozambique, Niger, Portugal and South Africa, among other countries around the world.

From the aforesaid guidelines issued by the IEBC to political parties, it is clear the list system adopted in Kenya is a closed system. We reiterate what the guidelines provide:-

“(b) The party list shall be a closed list, that is, the list may not be amended after it has been submitted to the commission.”

It follows that it is the responsibility of the parties to choose their preferred candidate and rank them in order of priority of preference. The seats won by each party are filled by candidates in the order they appear on the parties' respective list. The definition of “*party list*” under **Section 2** of the Elections Act suggests ownership of the list by the political party that has prepared it. The practice, indeed the law, in jurisdictions with a closed list system is that the power over who gets the reserved seats resides with the parties themselves and no other authority.

There is no better explanation for the adoption of the closed party list in Kenya and the role of the IEBC with regard to the list than that provided in the Elections Act itself. It provides in **Section 37** as follows:-

“37. (1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.

(2) Notwithstanding the provision of section 34 (10), if there are no more candidates on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty-one days.

(3) A vacancy in any seat in a political party list shall not be filled three months immediately before a general election.

(4) Where a political party fails to comply with the provisions of subsection (2) the Commission shall not allocate the seat for the remainder of the term of Parliament or the county assembly.”

The list serves as a reservoir of candidates in any of the eventualities enumerated above. It is clear from what we have said up to this point that the IEBC, in a closed list system has no power to rearrange the list or pick out from the list any other candidate apart from the parties' preferred candidate listed at the top of the list if only one candidate is required. In choosing the appellants in place of the 1st and 2nd respondents who were ranked first by their respective parties, the IEBC argued that it has the power in **Section 36 (4)** of the Elections Act to do that, and secondly that it was “*constitutionally necessary*” to balance the categories of disabilities. It was submitted before the election court that:-

“iv. To achieve the principle of diversity and to ensure the two disabilities (physical and visual) are represented it became constitutionally necessary to allocate the two seats such as to have one physically disabled member and one visually disabled member.”

This decision appears to us to have been informed by genuine intentions and logic but it was not a criterion or a consideration of the Constitution or statute. It was not even in the guidelines issued to parties by IEBC in the following terms:-

“1. The Senate (Persons with Disability) party list must have 2 names of qualified persons with disability nominees, being one woman and one man.

2. The nominees to the party list must have similar qualifications as those required of candidates contesting for elections as members of the Senate.

3. In order to meet the requirement of regional diversity, not more than one nominee in the party list shall be registered voter in the same county.

4. In order to meet the requirement of ethnic diversity, not more than one nominee in the party list shall be from the same ethnic community.”

The United Nations Convention on the Rights of Persons with Disabilities, like the Kenya Constitution and the Persons with Disabilities Act give more or less similar definition of the word “*disability*.”

Article 260 of the Constitution defines disability to include,

“.....any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities.”

The key consideration whether or not a person has a disability is whether, due to the impairment which in interaction with various barriers may hinder the person from fully and effectively participating in society on an equal basis with others. The route adopted by the IEBC to satisfy various categories of disabilities in our view, is not only untenable but also lacks basis in law. The only reference to that consideration is found in Regulation 54 (2) of the Elections (General) Regulations, 2012 which stipulates that the party list must contain, among other details, disability and the category of disability. But even if there is need, as indeed there may very well be, a case to have representation of other categories of disabilities, the power to make that decision lies with the political parties. The IEBC can only reject the party lists if it contains names of nominees who do not possess constitutional and statutory qualifications. In such a case, the party must, within the time the IEBC may specify, submit another name.

The second justification advanced by the IEBC for their action is based on the construction of **Section 36 (4)** of the Elections Act, that:-

“(4). Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.” (Emphasis supplied).

This provision must be read together with **Articles 88, 90, 248 (2) (c)** and **249** of the Constitution on the role, objects and authority of IEBC. This is necessary as a principle of constitutional interpretation to read the entire Constitution as integrated whole. The overall functions of the IEBC under **Article 88 (4)** of the Constitution are:-

“88. (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as

prescribed by an Act of Parliament and, in particular, for—

- a. the continuous registration of citizens as voters;
- b. the regular revision of the voters' roll;
- c. the delimitation of constituencies and wards;
- d. the regulation of the process by which parties nominate candidates for elections;
- e. the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- f. the registration of candidates for election;
- g. voter education;
- h. the facilitation of the observation, monitoring and evaluation of elections;

- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
 - (j) the development of a code of conduct for candidates and parties contesting elections; and
 - (k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.
- (5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.”

It is clear to us that under (d) above the IEBC can only regulate the process by which parties nominate their candidates and under (k) it is required to ensure compliance with the provisions of the Elections Act on qualification, procedure of nomination including submission of party lists, gender, youth, nomination rules, and other requirements. That does not in any way give it the mandate to participate in the actual nomination, in view of the fact that under (e) above it would be the arbiter in the event of any dispute arising from nomination exercise.

Indeed by dint of **Section 31 (2)** of the Election Act the IEBC can only supervise party nominations upon invitation by the party and at a fee. The “*designation*” of a candidate after the declaration of election results in **Section 36 (4)** aforesaid must therefore be read in the context of the broad constitutional role of the IEBC. In that context, it is our firm view the meaning to be attached to the word “*designate*” is not to “*choose*” or “*appoint*” because the action of designation comes after the elections are complete, but as an act of giving a title or, a name. “*Designatio personae*” in Latin according to Black’s Law Dictionary Ninth Edition, 2009, is the “*designation of the person by class or category rather than by name.*” Here the IEBC was required to formally declare the 1st and 2nd respondents members of the Senate, henceforth to be referred to as Senators.

We have reached the same conclusion as the learned Judge on the second issue; that the IEBC has no powers under **Articles 90** and **98 (1)** or under the Elections Act to nominate candidates on behalf of parties for that is what it did in the instant matter. The fact that the Judge reached a different conclusion in H.C Petition No. 13 of 2013, (**Lydia Mathia V. Naisula Lesuuda & IEBC**) on similar facts cannot be an issue for determination by this bench bearing in mind that an appeal to this Court has been preferred against that decision.

Before the High Court was an election petition and not a judicial review application. The Court having found that the wrong candidates were elected was under a duty to correct the mistake by revoking the gazette notice and order the body charged with elections (the IEBC) to gazette the correct candidates. Proceedings are only fully concluded when the court’s judgment is capable of being perfected. Once more, we cannot fault the learned Judge.

On costs, however, we think the learned Judge was plainly wrong in not awarding costs to the appellants even after finding they were not to blame for the confusion. For that reason, we set aside the order of costs to the extent that it states “*No costs to the 2nd and 3^d respondents*” and order that the IEBC shall pay costs of the petition and this appeal to the appellants and the 1st and 2nd respondents.

In sum, the appeal fails and is dismissed, save for the order on costs.

Dated at Nairobi this 20th day of December, 2013.

P. N. WAKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a

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