



Independent Electoral and Boundaries Commission v Sheik (Election Petition Appeal E001 of 2023) [2023] KEHC 18716 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
ELECTION PETITION APPEAL E001 OF 2023**

JN ONYIEGO, J

MAY 26, 2023

BETWEEN

**THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION APPELLANT**

AND

MAYMUNA ABDISHAKUR SHEIK RESPONDENT

*(Being an appeal from the entire judgment of the Senior Resident
Magistrate Honourable Mukabi kimani delivered on 29th
December 2022 in Election Petition No. MCCCCMISC/E003/2022)*

JUDGMENT

1. Prior to the 9th August 2022 Kenyan national general election, various political parties were required to submit party lists of their preferred candidates for nomination as Members of County Assembly in their respective counties pursuant to Article 90 and 177 (1)(b) of *the Constitution*.
2. In compliance with the above quoted provisions, the petitioner/ respondent herein applied to be nominated as a member of County Assembly Manderu County under the gender category through the Orange democratic movement party (hereafter the ODM). Consequently, the ODM party submitted its party list to the appellant for nomination with the respondent herein being at the top in the gender Category. However, the respondent's name was missing in the list of nominees gazetted by the appellant vide its notice dated 9th September 2022.
3. Aggrieved by the action taken by the appellant, the respondent filed a petition dated 15th September 2022, before the chief magistrate's court Manderu seeking orders as hereunder;
 - a. A declaration that the respondent herein exceeded its powers by failing to have due regard to the list submitted by the ODM party and consequently irregularly and illegally omitting the petitioner's name which was in the list submitted to the respondent.



- b. A declaration that the respondent exceeded its powers by failing to have due regard to the list of nominees that was submitted to it on 15th July 2022 by the ODM party and consequently irregularly and illegally omitting the petitioner's name that was forwarded by the ODM.
 - c. A declaration that the petitioner's right to legitimate expectation was violated by the respondent who irregularly and illegally omitted her name which was contained in the list forwarded on by the ODM for purposes of allocation of special seats in Mandera County Assembly.
 - d. A declaration that the petitioner is the duly nominated representative of the respondent in Mandera County Assembly under the gender top up category.
 - e. An order directing the respondent to Gazette and publish the name of the petitioner as the nominated member of the County Assembly of Mandera under the gender category by the ODM party.
 - f. An order be and is hereby issued quashing any certificates issued by Mandera County Assembly resulting in the gazette notice number 186 published on the 9th September 2022 and suspending and or annulling the gazettement
 - g. An order reinstating the petitioner's name in the list as submitted to the respondent
 - h. Costs of the suit
 - i. Any other or further relief that the honorable court may deem fit and proper in the circumstances.
4. Brief facts of this case as presented in the said petition and the affidavit in support sworn by the respondent /petitioner were that; The petitioner/ respondent was a life member of ODM party who prior to the 9th August 2022 national general election was qualified to be nominated as a member of the County Assembly Mandera County. That following ODM's advertisement on 13th May 2022 for interested parties to apply for party list nomination, she applied to be nominated under the gender category. She stated that during the nomination preliminaries, a complaint was raised against one Rahma Samow who had come first to the effect that she was not a registered voter nor was she a registered member of ODM. That as a consequence, she was elevated from position two to position one thus the ODM top candidate for nomination on ODM ticket on the gender category.
 5. It was her case that, despite ODM party having submitted her name to the respondent for nomination on 15th July 2022, the respondent deliberately disregarded the same and omitted her name when it gazetted names for nominated members proposed by various parties for nomination. That there being a nomination slot for ODM party, she was the automatic beneficiary hence ought to have been gazetted. She averred that by omitting her name from the nomination list, the respondent did violate her constitutional right under Article 38(3)(c) of *the Constitution* as no explanation was given to her for the omission of her name from the list of nominated member of County Assembly Mandera.
 6. According to her, ODM having won one elective seat of the member of County Assembly Mandera County against UDM party's 21 seats, Jubilee party 2, KANU 1, UPIA party 1, DAP-K party 1, IND party 1 and UDA 1, her party was entitled to the one slot available hence her nomination in compliance with the commission's nomination and election rules. In her view, the calculation was based on the number of seats garnered by a political party in Mandera County multiplied by the available nomination slots and divided by the total number of wards. That the formula applied by the appellant/respondent in awarding slots was illegal, unprocedural and unjust. She deposed that UDM



was awarded 15 seats instead of 13 slots. That the appellant's actions were prejudicial to her hence should be set aside and an order for her nomination to issue against the respondent.

7. In response, the appellant /respondent filed a response to the petition dated 14th September 2022 thus stating that the ODM party was not entitled to any nomination slot. The appellant denied the allegation that they interfered with and altered the ODM nomination party list with the intention of denying her her right.
8. It was the appellant's case that in the nomination party list submitted by the ODM, the respondent/petitioner was ranked 2nd and not 1st as alleged by the respondent/petitioner. That Mandera County has 30 wards all of which elected male members of County Assembly. It was stated that the commission did allocate nomination slots in accordance with the strength of each party in garnering the elective posts.
9. According to the appellant, the criteria applicable was that provided under Regulation 56 (2) of the election (General) regulations, 2012 that is; the number of seats won by a political party divided by the total number of seats multiplied by the available seats for allocation. They went further to summarize the number of seats won by each party as follows; UDM 21, Jubilee 2, UDA1, ODM1, UPIA1, NARC-Kenya1, KANU1, DAP-K 1 and Independent candidate 1. That in calculating the slots, the seat won by an independent candidate was excluded thus the number of elected seats on party tickets was 29 seats.
10. The appellant went on to state that it first allocated four slots under the marginalized party list category pursuant to section 36(8) of the *elections Act* thus allocating UDM 3 slots and jubilee 1 slot. That with this allocation, three males qualified and 1 female thus making a total of 33 males against one female. Applying the 2/3 gender rule, 17 females were required to be nominated. That since 1 female had already been nominated, the assembly was less 16 females to be nominated. That using the criteria of number of seats garnered by a party divided by total number of elective seats by parties multiplied by the available nomination slots, UDM got 12 slots and jubilee 1 slot. With that, 3 slots were left for allocation between UDA, ODM, UPIA, NARC-Kenya, KANU and DAP-K who had tied at 0.55172 each.
11. That to break the tie, the commission applied the criteria of the number of votes garnered by candidates of political parties which was; UDA 2038 votes; ODM 523 votes; UPIA 1711, NARC-K 764, KANU 1513 and DAP-K 1475. It was on this basis that UDA, UPIA and KANU won each 1 nomination slot.
12. Upon canvassing the petition through written submissions, the court delivered its judgment on 29th December 2022 thus upholding the petition with an order directing the respondent to gazette the petitioner as a nominated member of County Assembly under the gender category for the ODM party within 14 days from the date of delivery of the judgment. According to the learned magistrate, the appellant did not have the power not to gazette the respondent and that the method used to allocate slots was complex.
13. Dissatisfied with the said decision, the respondent moved to this court vide a memorandum of appeal dated 17th January 2023 and filed on 8th February 2023 seeking orders that;
 - a. The learned magistrate erred in law in holding that the ODM party was in law entitled to a nomination slot under the gender top list.
 - b. The learned magistrate erred in law in directing the appellant to gazette the respondent as a nominated member of County Assembly of Mandera under the gender top up list while there is no available nomination slot in the County Assembly of Mandera.



- c. The learned magistrate erred in law in exceeding his power under Section 75 (3) of the *Elections Act* by reaching a determination whose compliance will lead to a gross violation of Article 177(1)(b) of *the constitution*.
 - d. The learned magistrate erred in law in failing to take into account the evidence on record and analyzed the evidence in a perfunctory manner and thus failed to scrutinize the evidence as expected of an election court.
 - e. The learned magistrate erred in law in failing to properly evaluate the evidence on record in its entirety and arriving at a conclusion that is neither supported by evidence on record nor the law.
 - f. That the learned magistrate erred in law in finding that the appellant has contravened Articles 47 and 50(1) of *the constitution*
 - g. The learned magistrate erred in law in finding that the appellant has applied the formula set out in regulation 56(2) of the election(General) regulations ,2012 in a complex, unfair and unequitable manner.
 - h. The learned Magistrate erred in law in arriving at a decision that is contrary to the law and manifestly borne out of the misapprehension of the law.
 - i. The learned magistrate erred in law in delving into issues that were not pleaded by the parties.
14. When the matter came up for directions, parties by consent agreed to file submissions to canvass the appeal.

Appellant's submissions

- 15. Through the firm of Sheikh and Shariff Advocates, the appellant filed its submissions on 16th March 2023 thus adopting the content contained in the response to the petition. The appellant submitted on seven grounds; the first issue is whether the court erred by holding that the ODM party was entitled to a nomination slot; the appellant basically made reference to the relevant constitutional and statutory provisions governing nomination exercise based on the party list. Counsel contended that the appellant did not act in breach of any of the provisions in not allocating ODM party a nomination slot.
- 16. Regarding whether the independent candidate's seat was properly excluded in computing nomination slots, counsel relied on the holding in the case of Ann Potisho Kapasar v Sialo Natanya Tasur & 11 others (2018)e KLR where the court held that it was necessary to exclude the seats held by independent candidates in the allocation of nomination seats.
- 17. Touching on the possible solution in case of a tie between political parties, counsel opined that in such a scenario, the best international practice would dictate the application of the Hare quota principle which recommends use of the total number of votes to determine the deserving party for a nomination slot.
- 18. Learned counsel submitted that where there is a lacuna in law on how to handle a tie, the best approach is to use the number of votes scored by the tying parties to determine the beneficiary of the available slot. To demonstrate that courts have adopted similar approach before, the court was referred to the decision in the case of Harold Kimuge Kipchumba v independent Electoral & Boundaries Commission and another (2017) e KLR.
- 19. On the second issue, counsel submitted that the learned magistrate did exceed his powers under Section 75 (5) of the *Elections Act* in that he made orders affecting persons who were not made parties having



benefitted from the 16 slots available for nomination. That an order to gazette the respondent will mean creating an extra position outside the constitutional frame work.

20. In respect to issue number 3, counsel contended that the learned counsel failed to analyze the available evidence before arriving at the decision he made thus arrived at an erroneous decision by creating a non-existing nomination slot.
21. As regards the fourth issue, it was submitted that the court erred by holding that the appellant acted contrary to Article 47 and 50(1) of *the constitution* by not providing reasons for not nominating the respondent. Counsel contended that by the time the ODM party submitted the respondent's name as number one in its party list, the time for submission had lapsed hence her not being gazetted for nomination was legal and not an alteration of the party list by the appellant.
22. Concerning issue number five on whether the formula used by the appellant in allocating slots was complex as held by the court, counsel made reference to the provisions guiding the process of nomination inter alia Art. 90 and 177 of *the constitution*.
23. Regarding issue number six and seven on failure by the court to follow the law and delving on irrelevant provisions of the law, counsel dismissed court's reliance on Rule 26 (2) of the elections (party primaries and party lists) regulation 2017 which were not applicable in the current scenario.

Respondent's submissions

24. Through the firm of Duwane and company advocates, the respondent filed undated and unsigned submissions but filed on 29th March 2023 basically reiterating the content of the particulars of the petition and affidavit in support. Learned counsel submitted on two issues namely; whether the appellant erred in law in gazetting the party list and; whether the appellant acted within the law in allocating the special seats.
25. With regard to issue number one, learned counsel submitted that the trial court had jurisdiction to hear the petition. Counsel further submitted that the respondent was the bonafide candidate for nomination on ODM ticket hence under Article 90 and 177 of *the constitution* entitled to be nominated. That failure to gazette the respondent was malicious and unconstitutional as no written explanation was rendered for such action hence an act usurping the role of parties in determining candidates for nomination. To support that position, the court was referred to the holding in the case of Moses Mwiggi & 14 others vs Independent Electoral and Boundaries Commission (2015)e KLR
26. Touching on issue number two, Counsel opined that; the appellant adopted a formula unknown in law in determining the allocation of nomination slots; there is no law allowing use of quantity of votes to determine allocation of nomination slots; allocation to UDM 12 slots is not in dispute; that after UDM slots, ODM had the highest proportionate ratio than all the other parties.
27. According to learned counsel, ODM elected candidates won the highest votes being 523 out of 1526 of the registered voters translating to 34%, UDA candidate won 2038 out of 9000 registered voters translating to 22% of the total votes, UPIA won with 1711 out of 7252 translating to 23.5%,. That applying this formula, ODM ranks first hence entitled to a nomination slot on account of proportionality. That the criteria adopted by the appellant assumed that wards had equal number of voters which is discriminatory. That the formula applied by the appellant went beyond the scope of regulation 56 (2) of the Election Regulations 2012, Section 36 of the *elections Act* and Article 90 of *the constitution*.



Analysis and determination

28. I have considered the record of appeal herein, grounds of appeal and submissions by both counsel. The following issues are discernible for determination; Whether the appellant acted within the law in gazetting the party list without the respondent's name; whether the appellant acted within the law in allocating the nomination slots in the gender category.
29. This being a first appeal, this court is duty bound to re-evaluate, re-assess and re-examine afresh the evidence tendered before the trial court and arrive at an independent decision bearing in mind that the trial court had the benefit of listening to and seeing the witnesses testify hence able to assess their general demeanour. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as hereunder:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Whether the appellant acted within the law in gazetting the party list without the respondent's name;

30. The crux of the matter herein is the alleged failure by the appellant to gazette and nominate the respondent as a member of the County Assembly Mandera County through the ODM ticket under the gender category and the subsequent order by the trial court directing gazette and nomination of the respondent as such.
31. The relevant provisions governing nomination of candidates to the position of Member of County Assembly from the parties' party list can be traced to Article 90 and 177 of [the constitution](#). Art.90 does provide as follows;

Allocation of party list seats.

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 referred to 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.

32. Article 177 goes further to state that ;

Membership of county assembly

1. A county assembly consists of—

a. members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

b. the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;

c. the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

d. the Speaker, who is an ex officio member.

2. The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.

4. The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward.

5. A county assembly is elected for a term of five years.

33. Under Art.177(2), the special seat members necessary to ensure that no more than 2/3 of the membership are of the same gender, are to be nominated by political parties in proportion to the seats obtained in that election in that County by each political party under para. (a) in accordance with Art.90. The word proportionate herein means a party that gets more seats in a particular election shall be entitled to more nomination slots. It is worth noting that *the constitution* donated legislative authority to parliament to enact a provision to guide on the criteria for distribution of the nomination slots.

34. In view of the requirement for guidelines to enable the IEBC share out the available nomination slots, parliament enacted the *Elections Act* 2011 which under Section 34 provides that;

“Nomination of party lists members

(1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of *the Constitution* shall be on the



basis of proportional representation and in accordance with Article 90 of *the Constitution*.

- (2) A political party which nominates a candidate for election under Article 97 (1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97 (1) (c) of *the Constitution*.
- (3) A political party which nominates a candidate for election under Article 98 (1) (a) shall submit to the Commission a party list in accordance with Article 98 (1) (b) and (c) of *the Constitution*.
- (4) A political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (1) (b) and (c) of *the Constitution*.
- (4A) In the case of a person nominated pursuant to Article 177(1) (c) of *the Constitution*, the party list shall include a certification in the manner prescribed by the Commission.
6. The party lists under subsection (2), (3) and (4) shall be submitted in order of priority.
7. The party lists submitted to the Commission under this section shall be in accordance with *the constitution* or nomination rules of the political party concerned.
- (6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and —
 - (a) issue the political party with a certificate of compliance; or
 - (b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.
- (6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.
8. The party lists submitted to the Commission shall be valid for the term of Parliament.
9. A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.
10. The party list shall not contain a name of a candidate nominated for an election.
- (10) A party list submitted for purposes of subsection (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

[L.N 142/2011, r. 2, Act No. 32 of 2012, s. 2, Act No. 1 of 2017, s. 15.]



35. Section 36 further provides that;

Allocation of special seats.

1. A party list submitted by a political party under—
 - (a) Article 97 (1) (c) of *the Constitution* shall include twelve candidates;
 - (b) Article 98 (1) (b) of *the Constitution* shall include sixteen candidates;
 - (c) Article 98 (1) (c) of *the Constitution* shall include two candidates;
 - (d) Article 98 (1) (d) of *the Constitution* shall include two candidates;
 - (e) Article 177 (1) (b) of *the Constitution* shall include a list of the number of candidates reflecting the number of wards in the county;
 - (f) Article 177 (1) (c) of *the Constitution* shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group.
2. A party list submitted under subsection (1) (a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.
3. The party list referred to under subsection (1) (f) shall prioritize a person with disability, the youth and any other candidate representing a marginalized group.
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.
5. The allocation of seats by the Commission under Article 97 (1) (c) of *the Constitution* will be proportional to the number of seats won by the party under Article 97 (1) (a) and (b) of *the Constitution*.
6. The allocation of seats by the Commission under Article 98 (1) (b), (c) and (d) of *the Constitution* shall be proportional to the number of seats won by the party under Article 98 (1) (a) of *the Constitution*.
7. For purposes of Article 177 (1) (b) of *the Constitution*, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.
8. For purposes of Article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.



9. The allocation of seats by the Commission under Article 177 (1) (b) and (c) of *the Constitution* shall be proportional to the number of seats won by the party under Article 177 (1) (a) of *the Constitution*.

[Act No. 12 of 2012, Sch.]

36. From the above quoted provisions, the commission is under obligation to exercise its obligation in distributing the available nomination slots within the constitutional framework in compliance with Article 88(5) of *the constitution*. For purposes of this case, upon parties submitting their respective party lists of qualified candidates under the law for nomination under the relevant categories of special seats geared towards the attainment of gender parity, the commission had no power to interfere with or alter the list submitted by a particular party. See Moses mwicigi (supra) where the Supreme court stated that;
- “Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of apolitical party; such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations”
37. It then follows that where there is a clear procedure of redress in solving a dispute, such procedure must be exhausted first. To that extent, the appellant had no role to determine or interfere with the ODM party list as any potential dispute would only be resolved by the relevant mechanism within the party before submission of the party list. See East African Pentecostal churches registered trustees & 174 others v Samuel Muguna Henry & 4 others (2015) e KLR where the court held that where a statute establishes a dispute resolution mechanism, it must be strictly followed.
38. In the instant case, the respondent stated that her name was forwarded by her party to the appellant on 15th July 2022 for gazette. That the appellant ignored the communication when it gazetted the names of the proposed nominees on 9th September 2022 minus her name. This fact was admitted at para.5 of the appellant’s response to the petition. The appellant had no right to alter or ignore the party list or dictate a party on who is to be nominated. It can only reject a candidate if he or she does not meet the legal requirements for nomination. In the case of Linet Kemunto Nyakeriga & another v. Ben Njoroge & 2 others [2014] eKLR, the Court of Appeal rejected the notion or belief that IEBC can randomly choose or appoint qualifying candidates from the party list submitted by political parties in order to facilitate compliance with constitutional provisions.
39. Based on said admission, the appellant was under obligation constitutionally and statutorily to gazette the name of the respondent as one of those candidates qualified for nomination under the gender category subject to her party’s qualification for a slot or slots after declaration of the 9th August 2022. The allegation that the respondent was in second position was dealt with by her party which resolved a complaint earlier on lodged challenging the ranking of Rahma Samow in position 1 which was reversed in her favour thus confirming her as candidate number one. Therefore, there was no justification given in omitting the name of the respondent even after admitting that it received the letter submitting the respondent’s name as candidate number 1.
40. In the circumstances and based on that omission, I agree with the trial court’s finding that the petitioner/respondent had properly been nominated by the ODM party ranking position one and ought to have been gazetted by the appellant.



whether the appellant acted within the law in allocating the nomination slots in the gender category

41. The most contentious issue in this case is the failure to nominate the respondent as a member of the County Assembly Mandera on grounds that ODM did not qualify for a slot. As stated earlier, Art.90 and 177 of *the constitution* are key to the nomination process. However, to operationalize the two constitutional provisions, Parliament passed the *Elections Act* 2011 and the regulations thereunder which gives finer details on how to determine allocation of individual party nomination slots.
42. Regulation 56 (2) of the election general regulations 2012 provides a formula for allocation of special seats as follows; the formula for allocation of seats to the respective political parties from the party lists shall be the number of seats won by a political party divided by the total number of seats multiplied by the available seats for allocation in the respective house”.
43. In this case, Mandera County has 30 wards out of which only males were elected. With that in mind, the need to call in for special seats to meet the 2/3 gender rule pursuant to Art.177(1) (b) of *the constitution* became necessary. Having allocated four slots under Section 36(8) of the Election Act, where three males were nominated and one female which is not in dispute, the ratio was 33 males against 1 female thus requiring 16 more females to meet the mandatory gender rule.
44. After taking into account the number of seats won by each party, using the formula under regulation 56 (2) aforesaid, UDM took 12 slots based on the strength of their elected candidates that is the number of elected seats which was 21 divided by 29 being the total number of elected candidates multiplied by the available 16 slots for allocation ($21/29 \times 16 = 11.58621$ rounded up to the nearest decimal point to make 12 slots). Both parties are in agreement that UDM rightfully got 12 seats and Jubilee 1 making a total of 13 slots properly allocated leaving a balance of three slots to which six parties tied among them; UDA, ODM, UPIA, NARC-KENYA, KANU and DAP-K at 0.55172.
45. It is worth noting that currently, there is no law governing allocation of nomination slots when there is a tie. There is therefore a lacuna in the law which has over time left the commission in a precarious situation. An attempt to address the lacuna was made the year 2017 through the post-election evaluation report but no legislation was executed hence the position remains and here we are. In the said report, the evaluation committee considered various international best practices when such situations arise hence the preference for Hare quota system which takes into account the total number of valid votes divided by the total number of seats at stake in a constituency.
46. To break the stalemate, the appellant took the approach of Hare quota system which according to the said report they had applied in previous similar scenarios and were approved by the courts. In this case, they used party strength in securing elective votes to which parties scored as follows; UDA 2038, ODM 523, UPIA 1711, NARCK KENYA 764, KANU1513 and DAP-KENYA 1475. On the other hand, the respondent though not pleaded in its pleadings, submitted that the best formula is to use the percentage scored by each party. He gave 34% to ODM, 22% to UDA, and 23.5% to UPIA. Counsel tried to draw his calculation on figures indicated in the appellant’s affidavit at para 21 without specifying which affidavit. Assuming for a moment, the affidavit in reference is the one sworn in support of the response to petition, I do not find the quoted figures of 7252 votes,9000 votes etc.
47. However, I must make it clear that the formula being advanced by the respondent was not pleaded nor was it the subject of the trial before the lower court. This late introduction at the submission stage



is bad practice hence not tenable. See Daniel Otieno Migore v South Nyanza Sugar Co.Ltd(2018) e KLR where the court held;

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with pleadings is for rejection”

48. I am in agreement with counsel for the appellant that submissions outside the pleadings and what was canvassed before the trial court is for rejection as it amounts to introduction of new issues or evidence. In any event, a party cannot plead his or her case through submissions. The formula being advanced was not placed before the lower court nor was the same considered by the trial court. The respondent cannot be allowed to advance a fresh case through the appeal process. To that extent, I do not find the formula advanced by Mr.Duwane good for consideration. Even if, I were to consider, still I could not find the formula reflective of the will of the people as it purports to base party strength on votes garnered against registered voters instead of votes acquired by each party against valid votes cast just like presidential election computation of votes of 50% plus one under Article 138 of *the Constitution*.
49. Having dismissed the formula advanced by the respondent which equally is not recognized in law if I can use the respondent’s expression, am left with the criteria of the formula applied by the appellant. As stated, there is no law providing a solution on how to break a tie. It is also true that, the formula the appellant applied is not provided for anywhere in the law save for judicial precedents which is itself case law and binding or persuasive depending on which court is applying the same.
50. What then happens in a situation such as this one where the commission is caught up in a tie by parties yet the Assembly cannot be constituted without fulfilling the 2/3 gender rule. The only option in addressing the stalemate is for the commission to be more pragmatic and proactive if not innovative by applying the most favourable method to proportionately allocate slots to a party according to its strength in the total number of votes garnered by candidates in respect of the seats won. In my view, the commission could not sit and leave the county without an Assembly. If ODM lost in the neutral formula applied by the appellant, it cannot blame the appellant.
51. In the case of Harold Kimuge Kipchumba v Independent Electoral & Boundaries Commission(supra), the court had this to say when it was faced with a lacuna in law during the nomination process;

“I take the view that the 1st Respondent had a duty to take a decision in this matter. It was faced with two party lists that were valid and which listed a man in position one. It had to make a decision to start designating the one nominee from one party list and to start with the party list with majority seats was not irrational but was guided by belief that the party with majority seats takes priority over the other(s) given the formula in Regulation 56. To my mind the decision by the 1st Respondent to pick the first male candidate from the Jubilee party list and the second candidate, a female, from the ODM party list, is logical, practical and objective in the absence of any law that guides the manner of dealing with this type of situation.

In my considered view, the method used by the 1st Respondent led to the designation of one man and one woman to represent persons with disabilities in the Senate. I fail to see how else the provisions of Article 98(1) (d) of *the Constitution* would have been complied with if a different decision, for instance of designating two men, had been taken. The two persons elected under Article 98(1) (d) must fulfill the “alternate” criteria commonly referred to as “zebra” of one man and one woman. Further, once a man is picked first, it follows automatically that the next person to be picked must be a woman.



It is true that the party list system in Kenya is a “closed list” and that once such a list is subjected to elections it cannot be amended as it was held by the Court of Appeal in Linet Kemunto & another case. The decision by the 1st Respondent to pick the 2nd Respondent and declare her as duly elected to the Senate to represent persons with disabilities alongside the Jubilee nominee was, in my view, born of necessity to comply with Article 98(1) (d) of *the Constitution* as explained above.

I do not think that it is the intention of the law to leave the body that is mandated to regulate and oversee elections without a solution when faced with a difficult situation like this one. To my mind it is given latitude in designating nominees to do so in a way that complies with *the Constitution*, the electoral laws and the regulations made thereunder. I think a distinction needs to be made between elections by registered voters and elections through nominations. In the former the IEBC will have no mandate to refuse to declare a candidate who has won the elections by the majority as duly elected, but in the latter, to take the list as it is and designate nominees as listed may in some cases lead to two men or two women being declared elected to occupy seats under Article 98(1) (d) in violation of *the Constitution*, the *Elections Act* and the Regulations”

52. I do not agree with the learned magistrate that the formula used by the appellant was cumbersome and complex. It was simple mathematics based on Regulation 56 which means that figures are most likely or are bound to end in decimal points and to separate a winner from a loser, the same decimal points become useful and applicable. In this case, the formula adopted cannot be said to be discriminative as it did not affect ODM only but the other parties as well hence the allegation of malice is unfounded and not correct.
53. Having found that the appellant did act pragmatically and properly in my view, a constitutional crisis which would have occurred in Mandera County for failure to constitute the Assembly was forestalled. Further, if the court were to take the route taken by the learned magistrate, it would mean creating an illegal nomination position or drop one of the parties’ candidates yet they were not named as parties in the suit. This would as well mean that persons who are not parties to the suit would be condemned unheard.
54. It is clear that the ODM party did not qualify for a nomination slot based on the formula adopted by the appellant. In view of the above holding, the aspect of gazettelement of the respondent will not serve any purpose hence rendered moot. In the circumstances, it is my finding that the appeal is merited hence uphold the same. Accordingly, the appeal is hereby allowed and the impugned judgment herein delivered on 29th December 2022 set aside and consequently the petition dated 15th September 2022 dismissed.
55. On the question of costs, the same ordinarily does follow the event. However, in this case, it is apparent that the institution of the suit was partly occasioned by the lacuna in the law. I am inclined therefore not to condemn any party to pay costs. In that respect, it is hereby ordered that each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY MAY OF 2023

J.N. ONYIEGO

JUDGE

