Njuguna v Gachingiri & another; Boundaries Commission (I.E.B.C (Interested Party) (Civil Appeal E063 of 2022) [2022] KEHC 11694 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11694 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E063 OF 2022

JM NGUGI, J

MAY 25, 2022

BETWEEN

SUSAN NYAMBURA NJUGUNA ..... APPELLANT

AND

JOHN KARANJA GACHINGIRI ..... 1ST RESPONDENT

UNITED DEMOCRATIC ALLIANCE (U.D.A) ..... 2ND RESPONDENT

AND

BOUNDARIES COMMISSION (I.E.B.C ..... INTERESTED PARTY

(Being an Appeal from the Judgment of the Political Parties Disputes Tribunal (Jessica Mmbetsa, Samuel Mbiriri Nderitu & Dr. Adelaide M. Mbithi) in Complaint No. 006 of 2022 delivered on 06/05/2022)

JUDGMENT

History of litigation

1. The Appellant and the 1st Respondent (hereinafter, "Cross-Appellant") are both members of the 2nd Respondent, a duly registered political party. They are contenders for the seat of Member of County Assembly for Njoro Ward within Nakuru County in the General Elections to be held on 09/08/2022. For this position, the 2nd Respondent's method of nomination was universal suffrage (of party members). Nomination elections were held in various polling stations within Njoro Ward on 14/04/2022. At the conclusion of the exercise, the Presiding Officer announced that the Cross-Appellant was the winner with 2,647 votes to the Appellant's 1,921 votes. Other candidates in the election got far fewer votes by that announcement. Pursuant to this declaration at the Constituency Tallying Center, the Cross-Appellant was issued with a Provisional Nomination Certificate by the 2nd Respondent.

2. The Appellant, being aggrieved by both the conduct and the announced outcome of the elections, filed a Petition with the 2nd Respondent's Electoral and Dispute Resolution Committee (hereinafter "the Committee"). This is the 2nd Respondent's internal dispute resolution body. The Petition - Nairobi UDA EDRC Application No. 91 of 2022 was filed against the 1st Respondent and the 2nd Respondent's National Elections Board.

3. In its Ruling dated 19/04/2022, the Committee revoked the Provisional Nomination Certificate issued to the Cross-Appellant and ordered the 2nd Respondent's National Election Board to issue the Nomination Certificate to the Appellant herein. The orders were as follows:

> 14. Accordingly, the Provisional Nomination Certificate previously awarded to the 2nd Respondent be and is hereby revoked.
>
> 15. The National Elections Board is hereby ordered to issue the Nomination Certificate to the Applicant herein.
>
> 16. No orders as to costs.

4. In revoking the nomination of the Cross-Appellant, the Committee based its finding on alleged disparity of votes between the two contestants and irregularity in the elections. Paragraphs 7, 8 and 9 of the Committee's Ruling is worded as follows:

> 7. We have perused the list and bundle of documents of the Applicant and noted the concerns raised by the Applicant. We have particularly noted the disparity of the votes between the Applicant and the 1st Respondent. We note that the Applicant garnered a total of 1,188 votes while the 1st Respondent garnered 1,514 votes.
>
> 8. We also note that the 2nd Respondent admitted that the process was marred with irregularity. The 2nd Respondent also admitted that the applicant was the bona fide winner of the nomination elections.
>
> 9. On the other hand, we note that the 1st Respondent claims that he was not involved in the nomination exercise and therefore could not be held liable. When asked about his opinion on the tally, the 1st Respondent claimed that he only had tally results from the 2nd Respondent.

5. The Cross-Appellant was aggrieved by the decision of the Committee and filed Complaint No. 006 of 2022 at the Political Parties Disputes Tribunal (hereinafter "the Tribunal"). The Tribunal rendered its judgment on 06/05/2022. In the main, the Tribunal reversed the Committee's decision and made the following orders:

   a. An order is hereby issued directing the 1st Respondent to issue the Complainant with a Nomination Certificate for election to the position of Member of County Assembly Njoro Ward in Nakuru County under the 1st Respondent's ticket.

   b. An order is hereby issued directing the 1st Respondent to include the name of the Complainant in its list of nominees/ candidates for the upcoming general elections that is to be forwarded to the Independent Electoral and Boundaries Commission (IEBC) as the 1st Respondent's nominee/ candidate for election to the position of Member of County Assembly Njoro Ward in Nakuru County.

c. That if the list of nominees was already forwarded without the Complainant's name then an order is hereby issued directing the 1st Respondent to amend the said list by forwarding the Complainant's name to the Independent Electoral and Boundaries Commission as its nominee/ candidate for election to the position of Member of County Assembly, Njoro ward in Nakuru County under the 1st respondent's ticket and withdraw any other name that may have been forwarded by the 1st Respondent or its organs in the same position.

d. Each party to this dispute to bear its own costs.

6. The Appellant was, in turn, aggrieved by the decision of the Tribunal and has now filed the present appeal seeking the following prayers:

i. That the Court be pleased to make an order setting aside or discharging the orders of the Tribunal in its judgment delivered on 6th May, 2022; and with its own finding that the 2nd Respondent's Electoral and Nominations Disputes Resolution Committee was indeed justified in cancelling the provisional certificate that had been issued to the 1st Respondent, the Court be pleased to order that certificate issued to the Appellant pursuant to the directions of the said committee stands sustained; or in the alternative.

ii. A declaration that the nomination exercise undertaken by the 2nd Respondent with respect to Njoro Ward, Nakuru Constituency on the 14th of April, 2022 is not verifiable and unaccountable, and in the circumstance, an order of this honourable Court be issued, directing the 2nd Respondent to conduct a fresh nomination exercise in accordance with its constitution.

iii. That the costs of this Appeal and those of the Tribunal be borne by the Respondents and in specifically, the 1st Respondent. (sic)

7. The Appeal is brought on the following grounds reproduced verbatim from the Memorandum of Appeal:

1. That the Honourable Tribunal did, as a matter of fact and law, correctly observe, and hold that indeed, the 1st Respondent had been accorded a fair hearing by the 2nd Respondent's Electoral and Disputes Committee (EDRC) being Nairobi UDA EDRC Application No. 91 of 2022; including a finding that the 1st Respondent did not file any response with the said committee.

2. That the honourable Tribunal did, as a matter of fact, and law, correctly observe and hold that in view of the pleading filed by the parties, the 2nd issue presented for determination is whether the Electoral and Disputes Resolution Committee was justified in invalidating the 1st Respondent's win and declaring the Appellant the winner of the nomination exercise. However, in making its conclusive findings, the Tribunal erred in fact and law by making the following finds: (sic)

i. That the Appellant herein did not, at the Electoral and Disputes Committee (EDRC) or Tribunal place any evidence to the effect that one Wycliffe Kangu was indeed a polling agent/tallying officer. In making this determination, the tribunal failed to observe that this fact was not contested by any of the Respondents herein in the Tribunal or EDRC; and evidence was indeed produced that he was in fact actively involved in campaigning for the 1st Respondent herein. (Paragraph 46-48 of the Judgement).

ii. That the Tribunal erred in fact and law, by failing to observe and determine that the 2nd Respondent's EDRC, made its decision primary on the admission by the 2nd

Respondent's National Election Board through its representative, that the Appellant herein had won the primaries with 1,885 votes and not the 1st Respondent with 1,514 votes. Consequently, and in view of this admission, the committee was bound to issue direct issuance of the nomination certificate to the person who had won the primaries.

iii. That the Tribunal erred in fact and law and on matters of record in making a finding the Appellant herein admitted/confirms her pleadings to the Tribunal, that form 34B presented by the 1st Respondent had been presented to the 2nd Respondent's dispute resolution committee by the 1st Respondent. The 1st Respondent did not file any response or present any document to the dispute resolution committee; and only introduced the said form, for the 1st time, in the proceedings of the Tribunal.

iv. That the Tribunal erred as a matter of fact and law by failing to observe and record that the Appellant claim at 2nd Respondent's dispute committee in accordance with her pleadings (Petition), was that 1st Respondent had declared the winner with about 2000 votes while she had garnered 1,985 votes. (See paragraph 12 of the petition). This is the background, as pleaded her affidavit to believe that the 1st Respondent had been inflated with a margin of about 500 votes. (sic)

v. That the Tribunal erred as a matter of fact, by making a finding that the Appellant had produced the four (4) form 6A(s) to establish inconsistency with form 34B, yet she had produced them as the only forms that she had been allowed to photograph, through her agents, yet the issue at the dispute resolution committee was that her agents were not allowed to take photographs of the forms, thereby making the process unverifiable and accountable. (sic)

3. That the Honourable Tribunal erred in law and fact, by relying on a from 34B which had not been signed by either the Returning Officer or the agents of any of the candidates to the primaries, as cogent and unrebutted evidence, of the final results of the nomination that took place in Njoro Ward, the validity of such form having been raised by the Appellant.

4. That the Tribunal erred in fact and law, by failing to observe and find that the following issues of fact had been presented to the Committee for establishment based on the Appellant's petition and her personal tally, that the 1st Respondent had garnered the votes that she tabulated in her manual tabulation, and in particular

   a. Njoro Secondary School (Njoro Day) 132 votes

   b. Njoro Polytechnic 80 votes

   c. Ngano Primary School 267 votes

   d. Kenana Primary School 15 votes

   e. Mwigito Primary 40 votes

   f. DEB Primary School 121 votes

5. That the Tribunal having erred in fact and law as elaborated to paragraph 2 (iii) (vi) ad 4 above, it furthered, in fact and law, to observe in view of the inadmissible form 34B presented by the 1st Respondent and having relied on the same, to have garnered the following votes in the polling station listed in paragraph 4; and notwithstanding the Appellant's claim to the

contrarily which can be constructed from her parallel tally, thus making 1,165 votes obtained by the 1st Respondent, an issue in dispute. (sic)

a. (Njoro Day) 432 votes

b. Njoro Polytechnic, 180 votes

c. Ngano Primary school, 767 votes

d. Kenana Primary school 115 votes

e. Mwigito Primary 105 votes

f. DEB Primary School 221 votes

6. That the honourable Tribunal erred in law and fact, by issuing final orders, which are inconsistent with their findings, on the verifiability of the final results on the nomination of exercise conducted in Njoro Ward, but however proceeded to issue an order which essentially confirms the 1st Respondent as the duly nominated candidate. (sic)

8. The Cross-Appellant was also aggrieved by the Tribunal's finding that he was accorded a fair hearing by the Committee and filed a Cross Appeal. He has listed seven grounds of appeal as follows:

1. That the learned members of the PPDT erred both in law and in fact in failing to find that the 1st Respondents failure and/or refusal to invoke and/or put in place a National Executive Committee for purposes of hearing the Appellants appeal from the decision of the Respondent's electoral Dispute Resolution Committee even when the same is expressly provided for in the Respondent's Constitution, ipso facto was a violation of the Appellant's right to fair hearing.

2. That the learned members of the PPDT erred both in law and in fact in failing to find that the failure by the 1st Respondent's Electoral Dispute Resolution Committee to give a notice to the Appellant of his right to review or internally appeal its decision and to the Respondent's National Executive Committee for that matter was also a violation of the Appellant's right to fair hearing.

3. That the learned members of the PPDT erred both in law and in fact in failing to consider the Appellant's complaint that the 1st Respondent's failure and/or refusal to invoke and/or put in place a National Executive Committee for purposes of hearing the Appellant's appeal from the decision of the 1st Respondent's Electoral Dispute Resolution Committee even when the same is expressly provided for in the 1st Respondents Constitution.

4. That the learned members of the PPDT erred both in law and in fact in failing to find that the 1st Respondent's E.D.R.C was duty bound to give a notice to the Appellant of his right to call an expert of his choice as well as his right to legal representation.

5. That the learned members of the PPDT erred both in law and in fact in failing to find that the 1st Respondent's E.D.R.C was duty bound to give a notice to the Appellant of his right to call an expert of his choice as well as his right to legal representation.

6. That the learned members of the PPDT erred both in law and in fact in failing to find that the Appellant was denied an opportunity to seek an adjournment even where he had not put in any responses to the case against him and did not have legal representation.

7. That the learned members of the PPDT erred both in law and in fact in failing to find that the Appellant was never allowed an opportunity to cross examine the witness that testified against him and that such failure amounted to a violation of his right to fair hearing.

Applicable law & standards of review

9. Under Section 41 of the *Political Parties Act*, the first Appeal from a decision of the Political Parties Dispute Tribunal is to the High Court on points of law and facts and on points of law to the Court of Appeal. The Act states as follows:

> 2)An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.

10. By the provisions of Section 41 of the *Political Parties Act*, the intention of the law is for the High Court to act as an appellate court to determine both matters of law and fact in the same way as it does other civil and criminal disputes that come before it. In the persuasive authorities of *Perputua Mponjiwa v Elius Okumu Otieno & 3 others* [2017] eKLR, the appeal was largely centred on facts while in *Ibrahim Abdi Ali v Orange Democratic Movement & 2 others* [2017] eKLR, the appeal was centred on points of law. The High Court considered the facts and the law afresh, respectively. In practice, therefore, the High Court considers both the facts and the law de novo in the same mould was stated in the famous *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the Court of Appeal stated:

> I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).

Arguments By Parties

11. Both the Appeal and the Cross-Appeal were argued by way of written submissions and the same highlighted orally on 20/05/2022. Both the Appellant and the Cross-Appellant filed extensive submissions and authorities. The 2nd Respondent did not participate in the proceedings despite being served. The Interested Party, the IEBC, filed submissions and appeared by counsel for the highlighting. I am extremely grateful to all the counsel for their diligence and timeliness in their filings since this appeal was canvassed in less than a week due to the nature of the subject matter.

12. The Appellant begins her salvo by dismissing the Cross-Appellant's assertion that he – the Cross-Appellant - was not accorded a fair hearing at the Committee stage. She contends that a fair hearing has two elements i.e., 'an opportunity of hearing must be given, and the opportunity must be reasonable.'

13. The Appellant contends that the Cross-Appellant failed to take up the chance to ventilate his issues both at the Committee and before the Tribunal. She submits that the rules neither required

representation by advocate nor affidavit evidence and that the Appellant complied with all the timelines before the Committee and the Tribunal. The Appellant relies on the case of *Judicial Service Commission v Mbalu Mutava & and another* [2015] eKLR in which she submits it was held that the requirements of natural justice must depend on the circumstances of the case. The Appellant also relies on *Thomas Ludindi Mwadeghu v John Mruttu & Anor* [2017] eKLR in support of her position that the Tribunal reached the conclusion that the Cross-Appellant had been given a fair hearing after analysing the evidence before it.

14. The Appellant, however, submits that the Tribunal had no basis for finding that there were no irregularities at the nomination elections. This is because, she argues, the Committee's finding was founded on pictorial evidence that Wycliffe Kangu was the Cross-Appellant's agent and on the 2nd Respondent's National Election Board's admission that there had been irregularities in the nomination election.

15. To the Appellant, the Tribunal misdirected itself on facts in finding that form 34B presented by the Cross-Appellant at the Tribunal had been presented at the Committee despite the Cross-Appellant's admission to the contrary and while it was clear from the evidence by the Cross-Appellant that he never filed any response to the Appellant's Petition at the Committee and the form was only produced at the Tribunal. The Appellant also contends that the Forms 6A produced by the Appellant was to fortify her position that she had been denied access to the forms and only managed to photograph 4 of them and it was not an issue of validity.

16. The Appellant therefore submits that the burden of proof at the Tribunal lay on the Cross-Appellant to prove that the material adduced proved his case to the required standard. She contends that the Tribunal did not attach any illegality to the material presented to it by the Appellant and the 2nd Respondent, for it to shift the burden of proof to the Appellant as it did. She relies on the case of *Washington Jakoyo Midiwo v IEBC & 2 Others* [2018] eKLR and the explanation given therein for when the burden of proof may shift in an election dispute.

17. The Appellant argues that political parties must not deviate from the requirements of the first schedule of the *Political Parties Act* and particularly, the requirements of Section 6 (c) thereof. She cites the case of Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR and submits that the 2nd Respondent's nomination for Member of County Assembly Njoro Ward was not ascertainable, credible nor verifiable both in terms of figures and compliance with the law. She faults the Tribunal for relying on a Form 34B which she contends could not be verified to be the form used to announce the results since it did not meet the bare minimum of a Form 34 B for want of signatures.

18. The Appellant further submits that the 2nd Respondent did not reasonably explain the discrepancies in the purported votes cast and the Tribunal did not have an opportunity to verify each vote cast at the various polling stations. The Appellant relies on *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR where the Court observed that the accuracy of the count was fundamental in an election. The Appellant contends that the Tribunal could not have proceeded to find that the Form 34B reflected the results while at the same time acknowledging that it was unsigned. On the issue of the election officials, the Appellant relies on the case of *Nuh Nassir Abdi v Ali Wario & 2 others* [2013] eKLR.

19. The Appellant prays that this Court orders a repeat of the nomination elections. As for its viability considering the timelines, the Appellant submits that the 2nd Respondent still has time to do a repeat nomination given that the timelines to resolve all nomination issues runs until 09/06/2022. She contends further that as per the 2nd Respondent's Constitution, the 2nd Respondent can apply various

modes of nomination other than universal suffrage amongst them, negotiated nomination and/or use of pollster to determine their popular candidate.

20. Lastly, the Appellant submits that if the decision of the Tribunal is upheld, the people of Njoro Ward would have been denied a chance to elect their preferred candidate for the 2nd Respondent given that the nomination election results were neither accountable nor verifiable.

21. The Cross-Appellant's submission on the appeal is that the Committee could not have reached the conclusion to revoke the Cross-Appellant's nomination based on the evidence presented before it. This is because, the Cross-Appellant says, the Appellant only presented her National Identity card and a receipt for nomination fee.

22. The Cross-Appellant faults the Committee for purporting to rely on documents filed by the parties in its ruling, yet the Cross-Appellant had not been accorded the opportunity to present any documents. This, the Cross-Appellant says is what informed this appeal and the appeal at the 2nd Respondent's National Executive Committee which has never been heard. The Cross-Appellant therefore contends that the Committee's decision without the backing of evidence offended the rules of evidence and requirements of fair hearing.

23. On the questions of burden of proof and standard of proof, the Cross-Appellant relies on R*aila Odinga and others v Independent Electoral and Boundaries Commission and 3 others* SCK Petition No. 5 of 2013 (2013) eKLR in support of his assertion that a Petitioner bears the burden of proof. The Appellant faults the Committee for applying the balance of probability standard of proof at paragraph 13 of its ruling when the applicable standard is "above the balance of probability, though not as high as beyond reasonable doubt."

24. The Cross-Appellant maintains that the Appellant never tendered evidence before the Committee to demonstrate irregularities at the election but rather introduced fresh documents at the Tribunal, did not properly introduce the said documents and provided illegible copies. Consequently, the Cross-Appellant submits that the Tribunal was right in upholding his nomination.

25. According to the Cross-Appellant, the Appellant has not proved irregularities at any level and did not even challenge the Cross-Appellant's nomination at the Tribunal but rather wanted the complaint dismissed and the finding of the Committee upheld.

26. The Cross-Appellant believes that the suggestion to have the nomination done by other means other than universal suffrage is to further perpetrate bias against him. He further faults the 2nd Respondent for refusing to provide election materials for the dispute before the Tribunal but instead asking that the Cross-Appellant's claim be dismissed

27. It is the Cross-Appellant's argument that even though the Form 34B was unsigned, it was not disowned by the 2nd Respondent. He cites the provisions of Section 83 of the *Elections Act* and claims that no evidence has been tendered demonstrating how the conduct of the polling and presiding officers or the validity of Forms 6A affected the nomination result and that the said process can therefore not be nullified.

28. For the cross-appeal, the Cross-Appellant challenges the finding of the Tribunal that he was accorded a fair hearing by the Committee. He cites the provisions of Article 47 of *the Constitution* and Sections 4 and 2 of The Fair Administrative Actions Act, respectively.

29. It is the Cross-Appellant's contention that in hearing the dispute between himself and the Appellant, the Committee was exercising a quasi-judicial function. He contends that the Committee was therefore

taking an administrative action against him and was thus an administrator as defined under Section 2 of the Fair Administrative Actions act.

30. The Cross-Appellant submits that in view of the provisions of Section 4 (3) (c) (e) & (f) of the Fair administrative Actions Act, the Committee was duty bound to give the Cross-Appellant a notice of a right to review or internal appeal against their ruling, a notice of a right to legal representation as well as a notice of the right to cross examine witness. The Cross-Appellant cites the case of *Phylis Kemuma Onenga v Dima College Limited* [2022] eKLR. He also relies on *Mwangi Stephen Muriithi v National Land Commission & 3 others* [2018] eKLR in which he contends it was held that the issuance of an inadequate notice breached the requirements of a fair administrative action. The Cross-Appellant also relies on *Sidian Bank Ltd v National Land Commission & 2 others; Sigtunes Communications Limited and another (Interested Parties)* [2021] eKLR.

31. It is therefore the Cross-Appellant's submission that the Tribunal erred in law and in fact in failing to find that the 2nd Respondent was duty bound to give the Cross-Appellant notices as per section 4 (3) (c) (e) & (f) of the Fair Administrative Actions Act, in failing to find that the 2nd Respondent did not give the notices and that such failure amounted to violation of the Cross-Appellant's right to fair hearing.

32. The Cross-Appellant contends that 2nd Respondent not only failed to issue him with a notice of his right to internal appeal, but also failed to consider his appeal to its National Executive Council in accordance with Section 38 of its Constitution. The Cross-Appellant thus relies on the case of *Musalia Mudavadi & 4 Others Angela Gathoni Wambura & 2 Others* [2019] eKLR in arguing that a party should be granted relief by the Court where the Political Party refuses to set its IDRM in motion.

33. The Cross-Appellant further relies on the interpretation of Article 47 given in Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR. He urges this Court to uphold his nomination and allow the final orders of the Tribunal to stand

34. On the feasibility of a repeat nomination election, the Cross-Appellant submits that the same is not feasible because the deadline for submission of names of persons nominated to contest in the General Election was 28/04/2022 which date has already passed. The Cross-Appellant also submits that the 2nd Respondent is not ready to conduct another nomination exercise by way of universal suffrage, having communicated to the Court that it was only amenable to carrying out alternative nomination methods by virtue of the provisions of Article 31 (iii) of the 2nd Respondent's Constitution. This provision, the Cross-Appellant argues, does not speak to alternative means of nominations and is therefore unhelpful.

35. The Cross-Appellant also contends that the 2nd Respondent does not have party primaries rules prescribing the criteria, procedures, and circumstances for non-competitive nomination methods. Accordingly, the Cross-Appellant argues that that to order a repeat of the nomination exercise would not only be prejudicial to him, but also not feasible.

36. The Interested Party's submissions mainly addressed the feasibility of conducting another nomination election by laying out the timelines it set for the 2022 General Elections. The Interested Party submits that it required submission of names of Aspirants, dates and venues of the nominations on or before Saturday, 09/04/2022 and thereafter, parties to conduct nominations and resolve any intra-party disputes on or before Friday 22/04/2022 and finally submit the names of persons selected to contest in the General Election on or before Thursday 28/04/2022 in prescribed forms.

37. The Interested Party contends that these timelines are important to enable it to prepare for the elections. It extensively relies on the case of *Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 Others* (2019) eKLR, in which the Court emphasized the importance of election disputes and contends that any delay will negatively affect the preparation of the elections.

Analysis And Determination

38. The Tribunal considered the complaint brought by the Cross-Appellant under two prongs. Under the complaints about the right to fair hearing, it dismissed the Cross-Appellant's arguments out-of-hand as unmeritorious. It is on the basis of this that the Cross-Appellant has appealed to this Court.

39. However, the Tribunal found the Cross-Appellant was correct on the question of merits: it concluded that it was wrong for the Committee to have reversed his victory on merits. From a structural reading of the comprehensively-considered judgment (given the brevity of time it must have taken to prepare it), the Tribunal reversed the Committee's decision on merits on four different grounds:

    a. First, the Tribunal concluded that based on the only available evidence which was not contested by the Party – which is the custodian of the electoral materials – the Cross-Appellant was, indeed, declared the winner and there was nothing from the Political Party that seemed to contradict that. In particular, the Tribunal was dismayed that the Committee proceeded to declare the Appellant the winner after concluding, from the Committee's own analysis, that the nominations were marred by malpractices. The Tribunal also faulted the Committee for using the wrong standard to reach its verdict: "balance of probabilities" as opposed to "above balance of probabilities but not as high as beyond reasonable doubt" – the standard enunciated in Kenya by the Supreme Court in the Raila Odinga Case.

    b. Second, the Tribunal found that the other evidence provided by the Appellant – her own tallying results – were both inadmissible and contradictory by her own accounts. In particular, the Tribunal pointed out that the Appellant had stated three different variations of her alleged victory in numbers while the Committee seemed to have a fourth different variation.

    c. Third, the Tribunal found that the Appellant had not proved that Form 34B had been so tempered with to the extent that one could claim that qualitatively or quantitatively there was no fair elections under the Raila Odinga Standard. In particular, the Tribunal found that of the Form 6As the Appellant submitted as evidence, only one seemed to point to inflation of the Cross-Appellant's votes – and only by 100 votes which could not have changed the outcome of the elections. The Tribunal was especially troubled that the Appellant could only avail two legible Form 6As – and that of the two (out of 19), only one supported her theory – and it would have increased her numbers by only 100 votes.

    d. Fourth, the Tribunal found that the allegations that a Tallying Officer was campaigning for the Cross-Appellant was unsubstantiated because it was not proved that Wycliffe Kunga was ever an electoral officer during the nominations.

40. Due to the nature and procedural posture of the case – including the exigencies of the circumstances which include the electoral timelines whose extension could lead to serious difficulties for the Interested Party (IEBC), it is imperative that this appeal be resolved in the most efficient fashion possible. As such, I will analyse – using the standard of review enunciated above - the five grounds which were canvased in the two forums below as well as before this Court in seriatim and propose a resolution.

41. On the question of alleged violations of the *Fair Administrative Action Act* and fair hearing standards by the Committee against the Cross-Appellant, I find both the Tribunal's exposition of the law as well as its analysis and application to the facts correct. The evidence available demonstrates that the Cross-Appellant was duly served with the Appellant's complaints and that he was accorded fair hearing. It was, further, his choice not to file any documents before the Committee. It was correct for the Tribunal

to dismiss his argument, which he has rehashed before this Court, that the Committee ought to have served him with a notice which, among other things, indicated his right to be represented by counsel in addition to the exact nature of case he was facing.

42. The Cross-Appellant misunderstands the nature of the situation. This was not a situation whereby the Committee was analogous to a disciplinary body and had all the information it was going to use against the Cross-Appellant. Rather, this was an adjudication where the party presenting a case against the Cross-Appellant was not the Committee but the Appellant. It was, therefore, enough that the Appellant served him with allegations as was proved before the Committee; and as was, indeed, not denied by the Cross-Appellant. Given the nature of party disputes and the tight timelines involved, it would be unreasonable to hold Political Parties to a higher standard than what was adhered to here. In any event, the Cross-Appellant was expected to be familiar with the Party rules and procedures on grievances related to nominations which provided for a right to an attorney in case of a challenged nomination elections.

43. Before this Court, however, the Cross-Appellant raised a novel argument for the first time. He claims that he had a right to file a further internal appeal to the National Executive Committee of the 2nd Respondent by dint of Article 38 of *the Constitution* of the 2nd Respondent. The Cross-Appellant claims that he attempted to file an appeal to the NEC but was met with intransigence necessitating his filing an appeal to the Tribunal. He counts this as a further denial of his fair administrative rights. The Appellant denies that any such right of appeal to the NEC exists.

44. On my part, I need only point out that this argument has been raised for the first time on appeal and is, for that reason only, unavailing to the Cross-Appellant. Even if it could be taken up, the Court does not have on record *the Constitution* of the 2nd Respondent to refer to – which is really a different way of stating that the issue ought to have been developed and documents submitted at the first two layers of the forums. In any event, the point raised by the Cross-Appellant – that he was denied access to a forum to appeal – is made moot by the fact that he later appealed to the Tribunal; and the Tribunal took up his case. His arguments would have worked well as a shield against a potential Preliminary Objection by the 2nd Respondent at the Tribunal. As a sword to prove violation of the right to fair hearing, it does no work at all.

45. Turning to the analysis of the merits of the decision by the Committee by the Tribunal, as pointed out above, the Tribunal found at least four reasons upon which they reversed the findings of the Committee.

46. First, the Tribunal concluded that based on the only available evidence which was not contested by the 2nd Interested Party – which is the custodian of the electoral materials – the Cross-Appellant was, indeed, declared the winner and there was nothing from the Political Party that seemed to contradict that. In particular, the Tribunal was dismayed that the Committee proceeded to declare the Appellant the winner after concluding, from the Committee's own analysis, that the nominations were marred by malpractices. The Tribunal also faulted the Committee for using the wrong standard to reach its verdict: "balance of probabilities" as opposed to "above balance of probabilities but not as high as beyond reasonable doubt" – the standard enunciated in Kenya by the Supreme Court in the Raila Odinga Case.

47. The Tribunal stated in its conclusion thus:

> All these results are different but going back to the evidence before us, the unsigned form 34B which the Claimant states is the result announced at the tallying centre is the only figure that has remained constant, right from the Committee hearings to these proceedings.

> Indeed, the 2nd Respondent in her pleadings confirms that the figures in Form 34B were what was announced at the tallying centre by the Returning Officer...The 1st Respondent being the owner and custodian of the electoral forms used in the nomination exercise has not disowned or discredited the copy of the form produced by the Complainant as being unauthentic or that the results indicated thereon are not what was obtained after the nominations. Consequently, in as much as this Tribunal frowns upon placing reliance on the Form 34B that is neither signed by the returning officer nor the candidates or their agents, it still remains the only consistent and unrebutted piece of evidence of the final result of the nomination that took place in Njoro ward.

48. The analysis and conclusion of the Tribunal are, in my view, correct only to the extent that there was little basis on the part of the Committee to reverse the results announced at the Constituency Tallying Centre in the face of Form 34B. However, as the Tribunal's own analysis shows, the Committee, as part of the Party, was the custodian of the other electoral materials – including the original Form 6As which the Appellant claimed contained different results. It, therefore, behooved the Committee to call for and scrutinize these forms especially to the extent that a valid foundation for challenging their credibility and authenticity had been raised. The fact that the Committee failed to do so fatally vitiates its own findings. However, it does not, ipso facto, meliorate the Tribunal's conclusions as demonstrated below.

49. Second, the Tribunal found that the other evidence provided by the Appellant – her own tallying results – were both inadmissible and contradictory by her own accounts. In particular, the Tribunal pointed out that the Appellant had stated three different variations of her alleged victory in numbers while the Committee seemed to have a fourth different variation. The Tribunal's analysis was as follows:

> Before the Tribunal now are 4 sets of results, the first one being the 2nd Respondent's handwritten tabulation that is of no evidentiary value since the 2nd Respondent says it was her own parallel tally and not a valid electoral document. Second, is the different result stated in the 2nd Respondent's pleadings which differs from her handwritten tally and which she claims the Constituency Returning Officer upheld as the true vote. The other results are to be found in the ruling of the 1st Respondent's disputes resolution Committee that states that the Complainant herein won the nomination. The final is the result given by the Complainant emanating from the Form 34B he has annexed to his pleadings.

50. I must remark that the Tribunal's analysis is quite on point: the Appellant alternately gave self-contradictory and self-serving evidence regarding the results. It would have been impossible, on the basis of those numbers, to have held that the Appellant won the elections and by what margin. Consequently, the Tribunal chose to go by Form 34B both because it tallied with the results announced at the Tallying Centre and because, the Tribunal reasoned, its authenticity was not questioned by the Party.

51. The choice to go by the results in the impugned Form 34B, however, as already pointed out above is problematic – not only because it was unsigned by the Returning Officer or the agents of the parties but because its credibility had been plausibly questioned by the Appellant. It was also problematic to rely on that form because the Party failed to produce the other Forms 6As which provided the raw data which was entered into the Form 34B and in the face of credible demonstration by the Appellant that in at least one polling station the numbers had been tampered with. It would be to treat the Appellant less than fairly to close the Court's eyes to this evidence where the custodian of the documents failed to bring them to light.

52. It is for this same reason that I would hold that the Tribunal erred in its third stated reason for ruling that the Cross-Appellant was validly nominated: The Tribunal found that the Appellant had not proved that Form 34B had been so tempered with to the extent that one could claim that qualitatively or quantitatively there was no fair elections under the Raila Odinga Standard. In particular, the Tribunal found that of the 6 Form 6As the Appellant submitted as evidence, only one seemed to point to inflation of the Cross-Appellant's votes – and only by 100 votes which could not have changed the outcome of the elections. The Tribunal was especially troubled that the Appellant could only avail two legible Form 6As – and that of the two (out of 19), only one supported her theory – and it would have increased her numbers by only 100 votes.

53. While it is true that the Appellant availed only four Form 6As – and two were so ineligible as to be unhelpful to the Tribunal or this Court – it is also true that at least one clearly showed a difference of 100 votes between the entry in Form 6A and that in Form 34B. It is also true that the Appellant was clear right from the Committee stage that she was only able to produce four Form 6As because those are the only polling stations she was allowed to take photos thereof with her phone. It is also true that the 2nd Respondent, as the owner and custodian of the electoral materials used during the nomination exercise had all the other Form 6As. While it is not clear why the 2nd Respondent did not make those documents available, it would be unfair to conclude that the Appellant's case failed merely because the 2nd Respondent failed to make the material available. The Appellant had, in my view, made a case strong enough to require the 2nd Respondent to produce all the Form 6As for scrutiny. It is probable – going by the two legible Form 6As produced – that the data in those forms might have quantitatively affected the results of the elections.

54. Finally, there is the question of the mysterious Wycliffe Kunga. Was he or was he not an electoral official during the nomination? The Appellant insists that he was a polling official. The Tribunal says no evidence was tabled to show that he was a polling official. The Cross-Appellant has maintained a rather ambivalent stance on the matter. At the Committee stage, the Appellant asserted that Wycliffe Kunga was a polling agent and that he had irregularly participated in campaigning for the Cross-Appellant. She produced evidenced of both. As far as the record can show, the Cross-Appellant did not dispute that Wycliffe Kunga was a polling official. Neither did the 2nd Respondent which, of course, was responsible for employing and deploying the said Wycliffe Kunga as a polling official. Indeed, the party merely admitted that the "process was marred with irregularity." To my mind, therefore, the question of Wycliffe Kunga being a polling official was established; and was, indeed, unrebutted.

55. Did he irregularly participate in campaigning for the Cross-Appellant? Again, the facts speak for themselves. The documentary evidence adduced by the Appellant at the Committee stage that the said Wycliffe Kunga was actively campaigning for the Cross-Appellant is clear: he, indeed, was doing so.

56. The conclusion, then, is that the nominations exercise was irregular if only for this reason. As shown above, the results can also not stand for the reason that it is not possible to conclude with certainty who the winner of the exercise was. This ward nomination exercise for the UDA Party was akin to what the Kriegler Report said of the Presidential Elections in 2007: "the conduct of the elections was so materially defective that it is impossible – for IREC or anyone else – to establish true or reliable results for the elections." So it is here.

57. The Court's conclusion, therefore, after due consideration of the evidence before me about the extent, nature, and prevalence of irregularities, anomalies, failures, errors and omissions propagated by the 2nd Respondent and in its conduct that attended the nomination election for Member of County Assembly for Njoro Ward on a UDA ticket in the election held on 14/04/2022, is that the election was conducted so badly that it was not substantially in accordance with the law as to elections, and that,

based on the evidence produced it is not possible to determine with certainty who the winner of the nomination exercise is.

58. Accordingly, I make the following orders:

I. A declaration is hereby issued that the nomination Election held on 14/04/2022 by the United Democratic Party (UDA) for the position of Member of County Assembly for Njoro Ward was not conducted in accordance with *the Constitution* and the applicable law hence rendering the result invalid, null and void.

II. A declaration is hereby issued that the irregularities in the nomination election held on 14/04/2022 by the United Democratic Party (UDA) for the position of Member of County Assembly for Njoro Ward were substantial and significant that they invalidated the integrity and legitimacy of the election and further that it is not possible to determine the winner of that election.

III. A declaration is hereby issued that the 1st Respondent (Cross-Appellant) was not validly declared as the 2nd Respondent's nominated candidate and that the declaration is invalid, null and void.

IV. An Order is hereby issued directing the 2nd Respondent to organize and conduct a fresh Nomination Election in which the two candidates herein (Appellant and Cross-Appellant) are candidates in strict conformity with *the Constitution* and the applicable election laws within 7 days of the date of this Judgment and to forward the name of the elected candidate to the Interested Party by Friday, 03/06/2022.

V. For the avoidance of doubt, in view of the crystallized rights of both the Appellant and Cross-Appellant in this matter, the fresh nomination exercise directed in (IV) above must be conducted by universal suffrage of all members of the 2nd Respondent eligible to vote in Njoro Ward and not by any other mode which may be permitted by the 2nd Respondent's Constitution. This directive shall only be varied by the joint consent of both the Appellant and Cross-Appellant.

VI. The Appellant's Counsel to make a copy of this Judgment available to the 2nd Respondent for compliance by Close of Business today (25/05/2022).

VII. Each party shall bear its own costs since each party has been partly successful.

59. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 25TH DAY OF MAY 2022

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JOEL NGUGI

JUDGE