Nderitu v Wahinya & another (Civil Appeal E293 of 2022)
[2022] KEHC 10111 (KLR) (Civ) (24 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10111 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E293 OF 2022

WA OKWANY, J

JUNE 24, 2022

BETWEEN

CHIERA ANDREW NDERITU ..... APPELLANT

AND

NJAU PETER WAHINYA ..... 1ST RESPONDENT

UDA ELECTORAL AND NOMINATION DISPUTE RESOLUTION COMMITTEE (THROUGH THE UNITED DEMOCRATIC ALLIANCE PARTY) ..... 2ND RESPONDENT

(Being an appeal from the whole Judgement and decree of the Political Parties Dispute Tribunal at Nairobi (Desma Nungo, Dr. Kenneth Mutuma, Flora M. Maghanga – Mtuweta and Ruth Wairimu Muhoro) dated, signed and delivered on 5th April 2022 in the Political Parties Tribunal Appeal No. E003 of 2022)

JUDGMENT

Background

1. The Appellant herein, Chiera Andrew Nderitu, offered himself for nomination as the United Democratic Alliance Party (UDA) Member of County Assembly (MCA) for Pangani Ward in Nairobi County. The nomination was conducted through an election, by way of universal suffrage, in which the 1st respondent emerged the winner to vie for elections in the said position of MCA.

2. Aggrieved by the outcome of the said nomination, the appellant lodged a complaint with UDA's Electoral and Nomination Dispute Resolution Committee (EDRC) in Application No 161 of 2022. It is alleged that the EDRC did not render a conclusive verdict on the matter. The dispute was however thereafter lodged before the Political Parties Dispute Tribunal (PPDT) in PPDT Complaint No E002

of 2022. The Tribunal set aside the decision of the United Democratic Alliance (UDA) Electoral and Nomination Dispute Resolution Committee (EDRC) in Application No 161 of 2022 and declared the 1st respondent herein as the validly nominated as the UDA ticket flag bearer for the position of Member of County Assembly (MCA) Pangani Ward.

3. Aggrieved by the decision of the PPDT, the appellant filed this appeal on May 9, 2022 seeking orders to set aside the aforementioned decision on the grounds that: -

    a. The Learned Members of the Tribunal erred in law and in fact by ignoring the appellants amended submissions of April 30, 2022 even after granting leave to admit the same and went ahead to rely on the erroneous version of April 29, 2022 thereby misleading themselves on the question of (in) validity of the nomination exercise held on April 20, 2022.

    b. The Learned Members of the Tribunal erred in law and in fact by ignoring an outright and express admission on the part if the UDA's National Election Board (NEB) that conducted, supervised and oversaw the nomination exercise of April 20, 2022 to the effect that the said nominations were a sham and that "... the quality of the nomination was questionable and bound to affect the election results..."

    c. The Learned Members of Tribunal erred in law and in fact in usurping the UDA National Election Board's Mandate of determining, in the first instance, whether the nominations it conducted supervised and oversaw on April 20, 2022 were free, fair and transparent.

    d. That Learned Members of the Tribunal erred in law and in fact in affirming a nomination exercise that even the UDA National Election Board, the returning officer and the body charged with conducting, supervising and overseeing the whole process of the said nomination exercise admitted expressly that it was a sham and that "....the quality of the nomination election was questionable and bound to affect the election results..."

    e. The Learned Members of the Tribunal erred in law and in fact in by ignoring that the nomination exercise of April 20, 2022 had already been overtaken by the subsequent indirect nomination of April 23, 2022 and therefore the orders they issued could not issue

    f. The Learned Member of the Tribunal erred in law and in fact in essentially affirming two nomination process the one of April 20, 2022 and the one of April 23, 2022 which nomination process are at cross purposes thereby precipitating unprecedented and unwarranted confusion

    g. The Learned Members of the Tribunal erred in law and in fact by misapplying themselves to the facts and applicable law in the appeal thereby reaching the wrong conclusions that there was no evidence that the April 20, 2022 nomination was a sham and that "..the quality of the nomination election was questionable and bound to affect the election results..." therefore the results emanating from the said exercise were not verifiable.

4. The appeal was canvassed by way of written submissions which the parties' respective advocates highlighted at the hearing of the appeal on June 21, 2022.

5. The gist of the appellant's case was that the tribunal disregarded his amended submissions wherein he pointed out the fact that UDA NEB, the body responsible for conducting and overseeing the impugned nomination elections, admitted before the EDRC; "... the quality of the nomination election is questionable and bound to affect the election results and has requested the Committee to issue appropriate order in the circumstance ... "

6. The appellant's grievance was that the Tribunal, in its entire decision, did not address NEB's observation on the quality of the nominations despite extensive highlighting by Counsel during the hearing. It was submitted that the Tribunal instead adopted the abandoned submissions thereby misleading itself and arriving at the erroneous finding that the Appellant's case did not meet the required standard of proof.

7. The appellant argued that in light of the admission, by UDA's electoral body on the quality of the election, the Tribunal misdirected itself on the question of burden and standard of proof. Reference was made to the decision in *Raila Odinga & Another vs Independent Electoral Boundaries Commission & Others*, Supreme Court Presidential Petition No I of 2017, where the Supreme Court held that: -

> "... [133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law".

8. The appellant contended that facts are admitted are considered to have been proved because proof can either be by way of evidence or admission. For this argument, reference was made to the case of *Rabab Micere Murage (Suing as a Representative of the Estate of Esther Wakiini Murage) v Attorney General & 2 others* [2012] eKLR where the Court of Appeal held: -

> " However, as we stated earlier in this judgment the 1st respondent having admitted that fact there was no obligation to call evidence on it ... The 1st respondent having admitted the deceased was a passenger in his accident vehicle it was not open to the learned trial Judge to find otherwise."

9. The appellant further observed that even though no official election nomination results were filed before the Tribunal and that the same was only alluded to by the Respondents herein in their respective affidavits, the Tribunal went ahead to affirm results that had been abandoned by UDA's electoral body.

Respondents' Submissions

10. The 1st respondent submitted that the appellant's claim that the quality of nomination election was questionable was not supported by any tangible evidence to warrant the nullification of the declared nomination results. Reliance was placed on the decision in *Apungu Arthur Kibira v IEBC* [2018] eKLR where the election court termed as 'vexations and malicious', the lack of evidence to prove that a respondent was responsible for or condoned or perpetrated violence that occurred at party nominations.

11. The appellant further cited the decision in *Odera Arthur Papa vs Oku Edward Kaunya and 2 Others* [2018] eKLR where it was held that the necessary threshold to invalidate an election requires that

one must show that the violence is traceable or attributed to the respondent(s), the violence must be widespread and not isolated and the violence must have affected the voting and elections results.

12. The 1st respondent further submitted that the appellant's claim on the quality of the nomination is an afterthought which could not have been brought up at all if he had emerged victorious in the said nominations.

13. The 1st respondents argued that once the proceedings before the NEB were declared a nullity, then no decision therefrom can be binding or enforceable. He maintained that the PPDT was right in disregarding the entire proceedings before the NEB as accepting the same would have amounted to sanitizing an otherwise illegal process. He added that if the NEB, indeed had no jurisdiction, as was held by the PPDT, then this Honourable Court cannot be asked to interrogate purported rights emanating or stemming from the decisions made by a body that lacked jurisdiction.

14. On its part, the 2nd respondent submitted that that the Tribunal erred in law and in fact by failing to recognize that the 1st Respondent did not at any one point dispute the claim that the nomination exercise of April 20, 2022 was marred with electoral irregularities, key among them being ballot stuffing.

15. The 2nd respondent stated that what the 1st Respondent challenged before the Tribunal was the fact that no evidence had been tendered before the tribunal linking him to the irregularities. It was submitted that at no point during the proceedings before the Tribunal did the 1st Respondent state and/or confirm that the said nomination exercise was regular, free and fair. Reference was made to the decision in *Moses Masika Wetang'ula vs Musikari Nazi Kombo* [2014] eKLR where the Court of Appeal held that: -

> "For an election to be valid, substantial compliance with that law governing elections is mandatory; that is to say that, no election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. No election can be valid."

16. The 2nd respondent submitted that the nomination exercise was marred with irregularities and that as such, it cannot be said to be valid. The 2nd respondent noted that upon the conclusion of the nomination exercise, the Appellant herein lodged a complaint before the EDRC which referred the dispute to the 2nd Respondent's National Election's Board for purposes of issuing alternative measures under Article 31 of the Party's Constitution.

17. It was submitted that Article 20.1(b) of the Party's Constitution empowers the Board to undertake the nomination exercise and that pursuant to its role, the Board conducted interviews (indirect nomination) after which it issued the Appellant herein with a provisional nomination certificate. According to the 2nd respondent, the indirect nomination automatically nullified the nomination exercise that was conducted on April 20, 2022. For this argument, the 2nd respondent cited the decision in *Samuel Owino Wakiaga vs Orange Democratic Movement Party & 2 others* [2017] eKLR where the court, while agreeing with the findings of the Political Parties Disputes Tribunal stated that: -

> "The PPDT noted that initially, in this case, the Party had opted to conduct primaries by way of universal suffrage. When the results of this exercise were nullified by NAT it made an order in which it directed the Party to proceed in a manner compatible with the Party Constitution, and Nomination and Election Rules the PPDT found that by being asked to

identify its candidate, the party was given the opportunity to decide its mode afresh after the nullification of the primaries held on the April 24, 2017. The PPDT made the following findings: "It is our finding that in granting direct nomination, the party acted in compliance with the NAT decision, the party constitution, and Elections and Nomination Rules."

Analysis and determination

18. I have carefully I have considered the appeal herein, the Record of Appeal, and the parties' respective submissions. I find that the main issue for determination is whether the PPDT erred in finding that the 1st respondent was validly nominated as the UDA flag bearer for the Pangani MCA ward.

19. I note that the appellant's main argument, as contained in the 1st and 2nd grounds of appeal, was that the PPDT did not consider the arguments contained appellant's amended submissions dated April 29, 2022. In the said submissions, the appellant indicated that that NEB had, in a statement noted that "the quality of the nomination election was questionable and bound to affect the elections."

20. I note that the appellant's argument on the issue of the quality of the nomination election is an issue that was not raised in the pleadings before the PPDT but was introduced in the submissions. I find that the introduction of the issue during submission denied the 1st respondent the opportunity to substantively respond to it. Courts have taken the position that submissions cannot take the place of evidence and that a claimant is required to prove his claim through evidence. This was the finding by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR where it was held that: -

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

21. Taking a cue from the above cited decision, I find that the PPDT cannot be faulted in the event that it did not consider evidence that was introduced at the submissions stage.

22. My above finding notwithstanding and even assuming, for argument's sake, that the evidence adduced at the submission stage was to be considered, the question that arises is if the evidence in question is sufficient to oust the results of the nomination elections. What then was the appellant's evidence?

23. The appellant claimed that the NEB, the body mandated to conduct and oversee the impugned nomination elections admitted before the EDRC that in its assessment of the issues raised, it had arrived at the conclusion that; "... the quality of the nomination election is questionable and bound to affect the election results and has requested the Committee to issue appropriate order in the circumstances ... "

24. My finding is that the above statement, by the NEB, is a general statement on the quality of the said nomination elections which the NEB found to be questionable. The NEB did not however tender tangible evidence to show the facts that it relied upon in arriving at the conclusion that the elections' quality was questionable. Furthermore, the NEB did not tender evidence to show how the alleged quality of the elections affected the results and if the said poor quality of elections could be attributed to the actions or fault of the 1st respondent so as to justify the nullification of his nomination.

25. Turning to the 3rd ground of appeal, on whether the PPDT usurped the UDA National Election Board's Mandate, the appellant argued that the party had conducted two unsuccessful nomination exercises thus necessitating the 2nd respondent's invocation of Article 31 of the Party's constitution in recommending that NEB issues alternative measures. The PPDT however found that the EDRC did not make any conclusive findings on the issues that were raised before it.

26. A perusal of the record reveals that indeed, the EDRC did not pronounce itself conclusively on the issues that were placed before it and neither did it nullify the nomination of the 1st respondent who had already been issued with a nomination certificate. The EDRC instead referred the matter to NEB for alternative measures.

27. Section 40 (2) of the *Political Parties Act* allows a party who is dissatisfied with the decision of the EDRC to challenge the said decision before the PPDT. I find that the facts of the instant case are distinguishable from the facts in Samuel Owino Wakiaga case (*supra*). In the cited case, the results of the nomination exercise were nullified by the EDRC which then directed the party to proceed in the manner compatible with the party's constitution. In the instant case, however, the EDRC did not make any findings on the validity of the nomination exercise or nullify the results before directing the Party on how to proceed.

28. I find that in the circumstances of this case and considering the fact that EDRC did not nullify the results of the party primaries, the party had no basis for purporting to conduct fresh nominations. It is therefore my finding that the PPDT was properly seized with the matter and that it acted within its jurisdiction in determining the dispute.

29. The 4th, 5th, and 6th grounds of appeal were that the PPDT erred in affirming the nominations, it was the appellant's case that the admission by NEB that the elections were flawed was a factual admission which required no proof.

30. The 1st respondents submitted that the only evidence adduced by the appellant was a non-certified photocopy of an OB report which, he argued, was incomplete, unreliable and lacked probative value. He observed that the said OB report did not relate to Pangani Polling Centre, where the appellant alleged poll violence.

31. In *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR it was held that: -

> "(195) There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made."

32. On the standard of proof, the Court held as follows at paragraph 203: -

> " The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt - save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the *Constitution*, for an

outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."

33. Guided by the above cited authority on the burden and standard of proof in election disputes, I find that the Tribunal was right in its holding that the appellant was unable to prove that the 1st respondent was to blame for the chaos that arose in the polling stations.

34. On the final ground of appeal, that the PPDT misapplied themselves on the facts and applicable law, I find that having already found that the evidence presented by the appellant did not meet the threshold of the standard and burden of proof expected in an election petition, I reiterate my finding that the PPDT arrived at the correct decision on the issues that were placed before it.

35. Needless to say, even assuming that it was established, as a fact, that there were instances that could lead to the conclusion that the quality of the nomination election was compromised, courts have taken the position that an election is ordinarily not a flawless process and that there are bound to be mistakes which may be overlooked as long as they do not affect the overall results. This was the holding in *Peter Gichuki King'ara vs IEBC & 2 Others, [2014] eKLR where it was held that: -*

> "It follows that electoral systems and processes all over the world are not perfect, they are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall results and the democratic will of the people"

36. In the instant case, I find that not only did the appellant fail to tender evidence, to the required standard, to show that the 1st respondent was responsible for the alleged poor quality of the nomination elections, the appellant did not also prove the extent of the alleged flaws and how they affected the overall results of the elections.

37. Having regard to the findings and observations that I have made in this Judgment, I find that the instant appeal is not merited and I therefore dismiss it with no orders as to costs considering that the dispute herein pits a political party and its members.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Mwangi for the Appellant.

Ms Kyeva for Ms Thiongo for 2nd Respondent.

Mr. Mabeya & Okatch for the 1st Respondent.

Ms Anjiko for Okatch for 1st Respondent

Court Assistant- Sylvia