



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E248 OF 2021**

**HON. ISAAC MWAURA MAIGUA.....APPELLANT/APPLICANT**

**-VERSUS-**

**JUBILEE PARTY.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES.....2<sup>ND</sup> RESPONDENT**

**THE HON. KENNETH LUSAKA, SPEAKER OF THE SENATE.....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment and orders of the Political Parties Disputes*

*Tribunal delivered on 7<sup>th</sup> May, 2021 in PPDT Complaint No. E002 of 2021)*

**JUDGMENT**

1) Hon. Isaac Mwaura Maigua, the appellant herein being a member of the 1st respondent was nominated as a member of the Senate representing persons with disability in the 12th Parliament. On 1st February 2021, the 1st respondent commenced disciplinary proceedings against the appellant on various grounds namely that he had violated the party constitution and for contravening the code of conduct.

2) The 1<sup>st</sup> respondent's National Disciplinary Committee (NDC) after hearing the parties resolved to have the appellant suspended for 6 months from the 1st respondent's membership. The respondent's National Management Committee (NMC) acting on behalf of the National Executive Committee (NEC) reviewed the NDC decision and substituted it with that of expulsion.

3) Being aggrieved by the decision of NMC, the appellant filed a complaint with the Political Parties Tribunal (PPDT) hereinafter referred to as the 'Tribunal'. The Tribunal heard the complaint and proceeded to dismiss the appellant's complaint vide its decision delivered on 7th May 2021.

4) Being aggrieved by the tribunal's dismissal order, the appellant preferred this appeal and put forward the following grounds

*i. The honorable tribunal erred in law and in fact having found that the complainant was granted a fair hearing.*

*ii. The honourable tribunal misdirected itself in failing to confirm that the appellant was not accorded a fair hearing contrary to the relevant law and specifically Regulation 52 the Jubilee Party National Disciplinary Committee Regulations, 2017.*

*iii. The honorable tribunal erred in law and in fact in finding that there was no sufficient basis to fault the 1<sup>st</sup> respondent's disciplinary committee and failed to consider that the 1<sup>st</sup> respondent failed to tender evidence to prove whether the same had been*

*served upon the appellant as required under Regulation 52 the Jubilee Party National Disciplinary Committee Regulations, 2017.*

*iv. The honorable tribunal erred in law and in fact in not finding that the appellant was discriminated against in the entire disciplinary process.*

*v. The honorable tribunal erred in law and in fact in failing to find and hold that the charges as against the appellant were not justified.*

*vi. The honourable court misdirected itself in failing to find and hold that there exist as a coalition agreement between PDR and now UDA with Jubilee party and therefore the appellant did to advance the policies of another political party.*

*vii. The honorable tribunal erred in law and in fact in failing to find and hold that the charges as against the appellant were unjustified as they failed to indicate in any manner how the appellant acted in a manner that was disloyal to the 1<sup>st</sup> respondent party.*

*viii. The honorable tribunal erred in law and in fact in failing to find and hold that the 1<sup>st</sup> respondent party organs have never been constituted or convened since 2017.*

*ix. The honorable tribunal erred in law and in fact in awarding costs as against the appellant*

*x. The honoruabe Tribunal misdirected itself in arriving at its decision or orders by taking into account extraneous matters and misinterpreting issues such as:*

*a) There was no evidence on the vagueness of the charges before the 1<sup>st</sup> respondent's disciplinary committee.*

*b) That the appellant did not seek for more time to appropriately prepare his defence before the 1<sup>st</sup> respondent's disciplinary committee.*

*c) That the defence of the appellant was not sufficient.*

*xi. The honorable tribunal erred in law in failing to grant the appellant the orders sought and dismissed the complaint.*

5) When this appeal came up for hearing, this court gave directions to have the same disposed of by written submissions.

6) I have re-evaluated the case that was before the Tribunal. I have also considered the rival written submissions and the authorities cited by the parties.

7) In the first and second and third grounds of appeal, the appellant is of the submission that the political parties tribunal erred when it found that the appellant had been granted a fair hearing by the 1st respondent yet the contrary happened. It is the argument of the appellant that he was denied a fair hearing by the 1st respondent's disciplinary committee under Article 13.1.11 of the Jubilee Party Constitution and Regulations 5, 9,13,14, 20 and 52 of the Jubilee Party National Disciplinary Committee Regulations, 2017.

8) The appellant further argued that the 1<sup>st</sup> respondent's disciplinary committee purported to hear and determine the allegations levelled against him without availing responses to the preliminary objections he raised and that the 1st respondent produced evidence of the offences he was charged with during the disciplinary hearing contrary to the regulations that require that all evidence submitted by the complainant be made available during the service of the charge sheet.

9) It is for this reason that the appellant avers that he was not accorded a fair hearing but was instead ambushed on the date of hearing. The appellant also pointed out that statement that the appellant (complainant) was guilty of the offences listed cannot and did not constitute reasons for the decision.

10) It is argued that the decision violated Articles 47 and 50 of the constitution of Kenya, 2010 Sections 4(2) and 4(3) of the Fair Administrative Action Act, 2015, and Regulations 5 and 52 of the Jubilee Party National Disciplinary Committee Regulations, 2017.

11) The appellant further accused the 1<sup>st</sup> respondent of proceeding to implement the impugned decision prematurely. The appellant also stated that the Disciplinary decision was only attached as the alleged reasoned decision in

the 1st respondent's pleadings. The appellant further argued that any implementation of a decision tainted by such irregularities was unjust and hence has no effect in law.

12) In the fourth ground of appeal, the appellant argued that he was discriminated in the entire disciplinary process. The appellant pointed out that the 1st respondent contravened Article 27 of the Constitution of Kenya, 2010 by selectively and discriminately subjecting him to a disciplinary process without any explanation or reasons at all, therefore the actions confirm the illegalities malice and utter discrimination.

13) The appellant denied committing the acts specified in Section 14(5) of the Political Parties Act that would be used to deem a member as having resigned from a political party. He further denied having participated in the formation of any other political party or in the promotion of the interests of another political party.

14) It is argued that the Political Parties Tribunal erred in not finding that the appellant was discriminated against in the entire disciplinary process and in failing to find and hold that the charges preferred against him were unjustified on the basis that it remained silent in taking cognizant existence of a coalition agreement between the Party of Development Reforms (PDR) now referred as United Democratic Alliance (UDA) with Jubilee party.

15) It is the submission of the appellant that the penalty meted on him was unfair unreasonable, malicious and unwarranted in the circumstances of this case. The appellant submits that the 1st respondent abused the discretion in the punishment meted out taking into account the previous circumstances where no disciplinary proceedings were ever meted on any of the party members who supported contestants of other parties and further failed to take into consideration that there exists a coalition agreement between PDR (Now UDA) with Jubilee Party which the Disciplinary Committee ought to have taken judicial notice pursuant to Gazette Notice no. 11254 issue no. 37 of 28th December 2020. The appellant accused the Tribunal of awarding costs to the 1st respondent without considering the above circumstances.

16) The appellant further argued that the Political Parties Tribunal misdirected itself in arriving at its decision by taking into account extraneous matters. First, that there was no evidence on the vagueness of the charges before the 1st respondent's Disciplinary Committee. Secondly, that the appellant did not seek for more time to appropriately prepare his defence before the 1st respondent's disciplinary committee. Thirdly, that the defence of the appellant was not sufficient.

17) It is also the submission of the appellant that the Tribunal erred when it proceeded to find that there was no sufficient basis to fault the 1st respondent's National Disciplinary Committee (NDC) exercise of its discretion yet the NDC decision was never served upon the appellant.

18) It is argued that the Jubilee Party's Disciplinary Committee's decision was varied from a suspension of six (6) months to an expulsion by the party National Management Committee (NMC). The appellant is of the submission that the sanction meted out was unreasonable in the circumstances.

19) The appellant pointed out that the Tribunal was silent on the issue of service and instead noted that the 1st respondent had attached a reasoned decision to its replying affidavit. It is said the Tribunal failed to resolve the issue of service as required under Regulation 52 of the Jubilee party National Disciplinary Committee Regulations, 2017.

20) It is stated that the Tribunal treated the decision attached to 1st respondent's relying affidavit just as an annexure and that there was no evidence tendered proving that service of the decision was ever effected upon the appellant hence it is the appellant's submission that the Tribunal unfairly dismissed his complaint without any lawful basis.

21) The appellant further argued that he was and is entitled under Articles 98, 99 and 105 of the Constitution of Kenya, 2010 as read with Section 14 of the Political Parties Act together with Regulation to exhaust all the available forums and appellate process before the position he holds as a nominated senator could be declared vacant by the 3rd respondent and replaced by the 4th respondent via a hurriedly published gazette notice.

22) The appellant also submitted that the 3<sup>rd</sup> and 4<sup>th</sup> respondent's decision with the Tribunal's judgment on whose strength the two gazette notices were issued by operation of law should be quashed and declared as of no effect and the appellant be awarded all the benefits and privileges the court had in its orders preserved on the 7th May 2021.

23) It is further argued that the decision by the 2<sup>nd</sup> respondent made on 29th March 2021 to deregister the appellant from the 1st respondent's party and any gazette notices issued by the 3<sup>rd</sup> and 4<sup>th</sup> respondents cannot stand. It is also stated that the 1st respondent's decision to expel the appellant was and is still a nullity for want of legal and statutory compliance.

24) In response, the respondents each opposed the appeal urging this court to dismiss the same. It is the submission of the 1st respondent that the Political Parties Tribunal (PPDT) properly exercised its discretion judicially and judiciously in reaching at its impugned decision. The 1st respondent further submitted that the decision of PPDT is expressly anchored on law in application to the specific issues and evidence that were placed before it by the parties.

25) The 1<sup>st</sup> respondent also argued that the PPDT conducted a fair hearing before dismissing the appellant's complaint. It was pointed out that service of the charges and its particulars were effected upon the appellant on 1st February 2021 which fact is admitted. The 1st respondent is of the submission that the charges preferred against the appellant were clear, justified and in accordance to Article 13.3:1 D, E and J of the 1st respondent's constitution. It is said that the appellant was given sufficient time and platform to prepare and present his defence where the appellant personally and physically participated.

26) The 1<sup>st</sup> respondent further stated that the decision of PPDT is sound both in fact and in law. The 1st respondent also argued that its NMC had the discretion under Articles 7(2A) and 13.1.12 of its constitution to legally vary the NDC's order of suspension against the appellant to that of expulsion.

27) The 1<sup>st</sup> respondent further pointed out that Regulation 52 of the National Disciplinary Committee Regulations requires that the charged members shall be informed of the ruling and sanctions of the committee together with the reasons thereof and that there is no prescribed time frame nor form of information. According to the 1st respondent, the information was provided to the appellant.

28) It is also the 1<sup>st</sup> respondent's submission that the Political Parties Tribunal gave reasons in its findings with respect to discrimination and that the appellant did not present or substantiate other similar cases that may show bias or discrimination. Accordingly, it is the 1st respondent's submission that the appellant failed to discharge his initial burden of proof therefore the Tribunal's decision cannot be faulted.

29) The 1<sup>st</sup> respondent further faulted the appellant for accusing the Tribunal of considering extraneous matters yet it is the appellant had raised the issues thus inviting the Tribunal to determine issues in question. It is also argued that the Tribunal was right in awarding costs since costs follow the event.

30) It is further the submission of the 1<sup>st</sup> respondent that the appellant's attempt to introduce new issues in relation to his replacement as a nominated member to the senate cannot legally and factually stand. It is pointed out by the respondent that this court lacks jurisdiction to entertain, hear and determine matters not placed before the Tribunal. It is the argument of the 1st respondent that the nomination of the appellant's replacement crystallised upon his gazette and that can only be challenged by an election petition and not through this appeal.

31) The 3<sup>rd</sup> respondent also opposed the appeal through the written submissions filed and dated 16th September 2021. It is the submission of the 3<sup>rd</sup> respondent that he performed his constitutional duty under Article 101 (2) of the Constitution of Kenya, 2010 to declare a vacancy whenever a vacancy occurs in the office of a member of Senate held under Article 98 (1) (b), (c) and (d) of the Constitution.

32) The 3<sup>rd</sup> respondent further argued that the orders sought in this appeal violate the principle of separation of powers since this court is being invited to interfere with the internal management of parliament and political parties that constitute members of parliament. This court was urged to refrain from determining political

questions but instead leave them to be determined by political parties. The 3rd respondent further implored upon this court to decline entertaining proceedings instituted against the speaker for actions done in the course of performing mandatory constitutional and statutory duties.

33) It is pointed out that the appellant has failed to demonstrate any actual or threatened violations of the constitution. The 3rd respondent also stated that this appeal has been overtaken by events as the appellant's removal as a member of parliament under Article 98(a) (d) of the Constitution of Kenya, 2010 has already been effected and as such this court will be engaging in an academic exercise by entertaining the present appeal.

34) On its part, the 4<sup>th</sup> respondent filed written submission opposing the appeal. The 4th respondent just like the 3rd respondent admit that upon the dismissal of the appellant's complaint by the Political Parties Tribunal, they took the requisite steps to publish in the Kenya Gazette a declaration of a vacancy in respect of the senate position held by the appellant and an election by way of nomination of Sammy Prisa Leshore as duly nominated by the 1st respondent to the Senate to represent persons with disability.

35) The 4<sup>th</sup> respondent argued that the dispute can only be resolved by the election court hence this court lacks jurisdiction to entertain the appeal whose outcome is intended to nullify the election by way of nomination of Sammy Prisa Lesore.

36) The 4<sup>th</sup> respondent stated that it was joined to this appeal without leave of court therefore he is improperly before this court, thus the appeal as against the 4th respondent is incompetent and fatally defective.

37) It is the submission of the 4<sup>th</sup> respondent that the appellant was granted a fair hearing before the Political Parties Tribunal. The 4th respondent further argued that though the charge document was not produced, the pleadings and evidence presented before the Tribunal show that he appellant understood the charges facing him. It is further pointed out that though the Tribunal was not provided with the charge document, the tribunal noted that the appellant's replying affidavit contained the details of the charge.

38) The 4<sup>th</sup> respondent further argued that it cannot lie in the appellant's mouth to say that he was not given reasonable time to prepare for his defence because it is on record that the Tribunal gave him time to prepare is defence but he declined the offer.

39) It is the argument of the 4<sup>th</sup> respondent that the failure to provide the appellant with the decision by the 1st respondent did not violate the appellant's right to a fair trial. It is said that the decision of the 1st respondent's NMC dated 8th February 2021 was made public as required under the regulations and therefore the appellant got the opportunity to interrogate and challenge the reasoning by the NDC.

40) On the question of discrimination, it is the argument of the 4<sup>th</sup> respondent that the appellant did not tender credible evidence that he was discriminated by the 1st respondent. It is also pointed out that the appellant failed to produce the coalition agreement between the two parties in order for the Tribunal to consider the terms therein and that there is no evidence that PDR is the same as UDA on account of change of names.

41) The 4<sup>th</sup> respondent further argued that the extract of the coalition agreement produced by the 1st respondent does not grant members of the 1st respondent the right to pledge allegiance to the other coalition party or to be disloyal to one's party or breach a party's code of conduct.

42) Having re-evaluated the complaint which was before the Political Parties Tribunal and having considered the rival written submissions plus the authorities cited, this appeal can be determined on broad grounds. The first issue which was substantively argued before this court is the question whether the appellant was granted a fair hearing by the 1st respondent's national disciplinary committee.

43) I have considered the rival submissions over this ground. The appellant appeared before the Tribunal and argued that the 1st respondent denied him a fair hearing by deliberately neglecting to provide him with the evidence upon which its assertions were hinged on prior to the hearing.

44) The appellant further argued before the Tribunal that he was ambushed with a raft of allegations against him while denying him a reasonably sufficient time to prepare for his defence. The record shows that the Tribunal considered the appellant's complaint and found no merit. In its judgment the Tribunal at page 9, the Tribunal stated inter alia as follows:

**“The only recorded objection by the complainant relates to the allegation that the complainant was served with evidence at the beginning of the session.**

**As per the subject NDC minutes, whereas the complainant was granted an opportunity to have the proceedings adjourned due to late service of evidence, the record reflects that his defence team refused to adjourn.”**

45) At page 10 of its judgment the Tribunal further stated as follows:

**“With respect to the allegation of sufficiency of notice and service of evidence, we note that the NDC regulations expressly state that the summons should be served within 48 hours prior to the hearing. From the record, it is evident that the 1<sup>st</sup> respondent dealt within the timelines that guide the party's disciplinary process as prescribed in the party laws. If the complainant felt that the notice period was insufficient, the question we ask ourselves is whether he sought for an adjournment and or more time to the commencement of the NDC hearing. From our perusal on the record, there is no evidence that the complainant sought and was declined an adjournment of the proceedings to allow him what he considered sufficient time to prepare. In fact from the NDC minutes already referred above, the complainant was granted an opportunity to adjourn the proceedings but his defence team insisted on proceeding with the hearing.”**

46) It is clear from the above excerpts that though the Tribunal did expressly state that the appellant was given a fair hearing, it can be inferred that it came to such a conclusion. There is no dispute that the appellant was served with the evidence at the beginning of the 1st respondent's disciplinary proceedings.

47) The thinking of the Tribunal that since the appellant did not seek for an adjournment to enable him prepare for his defence meant he was given a fair hearing, in my view is wrong. It is in the opinion of this court that the conduct of providing evidence to the appellant at the time of hearing the complaint is an outright ambush and put the appellant in a disadvantaged position in that he was at a loss as to how to answer the charges and the accusations levelled against him.

48) It is a cardinal rule of natural justice that the right of a fair hearing can only be exercised, upon a party being granted more time to prepare his evidence to respond and controvert evidence that was produced during the disciplinary hearing

49) This court is satisfied that the appellant was not accorded a fair hearing notwithstanding the fact that the appellant did not apply for adjournment of the hearing of the disciplinary proceedings. The Tribunal therefore erred when it held that the appellant was granted a fair hearing.

50) It is apparent that on the face of it that the 1<sup>st</sup> respondent breached its Constitutional and its Disciplinary Regulations. It also goes without saying that the 1st respondent breached Articles 47 and 50 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015.

51) The second main ground argued on appeal by the appellant is that the appellant was discriminated in the entire disciplinary process. The tribunal in its decision came to the conclusion that the 1st respondent did not discriminate against the complainant in the disciplinary process. The tribunal stated in page 10 of its judgment in part as follows:

**“Indeed, his attempt to show that other party members had been treated differently was countered at the cross-examination of the party secretary General (S.G) when the said SG stated that all cases the party always gave some leeway and opportunity to errant members to conform before taking disciplinary action against them .....Further the complainant did not present or substantiate other similar cases that may point to bias or discrimination. We are therefore of the considered opinion that the complainant was granted a fair hearing.”**

52) The proceedings before the tribunal clearly show that the secretary general of Jubilee party testified before the tribunal. In cross-examination at pages 22-23 the 1st respondent's SG stated in part as follows:

**“I took issue of the involvement of the complainant to UDA.**

**UDA previously known as PDR**

**PDR has a coalition agreement with Jubilee party .....Jubilee was in coalition agreement with people Democratic party but changed to UDA. The coalition agreement is not complete. There was a big election in Kibra, I am aware Jubilee Party members campaigned for ODM and the party had a candidate. Matter was raised to Sakaja but we did not have a scenario similar to this where party member went against ODM cannot have coalition.**

**I do not know of disciplinary proceedings against Sakaja and Maina kamanda....”**

53) The question is whether the tribunal erred in finding that the appellant was not discriminated against in the entire disciplinary process. I have already taken into account the rival submissions over this issue. It is apparent from the proceedings conducted before the tribunal that the 1st respondent's Secretary General admitted that the 1st respondent had a coalition agreement with PDR which later changed to UDA.

54) It is also evident that the appellant was accused of inter alia that he advanced the policies of another political party namely UDA. The proceedings further indicate that some members of the 1st respondent namely Sakaja and Maina Kamanda supported the ODM candidate in the Kibra by-election yet they were not summoned to undergo any disciplinary process like the appellant.

55) With respect, I am persuaded by the appellant's argument that the 1st respondent selectively conducted disciplinary proceedings against him for associating himself with another political party just like the other named parties. The tribunal therefore fell into error when it held that the appellant was not discriminated in the entire disciplinary process. The appellant did not need to tender further evidence to establish discrimination since the evidence of the 1st respondent's S.G was sufficient to establish the allegation of discrimination.

56) The third main ground is whether the charges preferred against the appellant were justified. I have considered the competing submissions over this ground. It is the argument of the appellant that the complaints lodged against him before the disciplinary committee were unjustified because there was in existence a coalition agreement between the Party of Development and Reforms (PDR) now United Democratic Alliance (UDA) with Jubilee.

57) With respect, I am persuaded by the appellant's arguments.

The proceedings before the tribunal clearly show that the 1<sup>st</sup> respondent's S.G admitted that there existed a coalition agreement between Jubilee Party and UDA. It is therefore clear that the appellant did not advance the policies of another political party as concluded by the disciplinary committee.

58) A careful perusal of the tribunal proceedings will show that the 1st respondent had failed to establish the manner in which the appellant was disloyal to the party. The tribunal therefore fell into error when it held that the 1st respondent was justified in disciplining the appellant.

59) It is clear in my mind that the 1<sup>st</sup> respondent's disciplinary proceedings which led to the expulsion of the appellant from Jubilee Party was not conducted in accordance with the law.

60) This court also has come to the conclusion that the Jubilee party's National Disciplinary Committee processes and the decision that followed was unlawful.

61) This court further finds that the decision of NDC which was varied by the NMC from the suspension for six months to an expulsion from the 1st respondent party which was then transmitted the national organ including the subsequent decision of 8th February 2021 and the decision by the 2nd respondent dated 29th March, 2021 to deregister the appellant from the 1st respondent party and any gazette notices issued by the 3rd and 4th respondents cannot stand.

62) In the end, this appeal is found to be meritorious. It is allowed.

Consequently, the decision of the Political Parties Tribunal is set aside and is substituted with an order allowing the complainant's (now appellant) complaint.

63) The deregistration of the appellant by the 2<sup>nd</sup> respondent made on 29th March 2021 and the gazette notice no. 4597 vol. CXXII-102 dated 10th May 2021 and the gazette notice no. 4598 vol. CXXII-103 dated 11th May 2021 issued by the 3rd and 4th respondents respectively are hereby quashed and set aside hence are of no effect and cannot confer any rights. Costs of the appeal are given to the appellant.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

.....for the Respondent