



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF ELECTIONS ACT, 2011 LAWS OF KENYA

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND

COUNTY ELECTIONS) PETITION RULES, 2017

AND

IN THE MATTER OF THE PURPORTED NOMINATION, CANDIDATURE

AND ELECTION OF RACHAEL KAKI NYAMAI AS THE MEMBER

OF PARLIAMENT OF KITUI SOUTH CONSTITUENCY

AND

IN THE MATTER OF IMPLEMENTATION AND ADHERENCE TO

THE CONSTITUTION OF KENYA 2010 & THE RULE OF LAW

BETWEEN

KENNEDY MOKI.....PETITIONER

VERSUS

HON. RACHAEL KAKI NYAMAI.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

PAMELA AWOUR WANDEO.....3RD RESPONDENT

JUDGMENT

1. **Kennedy Moki**, the Petitioner, participated in the **Election** held on the **8th** day of **August, 2017**. He vied for the seat of **Member of National Assembly** for **Kitui South Constituency**. Following the stated Election, **Hon. Rachel Koki Nyamai**, the 1st Respondent, was declared the winner. There were other contestants. The results were declared by **The Independent Electoral and Boundaries Commission**, the 2nd Respondent, as follows:

Rachel Kaki Nyamai	– 22,753
Kennedy Moki	– 16,217
Bernard Musembi Kitindio	– 12,837
David Mbilo Mwaniki	– 284
John Munyallo	– 190

2. It is the contention of the Petitioner that the declaration and subsequent gazettelement of the 1st Respondent through **Gazette Notice Volume CXIX** as the person elected to represent the people of Kitui South as Member of the National Assembly was a mockery of justice and its outcome did not reflect the will of the people of Kitui South Constituency.

3. It was averred that the 1st Respondent engaged in various pre-electoral election date malpractices and breaches of law that rendered her candidature for the elective seat invalid. That the 1st Respondent presented to the 2nd Respondent a Nomination Certificate that was illegally obtained which was a perpetration of an illegal and contemptuous act of Jubilee Party; a fraud that was committed against the 2nd Respondent and the people of Kitui South.

4. Further, the Petitioner averred that there was widespread bribery where voters were paid to vote for the 1st Respondent, and that agents were ordered out of the polling stations therefore they were not present during the counting of votes and as a result did not sign Form 35A and 35B as verification of their approval of the announced results.

5. The Petitioner faulted the 2nd and 3rd Respondents for failure to comply with **Article 82(1)(b)** of the **Constitution** regarding nomination of candidates; **Article 10** of the **Constitution** by not defending the National Values and principles of governance in relation to the said election.

6. Consequently, the Petitioner prayed for a declaration that: the 1st Respondent was not validly nominated as required by **Article 99(1)(c)** of the **Constitution of Kenya, 2010** and was therefore ineligible to stand as a candidate for election as Member of National Assembly for Kitui South Constituency; that the subsequent gazettelement by the 2nd Respondent contained in **Gazette Notice No. 6253 of 2017**, allowing her to vie for the position was null and void and of no consequence; and as a consequence the 1st Respondent was not validly elected as the Member of the National Assembly for Kitui South Constituency; that the Petitioner is the validly elected Member of National Assembly of Kitui South Constituency or a fresh election be ordered; and that the 1st Respondent be found to have committed an election offence to be investigated by the Director of Public Prosecutions and to be barred from contesting future elections.

7. In response, the 1st Respondent stated that the issue of nomination was *res judicata* having been litigated until the Court of Appeal therefore this court lacks jurisdiction to handle it. That nominations were carried out pursuant to the **Jubilee Party Election Rules** where she emerged the winner. She denied the allegations of malpractices and voter bribery and prayed for the dismissal of the Petition.

8. The 2nd and 3rd Respondents filed a joint response. The 3rd Respondent denied having received any

complaint of any electoral malpractices. She averred that the elections held on the **8th** day of **August, 2017** were free, fair and transparent and the results declared reflect the will of the people. That they were not party to the proceedings before the **Political Party Disputes Tribunal** or the Court and no Court Order was served upon them. That the Election Court does not have jurisdiction to determine disputes arising out of nomination or party primaries. That the nomination process was adjudicated and settled by a tribunal and courts with competent jurisdiction. They denied having knowledge of any fraud or electoral malpractices alleged.

9. Further, they stated that they carried out their mandate by upholding the Constitutional Values demanded by **Article 10** of the **Constitution**. They denied the allegation that the Petitioner's agents were locked out of the polling stations as they were given an opportunity to sign Forms 35As and 35B.

10. In his submission, learned counsel for the Petitioner, **Mr. Gomba**, stated that a person could only be eligible to vie for Member of Parliament position if nominated. That if nomination was tainted it was an illegality. He argued that the dispute resolution mechanism laid down in law having been exhausted and the body mandated by the Constitution or statute having failed to resolve the dispute this court can clothe itself with the jurisdiction and address it. That the court has jurisdiction to hear disputes relating to or arising from nomination as the requirement of nomination is anchored in **Article 99(1)(c)** of the **Constitution**. That no nomination was conducted by the Jubilee Party therefore the 1st Respondent was not nominated as required by law.

11. Regarding the issue of electoral malpractices, it was submitted that the 1st Respondent's agents attempted to bribe a witness to vote for Jubilee Party. That there was evidence of intimidation, harassment and arrest of some witnesses on orders of the 1st Respondent.

12. On the question of jurisdiction **Ms. Mwandumbo**, learned Counsel for the 1st Respondent, submitted that a court cannot grant itself jurisdiction. That the **I.E.B.C. Disputes Tribunal** had the Mandate to settle election disputes, but the Petitioner did not lodge any complaint before it as required by **Section 74** and **109** of the **Elections Act** therefore he has no audience before the election court. That the 1st Respondent was validly nominated by Jubilee Party. On the issue of electoral malpractices, she argued that it was not proved.

13. On jurisdiction, **Mr. Arunga**, learned counsel for the 2nd and 3rd Respondents argued that the Jubilee Party conducted nominations following the Court Order. That there were no electoral malpractices as alleged.

14. Separate issues for determination were filed by parties which can be condensed thus:

- i. Whether this Court sitting as an Election Court has jurisdiction to determine the validity of nomination of the 1st Respondent by the Political Party.
- ii. Whether the 1st Respondent was validly nominated by a political party as candidate of Member of Parliament, Kitui South Constituency.
- iii. Whether the 1st Respondent engaged in election malpractices in breach of electoral laws.
- iv. Whether the election was conducted in a manner that was free, fair and credible.
- v. Whether the 1st Respondent was validly elected.

15. An electoral dispute can only be handled by a court with jurisdiction. Such a court must be designated and gazetted accordingly. A court cannot confer on itself jurisdiction which is donated by either the Constitution or Statute. In the case of **Sir Ali Salim V Sharrif Mohammed Sharray (1938) KLR** it was stated that:

“If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as stopped or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be permitted. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack of jurisdiction.”

16. In the celebrated case of **Owners of the Motor Vessel “Lilian S” -V- Caltex Oil (Kenya) Ltd (1989) KLR 1, Nyarangi J.** stated that:

“...jurisdiction is everything. Without it, a court has no power to make one more step.”

17. It is the contention of the Petitioner that the 1st Respondent was not validly nominated. It was mandatory for the 1st Respondent to be nominated. **Article 99(1)(c) of the Constitution of Kenya, 2010** provides that:

“Unless disqualified under Clause (2), a person is eligible for election as a Member of Parliament if the person:-

(c) is nominated by a political party or is an independent candidate who is supported:-

(i) In the case of election to the National Assembly, by at least one thousand registered voters in the constituency;

(ii)...”

18. Section 2 of the Elections Act, 2011 defines Nomination as:

“the submission to the commission of the name of a candidate in accordance with the Constitution and this Act”

19. A political party is required to nominate its candidate in accordance with the Constitution and Nomination Rules within a specific timeline (**see Section 13(1) of the Elections Act**).

20. The Commission (**I.E.B.C.**) has the mandate to settle electoral disputes including disputes relating to or arising from nomination (**See Section 74(1) of the Elections Act**).

21. Evidence was adduced by PW2, **Hon. Samuel Kalii Kiminza** that at the outset the 1st Respondent was given a direct nomination by her Political Party namely, Jubilee Party. He (PW2) challenged this act of formally choosing the 1st Respondent as the person suitable as the candidate to vie for the position of Member of Parliament, Kitui South Constituency. He commenced his action by lodging a complaint before the **Political Parties Dispute Tribunal (PPDT)** where the finding reached was that the nomination was not free and fair. The Political Party was ordered to conduct the Nomination exercise within 96 hours. The 1st Respondent who was aggrieved by the decision of the **PPDT** appealed to the High Court which declared the decision null and void. PW2 appealed to the Court of Appeal which ordered the Political Party to conduct fresh nominations within forty eight (48) hours. The process of selecting the candidate was undertaken by the Political Party which the Petitioner dismisses as having been fraudulent and illegal.

22. The contestants for nomination before the Jubilee Political Party were PW2 and the 1st Respondent, not the Petitioner herein. On cross examination PW2 stated that he submitted to the Political Party but dismissed what transpired to have been a mere meeting which he attended and signed an attendance sheet.

23. It is submitted by both the petitioner and 1st Respondent that the nomination was conducted in line with **Article 11 of the Jubilee Constitution** that provides thus:

“The party shall conduct open, free, fair and transparent nominations in national and county elections through consensus, secret ballot, or through the Independent Electoral and Boundaries Commission (I.E.B.C.) or other democratic method acceptable to the members under the supervision of National Election Board and County Election Board.”

24. According to PW2 the nomination process adopted was not in accordance with the order of the Court of Appeal. Therefore he dismissed the Nomination Certificate issued for the 1st Respondent as a nullity and of no legal consequence. Although he made his averment in his affidavit, he did not contest the fresh nomination that was done following the order of the Court of Appeal.

25. Section 74 of the Elections Act provides thus:

“(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) An electoral dispute under Subsection (1) shall be determined within ten (10) days of the lodging of the dispute with the commission.

(3) Notwithstanding Subsection (2) where a dispute under Subsection (1) relates to prospective nomination or election the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

26. In the case of **Republic -Vs- The Independent Electoral and Boundaries Commission Exparte Charles Ondari Chebet, Nakuru High Court Judicial Review Application No. 3 of 2013** it was stated that:

“...My understanding of Article 88(4)(e) of the Constitution and Section 74 of the Elections Act is that any dispute relating to nominations to any electoral post are required to be determined within prescribed time, and those relating to nominations of candidates should be determined before the date of nomination of elections whichever is applicable. Clearly because of the limited time spans for determination of nomination disputes, political party nominations needed to be done well before the nomination dates to the returning officer/Electoral bodies. As this did not happen the aggrieved candidates must live with the choices of their political mandarins...”

In summary therefore, I find and hold that where there is clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes this court’s jurisdiction is precluded. This court’s jurisdiction would only arise after the due exercise by the mandated bodies, the returning officer and the commission of their statutory mandate.”

27. In the case of **International Centre for Policy and Conflict & 5 Others -Vs- Attorney General and 5 others (2013) eKLR** the court stated that:

“Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.”

28. In the case of **Francis Gitau Parsimei & 2 Others -Vs- National Alliance Party & 4 Others (2012) eKLR Majanja J.** observed thus:

“It is also my view that Article 88(4)(e) and Section 74(1) of the Elections Act, 2011 provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or it has been demonstrated that the process has failed.”

29. It has been admitted that no report was made to the 2nd Respondent regarding the manner in which the

nomination was done. It has not been demonstrated that the mechanisms laid down in law as provided by the Constitution and Statutes were exhausted; therefore this court being an Election Court cannot descend into the arena and clothe itself with non-existent jurisdiction to determine the matter.

30. Therefore, this brings us to the issue whether the 1st Respondent engaged in Electoral Malpractices.

31. The Petitioner alleged that the 1st Respondent engaged in electoral malpractices and breached the law. He accused the 2nd and 3rd Respondents of contravening the provisions of regulations at various polling stations. It is trite that the legal burden of proof lies with him as the Petitioner. **Section 107** of the **Evidence Act** provides thus:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

32. In the case of **Raila Odinga and 5 Others -V- Independent Electoral and Boundaries Commission & 3 Others**, Supreme Court Election Petition No. 5 of 2013 (2013) eKLR it was stated that:

*“Where a party alleges non-conformity with electoral law, the Petitioner must not only prove that there had been no compliancy with the law but such failure and noncompliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, *Omnia praesumuntur riet et solemniter esse ecta*; all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”*

Further, the court stated thus in respect of the standard of proof:

“...The threshold of proof, in principle, must be above the balance or 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.”

33. It was alleged in pleadings that there was widespread bribery. That voters were paid to vote for the 1st Respondent. At Paragraph 33 of the Petitioner’s affidavit he avers that voters were paid to vote for the 1st Respondent. The Petitioner did not adduce direct evidence of the alleged bribery. His witness who came up with allegations of bribery was PW3, **Newton Mweu Muhoho**, who testified that he was offered some **Ksh.100** if he voted for the 1st Respondent on the voting day. He was not able to identify persons who were in the photo and had no idea where it emanated from. Images seen in the copy of the photo did not suggest any offer of anything being made as alleged.

34. It was alleged that the 1st Respondent intimidated her competitors and in particular PW2. PW4 **Hickson Mwanduko Ndonyi** averred that the 1st Respondent used the police to arrest him. On cross examination he stated that he was arrested on allegations that he was bribing voters to vote for the Petitioner. PW5, **Francy Kambua Mbatha**, stated that she was a member of the Petitioner’s campaign team. That their activities were disrupted by the police.

35. In determining whether or not there were electoral malpractices, I am guided by **Section 87** of the **Elections Act** which stipulate thus:

“(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred...”

36. The allegation made by PW3, that some people offered to give him money if he voted in a certain

manner, suggest that the alleged individuals offered to give him money to influence his judgment of whom to vote for. This was purportedly done before he went into the polling station. There were security officers present and **I.E.B.C.** officers but he did not lodge any complaint with them. His evidence fell short of proving the bribery allegations.

37. Regarding intimidation and harassment, PW4 was arrested by the police following allegations of voter bribery on behalf of the Petitioner. It was not stated under what circumstances he was released. PW5 alleged without proof that she was arrested. None of the witnesses adduced evidence to connect the 1st Respondent with what allegedly happened. The allegations of electoral malpractices were not proved.

38. The 2nd and 3rd Respondents have been faulted for having not conducted the elections for Member of National Assembly, Kitui South, in a manner that was free, fair, credible and transparent.

39. General principles that are taken into consideration in the electoral system include what is envisioned in **Article 81** and **86 of the Constitution**. **Article 81(e)** of the **Constitution** envisages elections being conducted in a free and fair manner. To be free and fair as provided by the **Article 81(e)** the elections must be:

(i) by secret ballot

(ii) free from violence, intimidation, improper influence or corruption.

(iii) conducted by an independent body

(iv) transparent and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

40. Voting was expected to be done as stipulated by **Article 86** of the **Constitution** that provides thus:

“At every election the Independent Electoral and Boundaries Commission shall ensure that –

a. whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

b. The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

c. The results from the polling station are openly and accurately collated and promptly announced by the returning officer; and

d. Appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safekeeping of election materials.”

41. The corruption and intimidation alleged by the Petitioner was not proved. It was pleaded that the 2nd Respondent’s presiding officers at various unnamed stations failed to provide Forms 35As and 35B to each of the agents of the Petitioner. No agent was called as a witness to adduce evidence to that effect. It was pleaded that Form 35B was signed by an agent unknown to Wiper Party but no evidence was adduced to establish the allegation.

42. In her evidence, the 3rd Respondent stated that the election was conducted in strict adherence with the law as provided by the Constitution and electoral laws. Since no electoral malpractices or alleged irregularities were reported, the election was conducted in a free, fair, credible and transparent manner.

43. It was the contention of the Petitioner that the affidavit deposed by the 1st Respondent is incompetent

having been signed in Nairobi and commissioned in Kitui. On cross-examination the 1st Respondent stated that she deposed the affidavit at the KMA Building in Nairobi in the presence of all her advocates, **Kinyua Musyoki** inclusive. In the case of **Hamzan Musuri Kevogo v I.E.B.C.&3 others (2017)** when confronted by a similar situation the court stated thus;

“In the instant case, I do not think that swearing the affidavit in Nairobi and having it commissioned in Kakamega is either misleading or prejudicial to the applicant. This court also notes that in Kenya, there are no statutory limitations as to where a commissioner of oaths can administer oath. He /She can do so in any part of the country. In the instant case, the oath was administered in Nairobi though the commissioner’s stamp gives an address in Kakamega.”

In the instant case the affidavit was deposed in **Nairobi**. No evidence was called to controvert the evidence adduced by the 1st Respondent that she appended the signature in Nairobi before the commissioner of oath who was present save that his stamp bore the address of the place where he is ordinarily based. In the circumstances the affidavit is not incompetent.

44. The 1st Respondent was declared the winner after garnering **22,753 votes** cast. Her closest competitor, the Petitioner, got **16,217**. She defeated him by **6,536 votes**. Therefore the 1st Respondent was validly elected and subsequently declared the winner.

45. Consequently, I make orders as follows:

- i. The Petition be and is hereby dismissed.
- ii. The 1st Respondent was validly elected as the Member of the National Assembly for Kitui South Constituency in the Elections held on the **8th** day of **August, 2017**.
- iii. The Respondents are awarded costs thus:
 - a. The 1st Respondent shall have costs capped at **Kshs. 1,000,000/=**.
 - b. The 2nd and 3rd Respondents shall have costs capped at **Kshs. 1,000,000/=**.
- iv. Pursuant to the provision of **Section 86** of the **Elections Act**, a Certificate as to the validity of this Election Petition shall be issued to **I.E.B.C.** (2nd Respondent) and the Speaker of the National Assembly shall be notified.

46. It is so ordered.

Dated, Signed and Delivered at Kitui this 24th day of January, 2018.

L. N. MUTENDE

JUDGE