



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HR DIVISION**

**ELECTION PETITION APPEAL NO. 33 OF 2017**

**CHARLES MONG'ARE ONGOTO.....1<sup>ST</sup> APPELLANT**

**EVANS MENGE OMWOYO.....2<sup>ND</sup> APPELLANT**

**Versus**

**JOHN KENNEDY ACHOKI.....RESPONDENT**

**AND**

**JUBILEE NATIONAL ELECTIONS BOARD...1<sup>ST</sup> INTERESTED PARTY**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The outcome of this Appeal turns on whether or not the Result of Polling at Miruka Polling Station as announced by the Presiding Officer will be upheld by this Court.
2. Miruka Polling Station is one out of 38 Polling Stations set up and used by Jubilee Party of Kenya to conduct its Primary for the Nomination of its Candidate for Member of Parliament for West Mugirango Constituency. It is not contentious that for logistical purposes, some of the Polling Stations gazetted by The Independent Electoral and Boundaries Commission were combined for the purposes of the Nomination. Miruka Nursery School was combined with Masosa AIC Primary School, Bugo DOK Primary School, BonyaigubaDOK Primary School, RatetiDOK Primary School and Nyaigesa ELCK Primary School, with Miruka being the designated station.
3. The Results of the voting at Miruka as announced by the Returning Officer was as follows:-
  - 1) Achoki J. Kennedy – 2074
  - 2) Omwoyo E. Menge – 504
  - 3) Ongoto C. Mong'are – 1540

This result irked Omwoyo E. Menge (the 2<sup>nd</sup> Appellant) and Ongoto C. Mong'are (the 3<sup>rd</sup> Appellant) who challenged it before the Jubilee Party National Election Appeals Tribunal, an Internal Political Party Disputes Resolution Mechanism (IDRM) of the Party. The Party Appeal Tribunal held in favour of the Appellants and nullified the results at Miruka Polling Station. It then declared the 1<sup>st</sup> Appellant herein as the legitimate winner of the Party Nominations and directed the National Elections Board to issue a Nomination Certificate to him.

4. As he would be entitled, the Respondent herein escalated the dispute to The Political Parties Disputes Tribunal (**PPDT**). The jurisdiction of PPDT to hear and determine disputes arising out of Party Primaries is conferred by Section 40 (1) (fa) of The Political Parties Act.

5. In a Decision made by PPDT on 12<sup>th</sup> May 2017, it overturned the Decision of The Party Appeals Tribunal. The Appellants are aggrieved by that Decision and have moved to Court on Appeal under the Provisions of Section 41 (2) of The Political Parties Act.

6. Although the Memorandum of Appeal raises 13 Grounds, it became clear, at the hearing, that the entire appeal was a criticism of the manner in which the PPDT perceived the evidence and resolved the controversy in respect to the result at Miruka. It was an invitation by the Appellants for this Court to reevaluate that evidence. As a first Appellant Court hearing an Appeal on points of Law and facts, this Court is indeed duty bound to reevaluate the evidence that was before the PPDT with a view to arriving at its own findings. The evidence before the PPDT was Affidavit evidence and it is that evidence that falls for this Court's reassessment.

7. Having heard the arguments by Counsel and considered the evidence at the hearing, the Court forms the view that the matter is not involved.

8. The outcome of the entire Party Primary, when the result of Miruka are included, are as follows:-

- 1) Achoki Kennedy - 5525
- 2) OmwoyoMaenge - 2438
- 3) Ongoto C. Mong'are -5361

Evidence from Form 4B(ii), which is the Constituency Tallying sheet reveals that in none of the other 37 Polling Stations did the number of Votes cast surpass 620 Votes. But for Miruka a record number of 4137 was recorded as Votes cast. This is of great significance because that single result tilted the outcome away from the 1<sup>st</sup> Appellant and in favour of the Respondent. Is this result credible?

9. Those who vouch for it gave the following evidence. Mr. Nicholas Okemwa, the County Returning Officer of the Party swore an Affidavit on 11<sup>th</sup> May 2017 stating that the Voter turnout was very high, at about 82.14%, as the Polling took place on a market day of Miruka Location and its environs. He also points to the votes for the Nomination of Women Representative as corroborating those of the disputed Votes. That in respect to the Women Representative the total number of votes cast was 4137.

10. Thomas MomanyiGisore was the Presiding Officer at Miruka. He supports the evidence of Mr. Okemwa and adds that the combined Voter strength for the 6 Stations that were collapsed into Miruka is 5013.

11. The rival evidence is that it was not humanly possible for 4137 persons to each cast two Ballots in one stream in 12 hours. The Appellants, through Affidavits of ZablonMogoko, Daniel Nyambati and Evans Oyasi, deposed that there was Ballot marking, Ballot stuffing and double voting. In addition, a sheet indicating the number of registered Voters for the year 2013 was produced showing that the total number of Voters for the 6 Stations was 3,798.

12. The Appellants also thought it curious that there would be no spoilt Vote amongst 4137 Votes cast and that the number of votes cast would be completely the same as those for the Women Representative.

13. This is my take of the matter. This Court is determining an Appeal from the Decision of the PPDT. The Respondent was the Complainant at the Tribunal. He sought to rely on the result of Miruka as announced by the Presiding Officer. The onus was on him to establish that the result at Miruka were credible. There is, first, a contest as to the number of registered Voters. The Appellants alleged 3,798. The Respondent put it at 5013. The Respondent asks this Court to believe its figure because it is given by the Presiding Officer. While that may be so, the Presiding Officer does not state the source of his information. Was it a Party list or Register? Or was it the IEBC list or Register? And if so, why was this not annexed to his Affidavit or shown to the Tribunal? For starters, this Court finds that there was insufficient evidence to establish the number of Persons eligible to vote in the Polling Station.

14. In support of the outcome at Miruka, the Tribunal was shown Form 4(b) (iii) which was the Constituency Tallying Sheet. From the evidence, as I understood it, the Tallying Sheet is a collation of results received from each of the 38 Polling Stations. What is in contention is the outcome at Miruka and not the tally at the Constituency. From the evidence of Mr. Gisore there is a Form 3e which would be signed by Agents and the Presiding Officers after the counting of Votes at each Polling Station. This document was not shown to the Tribunal. The veracity of the result had been challenged by the Appellants with a witness like Mr. Rashid Ocharo who was a Polling Clerk at the Station alleging some rigging. The question one must pose is why was the Primary document that captured the actual outcome of the Votes at Miruka not produced before the PPDT?

15. These questions taken with other evidence would not be idle. From Form 4 B(ii) the total number of Votes cast is recorded at 4137(with no rejected Votes) yet an addition of the Votes of all the three Candidates works to 4,118. There is a difference. Indeed a small difference of 19 and which would on another occasion pass as an arithmetic error. But this is an error in the midst of other curious circumstances.

16. The Tallying Sheet of the Constituency shows that the Miruka was one of the 10 Polling Stations out of the 38 that reported no rejected Vote. The other 28 Stations had rejected Votes and this was even so where the total number of Votes was as low as 107 (see for example Nyantao D.O.K). The Voter turnout in Miruka as claimed was remarkably high. It is said that 4137 people turned out to vote. None of these people spoilt their Votes or otherwise caused a rejection of their Votes. Were the Voters in Miruka exceptionally careful and vigilant?

17. On another front, Miruka finds itself in the set of just another 8 Polling Stations where the total number of Votes cast for the Women Representatives was exactly equal to those of the Member of Parliament. The other Polling Stations are Etono (206 Votes) Ikurucha (255) Ibucha (74), Bomorito (175) Kebirigo (256) Gekomoni (73) and Nyagachi (160). Again, Miruka stands out because of the number of Voters in that Station. It allegedly counted twenty times more Voters than some of these Stations. The result of Miruka, taken together with the other issues raised, must therefore be viewed with circumspection.

18. In my analysis, I am unable to arrive at the same conclusion as the Tribunal. I do not find the result of Miruka to be completely free of

doubt. They are not entirely credible. This is not the type of result that can be permitted to tilt the outcome of the entire Election. The result may have the effect of torpedoing the Will of the Members of the Party who participated in the entire election at West Mugirango and this should not be allowed to happen. Measuring the Election at Miruka on the propositions set out by Lord Denning in Morgan Vs. Simpson [1974] 3ALL ER 722 , this Court is unable to uphold it. Lord Denning had stated:-

“Collating all these cases together, I suggest that the law can be stated in these propositions (1) if the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or no ...(2) if the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Election, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated.”(my emphasis)

19. On the other hand the Appellants themselves did not produce any evidence from which the true outcome of Miruka could be ascertained.

20. Further, there was no evidence or material before the PPDT or this Court that could be used to ascertain the Will of the Voters at Miruka. In the circumstances, the decision must be remitted back to the Members of the Party at Miruka in a Repeat Election. And for the sake of clarity a repeat will be in Miruka as combined with the other 5 Polling Stations.

21. These now are the final Orders of the Court;-

21.1) There shall be Repeat Election at Miruka Polling Station (as combined with 5 other Polling Stations) in respect to the Nomination of The Candidate for Jubilee Party for the National Elections for Member of the National Assembly (MP) for the West Mugirango Constituency.

21.2) Given the timelines set out under the Election Act but bearing in mind that Saturdays and Sundays are Worship days for certain religions or denominations, The National Election Board of Jubilee Party(The 1st Interested Party) of Kenya shall organize and conduct those elections on or before 22<sup>nd</sup> May, 2017.

21.3) Any Certificate issued by the Party in respect to the aforesaid Nomination shall stand cancelled pending the outcome of the Repeat Elections at Miruka.

21.4) Each Party shall bear its own costs.

**Dated, Signed and Delivered in Court at Nairobi this 17<sup>th</sup> day of May, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

N/A for Appellant

Lusigi for Respondent

Alex – Court clerk