



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

ELECTION PETITION NO. 1 OF 2018

ELIZABETH JEBET KIBOR.....APPELLANT

Versus

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

SANDRA MARIO.....3RD RESPONDENT

(Being an appeal arising from the Judgement of Hon. Kasera Chief Magistrate Court at Kajiado dated 23rd day of January 2018 in the Election Petition No. 2 of 2017).

JUDGEMENT

Elizabeth Jebet Kibor, hereinafter referred as the appellant filed an appeal against the respondents seeking declarations of setting aside the judgement of the election court presided over by Hon. Kasera delivered on 23rd January 2018. In Election Petition No. 2 of 2017.

The appellant premised the appeal on the following grounds as contained in the memorandum of appeal indicated as herein under stated:

- 1. The Learned Magistrate erred in law and fact in finding that the 3rd Respondent was duly and lawfully nominated by ODM Party as a member of Kajiado County**
- 2. The Learned Magistrate erred in fact and law in finding that the nomination of the 3rd Respondent took into account the questions of ethnicity and regional balance**
- 3. The Learned Magistrate erred in law and fact in finding that the 3rd respondent was eligible for nomination to the County Assembly of Kajiado**
- 4. The Learned Magistrate erred in law and fact by finding and holding that the 3rd Respondent was duly and lawfully gazette as a member of the Kajiado County Assembly**
- 5. The Learned Magistrate erred in concluding that the entire ODM Party list published by the 1st Respondent for Kajiado County was legal and valid**
- 6. The Learned Magistrate failed to consider and take into account the entire of the pleadings placed before her in arriving at her determination.**
- 7. The Learned Magistrate to analyze and consider the entire evidence and documents placed before her thereby arriving at an absurd conclusion.**
- 8. The Learned Magistrate erred in fact and in law in finding and holding that the 3rd Respondent was in the valid list provided by the 2nd Respondent**
- 9. The Learned Magistrate failed to appreciate the evidence placed before her thereby arriving making contradictory**

conclusions.

10. The Learned Magistrate misapplied the salient provisions of the Constitution, the Elections Act and the Rules on nomination by way of Party Lists, thereby arriving at an absurd conclusion

11. The Learned Magistrate failed to appreciate the full tenor and import of Article 90, 177, and Sections 34-36 of the Elections Act, Regulations 54-55 of the Elections (General) Regulations of 2012, as well as the (Party Primaries & Party Lists) Regulations 2017.

12. The Learned Magistrate erred in failing to appreciate the full tenor and import of the 2nd Respondent's Rules on generation of Party Lists.

13. The Learned Magistrate failed to consider and appreciate the structures of the 2nd Respondent as one whole and indivisible political Party and the place of those structures in general of Party Lists.

In his major complaint the appellant was dissatisfied that the process of nomination conducted by the 2nd Respondent which contained the 3rd Respondent being gazetted as a member of the Kajiado County assembly was not free and fair. Further, the said process was in breach of the laid down threshold both in the constitution and the Elections Act.

In answer to the petition before the Election court the 1st and 3rd respondents vehemently denied that there were any irregularities of procedure or breach of the law in which the 3rd Respondent got to be nominated by the 2nd Respondent and finally gazetted as a Member of the County Assembly by the 1st Respondent.

The learned magistrate in her judgement considered the affidavit evidence by each party to the election dispute and declared as follows:

- **The petitioner herein has failed to discharge the burden of proof.**
- **The petition is dismissed with costs to the 1st and 3rd respondents.**

Factual Matrix at the trial court

This matter found itself in High Court in the following manner. The second respondent referred as the ODM Party was required under the law to nominate candidate under the category of special interest. Constitutionally, for nomination to the County assembly of Kajiado. The appellant alleged that by virtue she was a life member of the party submitted her credentials and testimonials to the relevant organ of the party for consideration as a member. Further the application was considered and approved by the 2nd respondent and subsequently forwarded to the IEBC – the 1st respondent for final publication.

The 1st respondent did publish the names on 23rd July 2017 being the list of nominated members under the special category but the 3rd respondent name was missing. When the final list of 28th August 2017 was published by the 1st respondent for the nominees who have made it to be gazetted as members of the Kajiado County assembly, the appellant's name was excluded and substituted with that of the 3rd respondent. Through an Election Petition No. 2 of 2017 the appellant brought to the attention of the matter to the election court a petition to scrutinize the nomination process in favour of the 1st and 3rd respondents to seeking a declaration of nullification. Following the affirmation of the nomination process by the Election Court the appellant filed this appeal to have the nomination declared unfair and invalid as it related to the 3rd respondent.

In the hierarchy of the candidates to be members of the assembly. On appeal each counsel filed written submissions with a residual schedule of highlighting the salient features of the matter surrounding the appeal.

The appeal before this court was agreed to be canvassed by way of written submission and an opportunity for Learned counsels to highlight the salient features of the appeal.

Submissions by the Appellant

Mr. Lumumba led a contingent of other advocates in pursuing this appeal on behalf of the appellant. Learned counsel anchored his submissions on the jurisdiction of the court to entertain the appeal. The grounds upon which the appeal is premised is on the constitution and statutory provisions on matters to do with nomination of a member of the County Assembly. The errors of law impliedly committed by the election court in confirming the gazettement of the 3rd respondent. Finally, whether the election court failure to interpret the law of nomination did occasion prejudice and failure of justice on the part of the appellant.

Mr. Lumumba for the appellant submitted that the dissatisfaction by the appellant with the decision of the election court is presented primarily that the 3rd respondent was not constitutionally and legally nominated as a member of the Kajiado county Assembly. It was contended by Learned counsel that under the provisions of the 2nd respondent constitution, the constitution 2010 and the Election act 2011, the person who met the criteria set was the appellant learned counsel further submitted that by the 1st respondent gazettement of the 3rd respondent as the duly gazetted member of the County Assembly went against the legal provisions prescribed in the constitution and applicable laws on nomination.

The first issue in contention to be argued was on the justification of the court to entertain the appeal. On this ground, learned counsel took the

position that going by the decision of the election court and the grounds upon which the appeal is premised there is no dispute there are real legal issues to be interpreted by the appellant court. Learned counsel submitted that the point of law provided for under section 75 (4) of the elections Act arises from the facts of the election Petition and the final findings made by the learned trial magistrate. That in learned counsel contention the trial magistrate failed to apply the evidence to the facts hence misapplication of the law in her decision. He placed reliance in the case of **Gatirau Peter Munya Versus Dickson Mwendwa Kithinj & 2 others 2014 EKLR** to support this issue on what constitutes point of law on appeal.

The learned counsel for the appellant went further to approve the facts of a case and affidavit evidence as deponed by each of the respondents before the election court. Learned counsel argued and submitted that the evidence on the requirements set by the constitution and the Election laws to be satisfied for one to be nominated and gazetted were infringed in so far as the 3rd respondent case was concerned. Learned counsel invited the court to read the provisions of section 34 of the Political Party Act. Section 34 (8) of the elections Act and Article 177(1) of the constitution which were the key legal provisions at hand to be interpreted and applied by the election court. In his view the learned trial magistrate decision was contrary with the above stated provisions of the law on the criteria one has to meet to qualify as a member of the County Assembly. That burden of proof was never discharged by the 3rd respondent argued the appellant counsel.

The appellant's counsel further submitted that none of the main issues at the election court was that the 3rd respondent was not eligible for nomination by virtue of her ethnicity. In support of this legal proposition learned counsel placed reliance and noted the following cases: **Commissioner for Implementation of the Constitution Versus the Attorney General and another (2013) eKLR and Rose Wairimu Kamau Versus IEBC and 3 Others.** It was also learned counsel contention that the 3rd respondent did not qualify to be lawfully gazetted by the 1st respondent as a member of the County Council. On this position learned counsel relied on the provisions of section 34(6) of the elections Act, Article 7.5.3(1) of the ODM Constitution as read with Rule 20(1) of the ODM election and nomination rules. Learned counsel further argued and submitted that the provisions read together with Regulations 20(1) of the elections Party primaries and party list renders the decision by the election court untenable. Essentially, learned counsel contended that the name of the 3rd respondent did not go through the rules and regulations expressly outlined both in the party constitution and elections law.

Learned counsel on this legal proposition cited the case of *Narc Kenya & another Versus Independent Electoral & boundaries Commission & Another*, Chief Magistrate's Court (Nairobi) Election Petition No. 12 of 2013.

Lastly but not least learned counsel submitted that the IEBC Dispute Resolution Committee in the case No. 2 of 2017 involving **Daniel K. Osoi Versus ODM** was determined by a committee without jurisdiction. Regarding this issue, learned counsel relied and cited the following legal authorities on law and costs. Article 88(1) of the constitution **Moses Mwigigi. & 14 Others Versus Independent Electoral and Boundaries commission & 5 Others [2016] eKLR Faith Wairimu Gitau Versus Hon. Wanjiku Muhia & another.**

On the alleged nomination and gazetting of the 3rd respondent learned counsel submitted that the 1st respondent action was in contravention of section 34 of the elections act 2011. The 2nd respondent party constitution and party elections and nomination rules. Lastly, learned counsel submitted that the learned trial magistrate failed to consider the evidence presented by the respective parties resulting in arriving at a wrong decision to the detriment and prejudicial on the part of the appellant.

Submissions by the 1st Respondent

Mr. Mungai in conjunction with other counsels represented the 1st respondent in this appeal. The 1st respondent submitted and relied on this appeal primarily under section 75(4) of the elections act on jurisdiction of this court.

According to learned counsel, this being an appeal on a purely point of law the appellant has not fulfilled that legal threshold. On whether the 3rd respondent was eligible for nomination as a member of the county assembly, learned counsel urged this court to go by the evidence before the trial court. Learned counsel maintained the position as the court below that there is no provision of the law to impugn the nomination of the 3rd respondent. Learned counsel further delved into the issue whether the Dispute Resolution Committee tribunal in cause No. 2 of 2017 had the jurisdiction to resolve logical party matters. According to learned counsel in the circumstances of the facts and the dispute there is no ouster of jurisdiction to warrant the decision being void. He relied on this legal provision. the provisions under Article 88(4) of the constitution section 35(1) of the Election act and also the case of **Mauray Asewe Ouko & another Orange Democratic Movement & another 2017 EKLR** learned counsel further argued and submitted that the 3rd respondent discharged the burden of proof in regard to her nomination as a member of the County Assembly. It was his contention that the learned magistrate having considered the evidence and the law there are no grounds to dispute or review the decision of the court. For this proposition learned counsel cited the cases of **Joho Versus Nyange & another 2008 EKLR, Giedion Mwangangi Wambua Versus IEBC & 2 others 2013 EKLR** learned counsel armed with these legal principles urged this court to dismiss the appeal.

The 1st respondent's counsel further opposed the appeal against the decision of the learned magistrate. Learned counsel submitted on various issues which arose at the trial which were in conformity with the decision reached by the learned magistrate on the dispute. The significant contention in learned counsels' submissions was the fact that there were no fundamental defects to warrant this court entertain the appeal. Further learned counsel contended that the process of nomination being challenged in the lower court was successfully dealt with by the 1st respondent rendering this appeal unmeritorious.

Learned counsel advanced the argument in his submissions that this court lacks jurisdiction to make any entry to the appeal done to the provisions of the law. The failure of the law learned counsel alluded to provides that an appeal from an election court presided over by a magistrate shall be on a point of law only. That the issues this court is asked to address fall within the realm of facts with no indictment on the law. Learned counsel urged this court to struck out the appeal for want of jurisdiction and merit. He relied on the following cases to support the 1st respondent legal stated point of jurisdiction: **M'Riungu Versus Republic [1982-88] 1 KAR 360, Timamy Issa Abdalla Versus Swaleh Salim Imu & 3 others [2014] eKLR, AG Versus Marakary [1960] EA 484, Gatirau Peter Munya Versus Dickson Mwendwa Kithinj & 2 Others [2014].**

Submissions by the 2nd Respondent

Mr. Oduor for the 2nd respondent submitted and conceded to the appellant's appeal. The 2nd respondent counters the other respondents claims and in particular argues that the nomination of members to the County Assembly is a function of the political parties. That according to the 2nd respondent rules and guidelines on the qualifications to be nominated the 3rd respondent failed to meet the threshold. The 2nd respondent asserts not only matters complained of are in breach of the party constitution but also the constitutional provisions on who qualifies to be nominated.

It was further the contention by the 2nd respondent counsel that the sovereign and discretionally power to screen, receive applications for nomination was vested in one Olga Kariuki. According to learned counsel the secretary General assertion or assumption of such powers was ultravires the 2nd respondent governance structure. The letter purportedly written by the Secretary nominating the 3rd respondent therefore failed to fulfil the constitutional and statutory obligations on such matters.

In a nutshell learned counsel urged this court to allow the appeal on grounds that the nomination of the 3rd respondent and impugned judgement was fatally defective. Learned counsel urged the court to be guided by the following authorities: **Gitarau Peter Munya Versus Dickson Mwenda Kithinji & 2 others (2014) EKLK, Meenakshi Mills, Madurai Versus the Commissioner of Income Tax, Madras (1957) AIR 49, (1956) SCR 691, Mwangi Versus Wambugu, (1984) EKLK, Mercy Kirito Mutegi Versus Beatrice Nkatha Nyaga & 2 others (2013) EKLK.**

Submissions by the 3rd Respondent

Mr. Kariuki for the 3rd respondent forcibly opposed this appeal on the litigation of this petition on appeal in respect of failure on the part of the appellant to satisfy the provisions of section 75(4) of the elections act. He urged this court to place strict adherence to the provisions on the jurisdiction of the court to hear and determine an appeal of this nature.

Mr. Kariuki for the 3rd respondent submitted and stated that the 2nd respondent in conducting the nomination acted within the constitutional provisions and confines of the party constitution. Learned counsel contended that the consideration of the facts presented at the election court revealed that due process was followed in nominating the 3rd respondent.

In particular and according to learned counsel the dispute in this appeal was initially adjudicated in Dispute Cause No. 2 of 2017. The outcome of the tribunal did make an order for a fresh list which reflected the 3rd respondent as nominated to be a member of the Kajiado County Assembly. According to learned counsel these were no fundamental faults arising from one of the nomination by the 2nd respondent which nominated the 3rd respondent being gazetted to represent the ethnic community. Mr. Kariuki referred the court to the evidence and citations from various provisions of the law and case law to prove the respective position of the 3rd respondent. In summary he urged this court to affirm the judgement of the election court relying on the following cited authorities in buttressing the various facts and contentious issues in this appeal, learned counsel cited and placed reliance in the following authorities: **Narc Kenya & Another Versus Independent electoral & Boundaries Commission & Another, Chief Magistrate's Court (Nairobi) election Petition No. 12 of 2013.**

I have carefully read, considered the evidence and the rival submissions on this appeal. My take would take the following direction, that is sieving through the material and judgement of the election court together with the grounds in the memorandum of appeal to come up with my own determination.

As laid down in **Mbogo Versus Shah [1968] EA 93** in an appeal against the exercise of its discretion is not to interfere with the decision of the trial court unless the learned magistrate has exercised his/her discretion wrongly in principle or perversely of the facts of the case.

The Relevant Constitutional Provisions

The appeal falls to be determined by reference to the constitution and statutory provisions. Article 100 of the constitution provides for provision of representation of marginalized groups namely:

- (a) **Women**
- (b) **Persons with disabilities**
- (c) **Youth**
- (d) **Ethnic and other communities and marginalized communities**

The same constitution provided for a County Government which comprises of a county assembly and a County Government under Article 176 (1). The principle underlying devolved unit of government is to entitle the citizens to take part in the governance of the country from the grass roots either already elected representatives and freshly nominated by the people in conformity with this constitution or in accordance with applicable laws.

Under Article 177 (11) a distinction between the membership of the County Assembly directly elected by voters through secret ballot from each ward was provided for and that of special members to ensure that no more than two thirds of the membership of the Assembly are of the same gender.

Further, in sub-section (c) the provision for members of the assembly to represent marginalized groups including persons with disabilities. The process contemplated in the above provisions to be claimed is through a nomination process by respective political parties duly registered under the relevant statutes. Article 260 of our constitution expressly recognizes and deposes marginalized community to mean: **“(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy”.**

Article 90 of the constitution provides for allocation for party list seats. (2) the Independent Electoral and Boundaries commission shall be responsible for the conduct and supervisions for seats provided for under section 177(1) (b) and (c) for the members of County Assemblies. It is pursuant to these provisions that I will proceed to deal with the substantive issues in this appeal. Section 7 of the County Government Act provides as follows:

The first ground framed by the respective parties is in regard to the jurisdiction of this court.

The bone of contention according to the 1st and 3rd respondents in regard to section 75 1(A) as read with 75 (4) of the Elections Act 2011 and Rule 34 of the Elections (Parliamentary and County Petitions rules 2017). Section 75 1A and 4 provides inter alia:

(A) A question as to the validity of the election of a Member of a County Assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice,

(4) an appeal under sub-section 1A shall lie to the High Court on matters of law only.

The learned counsels in advancing the submissions on this issue relied on the cited authorities of *M’ Riungu Versus Republic 1982-1988 KLR 360 Timany Issa Abdalla Versus Swaleh Salum & 3 others 2014 EKLR A9 Versus Marakaru 1960 EA 484 Gitarau Peter Munya Versus Dickson Mwenda Kithinji & 2 others 2014 EKLR, Samuel Kamau Macharia & Another KCB & 2 others SC Civil Application No. 2 of 2011*. Accordingly, the 1st and 3rd respondents took the position that this court is bound by the decisions from the superior court to legally find that jurisdiction to hear the appeal is ousted by the statute. The 1st and 3rd respondents argued and contended that the issues arising out of the judgement of the election court are partly factual and should not be given consideration by virtue of the express provisions under section 75/A and 4 of the Election Act.

It is quite clear from the submissions that the parties require this court to delve into the question as to what constitutes an error of law as opposed to that of fact.

The basic contest on this ground is whether the situation arising in the judgment of the lower court and findings are illustrative errors of fact or errors of law. In order to clarify this point on appraisal of the legal position is relevant.

According to the commentary by Professor Dickson in his book on Administrative Justice and the Supremacy of the Law writings of 1927 he observed as follows:

“Matters of law grow downward into roots of fact and matters of fact reach upward without break into matters of law. The knife of policy alone affects an artificial cleavage where the court chooses to draw the line”.

He further contended that circumstances which can be manifested on this knife policy situation for courts to be prepared to intervene as the distinction which can be drawn between findings of primary fact and findings of evidence as applied to the law.

In accordance with the above passage what then qualifies a matter to fall within a question of law. The statement of law as propounded by Professor Monahan in his treatise on Review of Findings of Administrators, Judges and Jurists: A **comparative analysis 1944 (58 Howard Law Revised 70 at 106 – 107** pointed out as follows:

“The duty of the courts in reviewing the administrative decision for error of law is to see that the agency has stayed within the bounds for the exercise of discretion filed by Congress and that it has applied the statutory standards and no others. As long as the agency does so, the courts are not to substitute their judgment. The function of the reviewing court in determining the law in this field is to search for legislature intention which of course, would include an intention to vest the administrator with discretionary power, and then to decide whether the administrative ruling is consistent with it”

As I see it the High court can interfere with the decision of the tribunal or subordinate court if on its decision there is no evidence to support the determination. Secondly, if the analysis of the facts and the evidence fall short of justifying the findings rendering the tribunal or the court to misdirect itself in law.

The relevant observations on this complexity has been illustrated by the decisions of the Apex courts in the following cases. In the **case of Attorney General Versus David Marakaru (1960) EA 484 adopting the principles in Bracegirdle Versus Oxney** the court used the following passage to define that constitutes a question of law:

“The question whether determination by a tribunal is a determination in point of fact or in pint of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and

conclusions from those facts. Primary facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of facts. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depends on them. The conclusions from those facts are sometimes conclusions of facts and sometimes conclusions of law...The court will only interfere if the conclusions cannot reasonably be drawn from the primary facts...

The leading case of **Gatirau Peter Munya Versus Dickson Mwendwa Githinji & 2 Others 2014 EKLK** sets out very clear approaches and guidelines which must govern a technical legal term on the question of law and the meaning of the word fact:

“It is not for this Court to issue edicts to the Court of Appeal on how it should exercise its jurisdiction. The process of evaluating evidence is not a mechanical one; and we agree with learned counsel, Mr. Muthomi, that in considering “matters of law”, an appellate Court is not expected to shut its mind to the evidence on record. We are unable, thus, to hold that, by the mere fact of having considered matters of fact, the learned Judges of appeal acted in excess of jurisdiction. To so hold, would place inappropriate fetters on the on the inquiry scope of the appellate Judges, as they determine whether an election was held in conformity with the principles of the Constitution.

However, as we already noted, Section 85A of the Elections Act is not an inconsequential legal provision. Much as the Court is free to navigate the evidential landscape on appeal, it must, in a distinct measure, show deference to the trial Judge: regarding issues such as the credibility of witnesses and the probative value of evidence. The Court must also maintain fidelity to the trial record. The evaluation of the evidence on record is only to enable the court to determine whether the conclusions of the trial Judge were supported by such evidence, or whether such conclusions were so perverse, that no reasonable tribunal would have arrived at the same.”

The 1st and 3rd respondents challenged me in this and painted a picture that by admitting this appeal was expanding the jurisdiction restricted by statute. The onus was on the respondents to satisfy that this court in entertaining this appeal exceeded the given statutory provisions.

Going by the appellant memorandum of appeal and submissions the salient issues revolve around the constitutional provisions Article 177 (b), (c), article (90) Part II of the Elections act, Section 35 of the elections Act 2011.

Applying the above principles to the question of law concern legal rules and principles determined by the trial court as applied to particular facts. Whether on the evidence the trial court erred in appreciating the constitutional provisions and applicable law in adjudication of the dispute will be a point of law.

The question whether a particular reference can be drawn from the facts and the evidence is a question of law. It is trite that in this appeal the decision by the learned magistrate was a decision on a question of fact and the evidence presented by the burden bearer. The dispute before the trial court to be determined was on validity and gazette of the 3rd respondent as a member of the County Assembly at Kajiado.

The first consideration in the petition is to appraise the evidence facts and the evidence in support section 107(1) of the Evidence Act Cap 80 of the Laws of Kenya provides as follows:

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists”.

In the instant case appeal the appellant is not challenging the facts but whether the facts or evidence justified the conclusion reached by the trial court. The petition filed against the respondents described the acts of omission in regard to each respondent. The petitioner who is the appellant relied on the provisions of the constitution and the elections Act which occasioned a failure of fairness and justice on the part of the petitioner/applicant in this appeal.

The petitioner for a declaration that the nomination and gazette as outlined in the constitution and other relevant elections law was fundamentally flawed and the same should be nullified. The petition did show the provisions of law violated which adversely affected her rights in the constitution. My observations therefore is that the jurisdiction on a part of law encompasses appeals on questions of law. The conclusion in the judgement of a lower court or tribunal as to the nature of the material implicit in making the findings and the decision on the dispute is to one question of law.

In my conceded view I disagree with the respondent’s counsel that in this appeal there is no question of law to be determined. My position remains that the nomination of a candidate in any election is purely anchored in the tenets of the constitution on the elections Act 2011. That therefore disposes this ground on jurisdiction under section 75(1) (4) of the Elections act.

Ground 2: Whether the 3rd Respondent was duly and lawfully gazette by the 1st Respondent as a Member of the County Assembly of Kajiado

In order to qualify as a nominee to the party so as to be gazetted as a member of the National or County Assembly the relevant constitutional provisions fall under Article 177 1, (a), (b), (c) 2 and 3. This Article clearly stipulates the eligibility criteria and the manner in which the party list shall take into account before submission to the IEBC. The same provisions expressly state that the nomination shall reflect regional and ethnic diversity of the people of Kenya and also factor in the special interest within the meaning of Article 97 (1) (c) of the Constitution.

There is also Article 193 which sets the general qualifications for elections as a Member of the County Assembly. It is for one first to be a recognized voter, satisfy educational, moral and ethnical requirements prescribed by this constitution or an act of Parliament (c) is either

nominated by a political party or...

I also note that Section 34 (b) of the elections Act 2011 expressly states that: "The party lists submitted to the constitution under this section shall be in accordance with the constitution or nomination Rules of the political party concerned.

However, the section is curiously worded presumably to support the internal democracy and governance principles of political parties. Essentially, the IEBC is prohibited in giving prescription or directing the manner in which the political parties shall go about considering various candidates for nomination. The only order is for the political list to satisfy the nomination eligibility criteria set by the constitution and the statute. In this regard, the ODM constitution provides for a governance structure comprising of various organs and rules within the party to strategically implement its vision and mission statement.

The rule and functions of the Secretary General are clearly spelt out under Article 63 Clause 5 of the Constitution. He or she is to be the party spokesperson and be responsible for the management of the National Secretariat and remain the Principal custodian of party records from the grassroots to the National Level. The other functional data are provided for in clause 5 (I) – (VII) of the constitution. In the nomination of party list members in accordance with the relevant laws of the land more so section 34 of Elections act has been exclusively stated to be the mandate of the National Executive Committee.

There is also the gazetted nomination rules and guidelines as published in gazette No. 5735 of 2017 by the IEBC. The 1st respondent to this appeal the gazette notice had the following significant provisions that: **"the party nominees of party list must be in compliance with the party nomination; rules and procedures, the names in the party list shall be in the order of priority, the party list must be signed by the authorized official of the political party submitting the party list"**.

There is no dispute that the ODM party participated in the controversial and hotly contested elections held on 8:8:2017. Besides the presidential elections other National seats to the National Assembly and members of the County assembly seats were up for grabs.

The Electoral framework and overall management and administration was constitutionally in the hands of IEBC. The constitution envisages that such a noble and onerous task as provided for by Article 88 (4) of the constitution and presented by various act of Parliament IEBC shall keep to the fidelity of the constitution in conducting appeals of elections.

For purposes of this appeal the appellant contends that there was an act of omission and commission on the candidate eligibility and nomination of the 3rd respondent. The major complaint directed against the 3rd respondent being the fact that she was not a member of ODM as at 28:8:2017 when the gazette of his nomination was effected by IEBC. In realizing the defect of the nomination, the appellant argues that follow up notices and demands were made to the 1st respondent vide letter dated 22:9:2017 and 5:11:2017 in respect to the 3rd respondent.

In addition, the appellant contends that there is prima facie evidence pursuant to the letter issued on 3:11:2017. The 3rd respondent was never a member of ODM when the 1st respondent gazzeted her name on 28:8:2017. In a rejoinder to these allegations the 1st and 3rd respondents stated that the trial court cannot be faulted in view of the credible evidence of a receipt of payment of membership as at 2:1:2017. Secondly, the 1st and 3rd respondents relied on the extract of the party vide a letter dated 7:8:2017. Thirdly, the 1st and 3rd respondent's placed alliance on the communication dispatched from the grassroot organ of nominees to the Executive Director of the 2nd respondent.

In this context following the gazette of a dispute on the nomination was considered before the Dispute Resolution Committee referenced as IEBC/NM/PC/02/2017 in Daniel Osoi case.

It appears that the decision to dismiss the nomination of the 3rd respondent failed to address the concerns raised by the appellant. As a result, the dispute materialized into an election petition before the trial court. The learned trial magistrate in her judgement pronounced herself as follows:

"The 3rd respondent on the other hand has produced a copy of office receipt dated 2:1:2017 for Ksh. 20,000/= receipt No. 32944 for life membership, her birth certificate dated 12:10:2005 and a copy of her Identity card.

The 3rd respondent birth certificate indicates she was born of Kikuyu mother and Italian father. She is therefore not Maasai as alleged by the appellant. It is worth noting that the receipt dated 2:1:2017 meaning it was issued minutes before 28:8:2017. The date the 3rd respondent was therefore qualified to be nominated as a member of the County Assembly."

The duty of the election court was to review the entire process of nomination in respect of the 3rd respondent to establish whether it was in conformity with the constitution and other laws governing nomination.

The decision on this ground in this appeal must depend in view whether the learned magistrate had the discretion to rule as she did and if so whether the discretion she exercise rightly or wrongly. Clearly in my view, the responsibility of generating the party list of nominees to be gazette by the 1st respondent is the province of the political party. In this case the Orange Democratic Movement the ODM as the 2nd respondent has gone to great length to express itself and make reference as to the rightful organ tasked with the function of forwarding the party list. The trial court was presented with the evidence that under the ODM constitution the responsibility on party list is the mandate of NRC. During the course of this legal battle the ODM's legal and parliamentary liaison officer one Olga Karani communicated the position of the 2nd respondent in regard to the nomination of the 3rd respondent. The wording of the letter was that the 3rd respondent was not a member of the 1st respondent as at 28:7:2017.

This piece of evidence supplied by 2nd respondent in a way rebutted the claim held by the 2nd respondent of a receipt for payment of Ksh. 20,000/= in favour of her party membership. The effect of the orders by the 2nd respondent was to the effect that the 3rd respondent does not belong to our community as ODM at all as at August 2017.

The averment and affidavit evidence from the Chairperson of the 2nd respondent with annexures and a letter from the Registrar of Political Parties dated 22:9:2017 put the 3rd respondent into strict proof on the legality of her membership. In other words, the source of the receipt bearing the name of the 3rd respondent was in view of the position taken by the 2nd respondent ought to have been resolved by the trial court.

The membership of a political party is a provision of the law. According to the political parties Act section 34 the Registrar who is a custodian of ministering the Registrar of the 2nd respondent confirmed that the 3rd respondent was not a member as at the time she was presented to be an eligible and *bonafide* member of the party.

Section 34(8) of the Elections Act made it mandatory for a person nominated to be a member of a political party of that party he or she seeks nomination to be included in the party list to IEBC. It is also important to note that the certificate of membership is relied upon by the 3rd respondent was issued on 3:11:2017 outside the time line provided in the law to be eligible for nomination.

Taking into account the Election party primaries and party list regulations, 2017 promulgated by IEBC pursuant to section 27(2) (B), 34(6B) and 109 of the Elections Act 2011 the conduct of the 2nd respondent agent, servant, employee was in breach of the guideline principles regulating such a process.

According to the principles political parties are to observe that the party list generated adheres to the ideals of a democratic, free and fair principles provide agent opportunities for all eligible candidate, not discriminate against any eligible candidate, be inclusive and participatory, be open, transparent and accountable, be credible and be peaceful. The question as to the criteria to be relied upon by in preparing the party list, would in no doubt that the provisions of the constitution will take the center stage on the specific conditions to be met by the political party. It was evident in the pleadings before the trial court that substantive legal question arose against the decision of the tribunal in respect to the nomination of the 3rd respondent.

However, the conclusion reached and the reasons given by the learned trial magistrate appeared not to have taken into account the question of law in the decision. Going by the above evidence I find that the trial magistrate erred in law and fact on this ground resulting in affirming the 3rd respondent as property nominated to the party list. This ground of appeal therefore succeeds.

Ground 3: Whether the 3rd respondent was not eligible for nomination by virtue of ethnicity as a Member of the County Assembly of Kajiado

The constitution strategic objective under article 177(1) is to achieve justice and diversity in the governance of public affairs at the County Level of government. The party list must therefore reflect the diversity of the Kenyan people, the gender party/fairness, inclusivity in terms of special interest groups, i.e. the minority, women, youth, persons with disabilities and an adherence

The political parties are therefore obligated in preparing the party list to uphold the constitutional values and principles of governance outlined under article 10 of the constitution in adherence non-discrimination and equality rights.

True to this is to ensure gender equity, equality, inclusivity diversity and proportionate representation of various groups within the county. It is also worthy mentioning that Article 90 (1) of the constitution provides that Elections for the seats in parliament provided for under Article 97 and 98 (1), (6) (c) and (d) and for members of the County Assemblies under Article 177(1), (b) shall be on the basis of proportional representation to the seats he received in that election in that County by each political party under paragraph (a) in accordance to Article 90.

On the other hand, section 7 of the County government act No. 17 of 2012 provides: “**(1) in addition to the members who are elected under Article 177(a) and those who are nominated under Article 177(b) of the Constitution, a county assembly shall comprises: - (a) six nominated members as contemplated in article 177(c) of the Constitution and (b) the speaker, who is an ex officio member elected in accordance with Article 178 of the constitution. (2) the political party nominating persons under subsection (1) shall ensure that: - (a) community and cultural diversity of the county is reflected in the county assembly; and (b) there is adequate representation to protect minorities within the county in accordance with Article 197 of the Constitution. (3) the number of members nominated under subsection (1)(a) shall be reviewed to accord with the number of Wards determined by the Independent Electoral and Boundaries Commission under section 27(3)(a).”**

The evidence on record is silent on whether or not the 1st respondent in admitting the party list from the 2nd respondent over the nomination of the 3rd respondent took into consideration the provisions of Article 177(1)(b)(c) and section 7 of the County Government Act. Moreover, considering the provisions of the Constitution and the Act which we partly be produced above a candidate who qualifies to be nominated is subject to this written law. The 1st respondent in executing the mandate on party list are clearly excluded by the clear language of the law.

The Constitution created the IEBC as an institution to exercise power in the nomination process and presentation of the party list to check and balance the institutional political parties. The domain on special interest constituency nomination is one such jurisdiction where the criteria for assessing the validity of a candidate should be reviewed in the context of the underlying constitutional issues.

Despite both the appellant and the 3rd respondent being eligible for nomination, I see one of the criteria to be considered by the election court was that of special interest representation.

In the language of **Dr. Collins Odote and Dr. Linda Musumba** in their book *Balancing the Scales of electoral Justice* observed that this was meant ***“to ensure that political parties did not just hand pick the nominees but would go through a process that brought in marginalized groups such as women, or youth, people with disability in a fair and transparent manner. (Emphasis underlined).***

Article 91(1) of the constitution provides that every political party shall:

(D) Abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party

(E) Respect the right of all persons to participate in the political process including minorities and marginalized groups

(G) provide the objects and principles of this constitution and the rule of law

(H) Subscribe to and observe the code of conduct for political parties”

In order to oversight the implementation and compliance with the above provisions under Article 90 (2) the Independent Electoral and Boundaries Commission has the mandate to conduct and supervise the filing and nomination of party list under Article 97(1) (c), 98(1) (b) (c) and Article 17(1)(b) which specifically provides for County seats.

The old constitution had approached a period of considerable clarification with the Kenya people in defining the Governance structure of the country. The conception of politics and the proper role of elected leaders to the National Assembly had reached a point of disconnect between the governors and the citizens. When the new constitution 2010 was debated the country yearned for a new Republic with a more inclusive set of devolved unit of government. Another response by the constitution was to specifically legislate for special seats to take care of special interest groups in our society. The provisions under Article 98(c) and 177(b) are in answer to that cause of the model to incorporate the concerns that certain groups were effectively fenced out in the old constitutional order. In recent years there has been a resurgence of jurisprudence from our courts on this issue as explained in the following authorities.

In the case of **Micah Kigen and 2 others v Attorney General and 2 others Nairobi petition No. 268 and 398 of 2012 eKLR** the court approached the definition of special interest in the following decisions: ***“the nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to time..... any special interests may emerge in future and which the political party may consider require representation”***

In the Micah Kigen case it was observed that Article 90 (2) bestows upon the IEBC the responsibility of ensuring that the party lists meet certain criteria set out in the constitution and legislation. The Political Parties themselves, just as any other person or State organ, are bound to observe all provisions of the Constitution including those that require that the rights of minorities, youth and persons with disabilities be promoted and protected”.

Adhering to this view the court in the case of **Commissioner for Implementation of the Constitution v. Attorney General and Another 2013 eKLR:**

“This is a constituency which is otherwise well represented by a representative and has a distinguishable minority who cannot on their own make any difference to the outcome of the elections has obviously a special interest in the minority. It is a democratic principle that minorities should be fully embraced to enable them become a minority. It is also a vital interest in terms of democracy to protect their rights so that they are never overwhelmed by the majority. The minorities empowerment to participate fully in the entire democratic process and the organs of a democratic society achieves even greater integration in terms of vision, programs and goals whereas on the contrary denying them participation leads to isolation. (Emphasis Added)”.

From this perspective the grounds on which the nominee is to qualify under Article 177(1) as read with Section 7 of the county Government Act 2012 is the scheme of interest which captures the letter and spirit of the said provisions. The political party during that nomination has to account for the criterial and legal requirements having been fulfilled before forwarding the party list. The sufficiency of evidence is to be verified by the IEBC before gazettelement of the considerate.

This conception of representation appears throughout the constitutional provisions on electoral nominations and Section 34, 35, 36 and 37 of the Election Act. To be sure of compliance with the constitution and the statute part event legislated the executive (General) Regulations Rules. The structure of the Regulations was to bring about public separated representation and provide safeguards and control on the part of political parties list.

The elements applicable on the regulations are captured in Rule 54(1) and 55(1) of the Act. Rule 54(1) Each political party shall submit to the Commission a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the constitution and section 34, 35, 36 and 37 of the Act.

(2) The party list referred to in sub regulation (1) shall contain the name, address, age, sex, disability and category of disability, phone number, occupation, elective post sought and such other qualifications as are provided under the constitution and the Act.

(3) The party list submitted under sub regulation (1) shall be in accordance with section 36 of the Act.

(a) by signed by the authorized official of the political party submitting the party list; and

(b) be submitted in hard copy and in electronic form.

(4) Each political party list nominee shall after nomination, submit to the Commission a letter stating his or her intention if nominated

(5) The commission may reject a nominee submitted by a political party for an elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution Act.

(6) The rejection by the Commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party.

(7) The commission, after making the decision to reject a nominee, informs the political party concerned of that decision and request that political party to submit another name within such time as the Commission shall determine.

(8) The commission shall publish the final list in at least two newspapers with nationwide circulation.

Rule 55 (1) The party list contemplated under regulation 54 shall be prepared in accordance with the nomination rules of the political party.

When an occasion present itself in which the interest of people is at variance with the provisions of the constitution and the law it is the duties of the guardians is to seize the moment and protect the constitution violation.

The enactment of the constitution and statutory provisions are not to be regarded as expirations or unachievable ideals. At various levels. The denial for equal protection under the law is such that its impermissible to say the least.

What the survey of the respective parties to this appeal reveal is that there is no dispute as to the birth origin of the 3rd respondent. The evidence shows that she is a Kenya citizen born to a Kenyan mother and an Italian father. The appellant took the view of the provisions of the constitution under Article 177(1) and Section 7 of the county Government Act that the 3rd respondent did not qualify to be nominated to the county assembly. He contended that the definition of marginalized county under Article 260 of the locks the 3rd respondent out of the race and party list to represent the people of Kajiado.

A report done by **Maurice Odhiambo Makoloo** titled **Kenya: Minorities Indigenous peoples and Ethnic Diversity** published by **CEReReDe** defined minorities in the following words:

“A group numerically inferior to the rest of the population of a state and in a non-dominant position, whose members, being nationals of the state – possess ethnic, religious, or linguistic characteristics differing from those of the rest of the people...and show, if only implicitly, a sense solidarity, directed towards presenting their culture, traditions, religious and language” *Emphasis supplied.*

He went on to capture the definition that was proposed in 1985 by Jules Deschenes as follows:

“A group of citizens of a state, constituting of numerical minority and in a non-dominant position in that state, ended with ethnic, religious or linguistic characteristics which differ from those of the majority of the population whose aim is to achieve equality with the majority in fact and in law”

The question that follows is whether the 3rd respondent was nominated to represent the Kikuyu community or the Italians as defined in the constitution of Kenya? From the extensive arguments and legal acquisition provided by the respondents and 3rd respondent in which category does the 3r respondent fall within the defined set under Article 177(1) (b) and (c) of the constitution and section 7 of the County Government Act.

The trial court made findings on this issue which had a consequence of invalidating the election nomination of the 3rd respondent in accordance with Article 90, 177(1), Article 260 of the constitution and Section 7 of the County Government Act.

On appeal the appellant has contended that by virtue of the inhabitant of Kajiado County none of this ethnic composition would qualify a candidate to secure a seat on any of the grounds outlined under section 7 of the County Government. The trial court primarily made a finding that by the birth origin of the 3rd respondent she was eligible to be nominated and gazette as a Member of county Assembly. In doing so, I find that the trial court failed to interpret the key provisions of the Constitution and the Statute to ensure the 1st and 2nd respondents complied with the law and nomination process.

The role of interest groups in our new constitution should be seen in the light of the past political dispensation. The special interest groups as defined in our constitution provide a mechanism for political representation geared towards supplementing constituency representation.

As articulated by the Court of Appeal in the case of Commissioner for Implementation of the constitution Versus the Attorney General and another (2013) eKLR, the nature of the nomination should be considered within the expressed provisions of the constitution. in respect to whether a tribe is a minority or a majority in the County or National representation. The court held as follows:

“Thus, a constituency which is otherwise well represented by a representative and has a distinguishable minority who cannot on

their own make any difference to the outcome of the elections has obviously a special interest in the minority. It is a democratic principle that minorities should be fully embraced to enable them become a majority. It is also a vital interest in terms of democracy to protect their rights so that they are never overwhelmed by the majority. The minorities empowerment to participate fully in the entire democratic process and the organs of a democratic society achieves even greater integration in terms of vision, programs and goals whereas on the contrary denying them participation leads to isolation.

Some of the arguments which were presented before the election court was in reference to the question of the special interest group the 3rd respondent was nominated to represent at the County Assembly. This was a legal question to be interpreted by the learned trial magistrate based on the facts and narrative contained in the petition. Nonetheless, it is perfectly plain on the evidence that this issue remained unresolved throughout the trial including final judgement.

The 1st respondent who acts as a gatekeeper on matters of nomination of the party list has not demonstrated that the 2nd respondent complied with its own constitution. It was never in dispute that the nomination of the two candidates fell under the special interest group constituency. Where condition is an essential term of the nomination it ought to have been followed by 1st and 2nd respondents.

As already observed both at the trial court and on appeal there is no evidence that the threshold set for the 3rd respondent was identifiable with any of the minorities, youth, women or persons with disabilities. In drawing up the party list and the proposal by the ODM the 2nd respondent in this appeal and subsequent gazettelement by the 1st respondent the undertaking to perform is underpinned both under the constitution and the Elections Act.

Protecting special interest representation and rights of the minorities and marginalized groups within Kajiado County Assembly was the real question the trial court was faced with in election Petition No. 2 of 2017. The evidence and the finding did not seem to have resolved the issue whether the 3rd respondent representation was for the special interest group or the minority and or marginalized group. It matters therefore, that the legal criteria set under Article 90 and 177(1) of the constitution together with the section 7 of the County Government Act is not only seen to be complied with but must be given effect.

There is some justification for the 1st respondent in accepting the party list to verify and satisfy that the formula in Article 177 has been met by the 2nd respondent. Under Article 31 of the constitution, every person has the obligation to respect, uphold and defend the Constitution 2010. In confirming the nomination of the 3rd respondent the trial court failed clearly to interpret and apply these provisions to assert that the decision by the 1st respondent negatively affected the rights of the special interest group representation in the County Assembly. Had the framers of the Constitution intended any member who is a resident of a particular County to be nominated to represent the marginalized, minorities, women nothing could have been easier than to provide so in the same Constitution. To the extent the trial court declared the 3rd respondent validly nominated without raising the threshold issue is in my view fatal to be left unchallenged. A glance at nomination of the 3rd respondent clearly shows that she does not hail from any of the ethnic minorities dominant at Kajiado County. I therefore find that this ground of appeal has merit.

3. Whether the third respondent was duly and lawfully gazetted by the 1st respondent as a member of the County Assembly Kajiado. Turning to this ground the 1st respondent before the 2017 Elections gazetted the Elections General Rules and Regulations 2017.

In the regulations was a compilation of rules on party primaries and party list. This was a fundamental legal document to enable political parties comply with the constitution provisions under Article 97(1) (c), 98 (1) and for the County Assembly the provisions in Article 171 (1), (b) and (c) were to be complied with.

In the circumstances of these regulations for purposes of the instant appeal, it provided that the party list must be signed by the authorized officers of the political party, a political party submitting a party list shall submit a declaration to that effect, that the party has complied with its party nomination rules for nomination of party list in respect of the County Assembly (marginalized group), the party list must have eight names of qualified marginalized group nominees. Among all the 8 nominees, there shall be at least two youth, two persons with disabilities and two persons representing marginalized groups. One nominee cannot represent more than one special interest group.

This ground primarily raises the issue as to whose responsibility it is to prepare and forward the party list to the 1st respondent. The statement of the law is based under Regulation 55 (1) of the General Regulations that provides ***“The party list contemplated under Article 90 (1) of the Constitution shall be prepared in accordance with the rules of the Political Party. The provisions of paragraph 19 of the second scheduled to the political parties Act (Act No. 11 of 2011 states that: “nomination rules and regulations with respect to elections of the party and rules governing the preparation of the policy list shall be that formulated by each political party.”*** It is plain from the provisions of Article 177(b) and (c) candidates who qualify to be nominated to take up seats in the County Assembly. The thrust of the constitution is that the 1st respondent on receipt of the party list has to act in line to the spirit of Article 249(1) of the constitution which provides:

Section 34 of the Elections Act provides inter-alia in sub-section (6) that: ***“the party list submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned. (8) a person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on preceding the date of submission of the party list by the political party.”***

It is argued by the appellant that the learned magistrate erred in law and in fact when she failed to evaluate the evidence in record thereby arriving at a wrong decision. It was submitted by the 1st and 3rd respondents that reliance on the nomination was based on the receipt of payment for Ksh. 20,000/= paid in the month of January to the 2nd respondent. In contestation was the 2nd respondent rejoinder that by the time the party list was being submitted in preparation for gazettelement the 3rd respondent was not a member of ODM. The 2nd respondent

brought to the attention of the court that the life membership certificate only came to be issued in the month of November 2017 for a purported membership paid for in January 2017. From the record, the trial court had only affidavit evidence available in this case. The disparity appearing on both affidavits by the 2nd respondent and 2nd and 3rd respondents were never resolved in a way to establish which of the two positions is the right procedure for one to be admitted as a member of ODM. In the instant case the assertion on membership by the 3rd defendant was controverted by corresponding affidavit from the 2nd respondent. No doubt the evidence of the 3rd respondent with that of the 2nd respondent is a hard word against the other. In essence that fact on membership remained unproven in view of the contradictory evidence adduced by the 3rd respondent on how she secured her membership with the 2nd respondent.

The matter which should be considered when a petition for nomination is being disputed before an election court one has to look at the entire process as illustrated in the case of **Kabatsi Versus Anifa Kawooya & Anor Election Petition No. 25 of 2005** where the court held that: *“An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law it affects the quality of the electoral process and subject to the gravity of flaw it is bound to affect the election results.... If any declaration is invalid by reason of noncompliance with the applicable law it affects the quality and result of the electoral process”.*

As indicated in the above judgement the flaws and inconsistency evidence on membership of the 3rd respondent put in question as to the period when it can be conclusively said he became a member of the ODM party. Was it when he paid the Ksh. 20,000/= fees or in November when the life membership certificate was issued? The answer to these two questions is refuted by the 2nd respondent a political party which the 3rd respondent claims membership and belonging.

At the hearing of this appeal legal counsels to the 1st and the 3rd respondents did not address the issue that the proceedings to nominate and gazette the 3rd respondent was flawed and defective in substance. While analyzing the second ground above I have alluded to some of the evidential material which point to the provisions of the law to justify the annulment of the gazette notice published in favour of the 3rd respondent. I am cognizant of the fact that Article 90(1) 171 of the constitution Section 7 of the County Government Act and Section 34, (6) of the Elections Act set out very clear provisions within which national values and principles of governance under Article 10 play a central role in the nomination process and party list.

It becomes quite apparent that the alleged nomination was not transparent. Similarly, it is not the intention of the Constitution nor the Statute that the 1st respondent's duty in the nomination and party list is not that of conveyor belt function. The issue as to the fundamental breaches in the party list generated by the 2nd respondent was never comprehensively adjudicated in the election Petition by the appellant.

To examine critically the line of analysis of the 3rd respondent the underlying assumption was that with the life membership certificate from the 2nd respondent the criteria to be eligible for nomination was met. While it is correct to assume that the 3rd respondent was a life member of the ODM party there is contrary evidence from the 2nd respondent that her name was not in the register kept with the Registrar of political parties. Thus, the data to corroborate the 3rd respondent assertion is the register of membership kept under the custody of the Registrar of political parties.

Turning to the second core evidence is the rebuttal evidence from the legal and particularly liaison officer one Olga Karani of the 2nd respondent. It is trite that all other things being equal prima facie evidence is reliable setting in motion in some varying degree. The deficiency, cogency and credibility of the said evidence that to me was the position before the court.

The 3rd respondent can only claim legitimacy of her nomination from process initiated and completed by the 2nd respondent is both constitutional and statutory. Viewing the nomination of the 3rd respondent from the lens of Article 90, 171(1) (b) (c) (2) and section 7 of the County Government Act. Indeed, regulation 55 of the Election General Regulation provides that: “a political party shall submit a declaration that the political party has complied with its rules relating to the nomination of the names contained in the list.”

The 1st respondent to the appellant's appeal did not set out that such a declaration was annexed to the party list from the 2nd respondent in so far as the 3rd respondent nomination was concerned.

It is of great importance in a country governed by the rule of law not only to guard against the oppression of the rules but also to guard the part of society against the injustice of the other.

If the 2nd respondent had withdrawn the support of its own document on membership what else was the 3rd respondent left to cling to prove her being a legitimate member of ODM party. The organ to generate the party list for publication under the ODM constitution in accordance to section 34 of the elections Act is the National Executive Committee.

As the protector and guardian of fundamental freedoms and rights in our constitution, the High Court has adopted the approach by issuing orders, declarations and decisions aimed at enforcement of any of the rights. The court has emphasized so in a plethora of cases in determining the pith and substance of the constitution. Some of the cases which have explained judge's views regarding the admonition of a party in breach of the constitution are; **Federation of women Lawyers of Kenya (FIDA – K) and Others Versus Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)**, **trusted society of Human right alliance Versus Attorney General Nairobi Petition No. 299 of 2012 (Unreported)** and **Jeanne W. Gacheche and 6 Others Versus Judges and Magistrate's Vetting Board and Others Nairobi Judicial Review No. 295 of 2011, 433, 434 and 438 of 2012 (Unreported)**.

In my view, it is trite that no person or authority can waive any of the fundamental rights embedded in the constitution. In sum total looking at the various facts of the appeal the process of nomination and gazette associated with the 3rd respondent, conclude as follow: The life membership certificate has been put in question by the 2nd respondent who the custodian of such instrument is. There is variance between the date the 3rd respondent paid the requisite fees and the period when he was issued with the certificate. This was a contested issue. Reliance on this evidence by the learned trial magistrate required scrutiny and reasons given why a particular direction was taken in the final analysis.

The impugned specified certificate of membership was signed and dated three months after the election and gazettement of the 3rd respondent. In my view there was no explanation why a life member of a political party would ultimately have his name missing from the register of ODM in custody of the Registrar of political parties.

To me that would have been the end of the matter before the election court. In this instance the appellant has demonstrated that the 2nd respondent was unlawfully gazetted by the 1st respondent as a member of the county assembly of Kajiado.

Whether the IEBC dispute Resolution Committee tribunal did have jurisdiction to hear and determine the cause No. 2 of 2017 Daniel Osoi v ODM and IIBC.

The essence of this ground is whether IEBC when adjudicating over Daniel Osoi case acted within the ambit of Article 88(4)(E) of the constitution. Section 74 (1) of the Electoral Act vests IEBC with the jurisdiction to settle disputes relating and or arising from the nomination of candidates eligible to participate in the electoral process. Section 34 (6)(A) of the Electoral Act recognizes the role of IEBC as regards party list. The section provides that:

“Upon receipt of the party list from a political party under subsection (1) the commission shall review the list to ensure compliance with the prescribed regulation and issue the political party with a certificate of compliance or require the political party list to ensure such compliance failure to which the commission shall reject the list.”

Having evaluated the rival submissions by the 1st applicant and respondents in this ground it is plain that the Daniel Osoi dispute was adjudicated by IEBC. On the basis of that decision dated 28th July 2017 IEBC pronounced itself as follows:

“The complaint herein is allowed and the Orange Democratic Party is hereby ordered to submit a fresh list in respect of Kajiado county as approved by the Kajiado county Orange Democratic Movement electoral college as specifically prayed for in the complaint there shall be no orders as to costs.”

From the perusal of the proceedings the subject matter before IEBC was on the impugned list involving the petitioner and the 3rd respondent. The record shows that neither the appellant nor the 3rd respondent was a party to these proceedings. It is not in dispute therefore that the decision has a bearing to the instant appeal. The only point of departure is the law upon IEBC entertained the dispute on the party list.

First the task of a dispute arising from an aggrieved party on the defects or deficiency in the nomination to the party list has an avenue to complain with the party internal resolution mechanism. The decision in the case of **Mary Asewe Ouko & another Versus ODM & another 2017 EKLR** pacifies that position where the court held inter alia that:

“a party unhappy with the contents of a party list in the hands of the interested party has a right of review only to the internal dispute mechanism of the party”.

It is perfectly clear that IEBC under section 88(4)(E) of the Act has no express jurisdiction to handle disputes on party list as between the complainant and interested party. The learned Judges in the Supreme Court case of **Moses Mwigigi & 14 Others Versus Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** where the court clarified on this issue as follows:

“Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party; such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations. This position has been aptly remarked in the case of National Gender and Equality Commission, where the High Court thus observed: Section 34(6) of the Election Act, 2011 specifically provides that, the party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned. This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria.”

The issue that arose in the course of hearing of this appeal is whether the 1st respondent had the jurisdiction to entertain the appeal on the party list. In my view, unless the contrary is expressed by statute and the dicta from the apex court of the land IEBC has no jurisdiction to entertain a dispute on party list matters. The trigger of the dispute in the Daniel Osoi case has a genesis in the nomination involving the appellant and the 3rd respondent. The aggrieved party in this dispute Daniel Osoi an official of the ODM party within Kajiado County. The justification of how IEBC came to entertain the complaint seems to have arisen due to their publication in respect of the Kajiado County nominees. In their decision the IEBC directed a fresh list be submitted and approved by the electoral college. I am unable to trace cogent evidence before the trial court on how IEBC assumed jurisdiction on party list disputes.

Whether the amended list was approved by the National Executive Committee or the Electoral College is a matter not very clear from the record of the trial court. However, in this appeal the 2nd respondent maintained that the name of the 3rd respondent was never sanctioned by the party organ on nomination of the party list.

Here the learned magistrate was faced with a contentious issue on the process of drawing and submitting the party list to the 1st respondent. In the absence of a finding why the appellant and 2nd respondent evidence was discarded in favour of the 3rd respondent is to me a matter which remained unresolved and error of fact and law on the part of the trial court.

The appellant dissatisfaction with the nomination process to the party list filed an election petition which has a direct bearing to that

impugned list. That does not mean that IEBC has the jurisdiction to handle disputes on party list in the first instance. The primary forum is the political party internal dispute mechanism. I do not think I need to say more on this point.

Whether the final list presented by the 1st respondent on 28th August 2017 complied with the provisions of the constitution, Election Laws, party constitution and Regulations

The law in relation to the nomination and gazettelement which binds the 1st respondent is provided for in the following provisions. Firstly, the mandate of IEBC who is the 1st respondent in this appeal is expressly provided under Article 90 as read with Article 98(1) of the constitution.

Further in accordance with elections for the seats in the County Assemblies the 1st respondent is required to comply with article 177(1)(b) and (c) of the same constitution. section 34 of the Elections Act respectively donates the provisions on the election and nomination of members of both the National Assembly and County Assembly under Articles 97(1)(c) and Article 177(1), (b), (c) of the constitution.

In reference to Article 177(1)(a) A political party which nominates a candidate for election has to submit the party list in accordance with this Article 34(6) of the Act provides that: "The party lists submitted to the commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned (8)" At all stages of the petition before the learned Judge the subject matter which was pivotal is in regard with compliance with the constitution and Electoral Laws. In all the circumstances of the case compliance on nomination of the 3rd respondent has been contested the 2nd respondent being the political party stated to be involved in such matters both under the constitution and other statutes. It is worthy of note though the appellant and 3rd respondent was claiming nomination to represent the category I refer to as special interest constituency. It is certainly clear that the 1st and 2nd respondents approved the party list which appear to be in contravention of the provisions under the Article 177(1), (b) and (c) and section 7 of the County Government Act.

In my view the nomination requirements laid down by the constitution, the political parties Act, the ODM constitution the elections act and further rules and regulations cited elsewhere in this judgement are not merely targeted to be attempted there are there to be observed.

I do not think that the only question before the election court was whether the 3rd respondent had paid for membership to the 2nd respondent but more fundamentally was whether she qualified under the law to be so nominated pursuant to other special conditions attached to the nomination as provided for in the constitution. In this regard the scrutiny and evaluation of the entire evidence persuades me to find that the learned magistrate applied wrong principles and as a result arrived at a wrong decision.

Whether the trial court considered the entire evidence and findings placed before it

This court has earlier set out the factual matrix of the dispute before the election court. In response to the petition the respondents' contention was that the petitioner did not have a valid claim challenging the nomination of the 3rd respondent. The appellant and the 2nd respondent's affidavit evidence demonstrated sufficiently existence of reasonable cause that there were procedural and legal deficiencies in the nomination.

This court holds the view that in the circumstances of the petition the learned trial magistrate was meant to give effect to all of the provisions of the constitution, applicable laws on nomination and the evidence to support a valid nomination.

I do not dispute that under the law this court being an appellate court does not have the jurisdiction to make a decision on the merits based on the factual matrix. That is the position of the trial court. For this court is only empowered to consider the facts for purposes of forming its own views on the matter and the examination of facts is only meant to see if the trial court in arriving at the decision did so within the specific provisions of the laws on election nominations and party lists.

Having considered the evidence and submissions of counsels on behalf of their respective parties I am satisfied there are grounds to impeach the judgement of the court below. In the present case I am persuaded that the learned magistrate misdirected herself on matters to do with the nomination of the 3rd respondent.

I am of the conceded view that the trial magistrate fundamentally misapprehended the evidence to support the conclusion of facts at hand contrary to the particular preconditions in law attached to the decision on gazettelement by the 1st respondent in favour of the 3rd respondent. From the record I find no such compliance with the expressed provisions of the law on this matter. There being no such adherence to the law I find the decision by the trial court to be a subject matter for review by this court.

The upshot of this is to allow the appeal in its entirety with the following orders to abide:

- 1. That the appeal is allowed by setting aside the judgement of election court dated 23/2/2018.**
- 2. That the declaration and gazettelement by the 1st respondent to the effect that the 3rd respondent was validly nominated as a member of the county assembly at Kajiado be and is hereby revoked and annulled.**
- 3. That the Gazette Notice by the 1st respondent declaring the 3rd respondent as a member of County Assembly of Kajiado be and is hereby revoked**
- 4. That in my view of the findings made in this appeal on the flaws and defects in the party list forwarded to the 1st**

respondent I decline to grant an order of substitution of the appellant as the validly nominated member of the County Assembly Member for Kajiado County

5. That the 2nd respondent is hereby ordered to conduct fresh nomination for purposes of submitting nominees for gazettelement by the 1st respondent to join the County assembly of Kajiado under the special interest representation.

6. That the costs of this appeal be borne by the 1st and 2nd respondents.

Dated, delivered and signed in open court on this day of 28th June 2018.

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R. NYAKUNDI

JUDGE

Representation

- Mr. Ayieko appearing alongside with Mr. Lumumba for the appellant and also Holding Brief for the 2nd Respondent

- Mr. Mungai for the 1st Respondent

- Mr. Kariuki for the 3rd Respondent

- Mr. Mateli - Court Assistant

Mr. Kariuki: I pray for 30 days stay and leave to appeal.

Court: Stay of Execution for 30 days granted.

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R. NYAKUNDI

JUDGE