



**REPUBLIC OF KENYA**

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

**ELECTION APPEAL NO. 6 OF 2018**

**BETWEEN**

**HELLENAH KISIKU KITHEKA.....APPELLANT**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....RESPONDENT**

(Appeal from the judgment and decree of the Resident Magistrate Court at Nairobi, Hon. E.K Usui (Ms.) of 19<sup>th</sup> January, 2018)

**JUDGEMENT**

1. The Appellant was the Petitioner in the trial Court. In a Petition dated 22<sup>nd</sup> September 2017, the Appellant claimed that on 7<sup>th</sup> August, 2017, the Orange Democratic Movement (ODM) Party submitted their final list for Nairobi County for Gender Top Up which list shows that she was the 11<sup>th</sup> candidate. It is averred that the Respondent on 28<sup>th</sup> August, 2017 through Gazette Notice Volume CXIX NO. 124 under schedule II, gazetted the Nairobi Member Top – up list of the ODM Party having 14 successful candidates and proceeded to swear them in violation of Articles 83 and 90 of the constitution and Electoral laws. It is further averred that the Gazette did not conform to the ODM Party list that was forwarded to the Respondent on 7<sup>th</sup> August, 2017 as her name was not there. The Appellant also averred that the Respondent through complaint number 434 of 2017 Roselyn Grace Osoo-Vs-ODM allowed the complaint as the nominee was not a registered voter and her name was replaced with hers in the gender top up list. The Appellant sought a declaration that it be declared that the Gazette Notice altered the final list of Nominated MCAs Gender Top Up of the ODM Party to her disadvantage and therefore it be declared null and void; a declaration that the Appellant was duly nominated no. 11 in the ODM party list and female number 6 and that there be an order for the Respondent to do fresh Gazette Notice in accordance with the ODM list and ensure the swearing in of the petitioner. The Appellant also prayed for the costs of the Petition.

2. The Respondent filed its Response dated 4<sup>th</sup> October, 2017 and denied contravening any Electoral law. The Respondent also denied amending the party list and averred that the ODM party pursuant to the judgment in IEBC/NM/PL/13/2013 vide a letter dated 7<sup>th</sup> August, 2017 submitted its final party list for Nairobi County for gender Top Up category to the Respondent on 10<sup>th</sup> August, 2017 in which the Petitioner appears as No. 51 in the list and not No. 11 as alleged. The Respondent denied presiding over complaint no. 434 of 2017 (Roselyn Grace Osoo V ODM). The Respondent therefore prayed for the Petition to be dismissed with costs.

3. In her judgment, the trial Magistrate found the Appellant was listed No. 51 in the final Party list and not No. 11 and therefore dismissed the Petition with costs.

4. Aggrieved by the trial magistrate's judgment, the Appellant filed this appeal on 13 grounds as enumerated in the Memorandum of Appeal dated 7<sup>th</sup> February, 2018. The grounds of appeal can be summarised as follows;

a. THAT the Learned Magistrate erred in law in failing to consider and interpret the provisions of article 90 (2) (b), 88 (4) (e) of the Constitution and section 34 (6A) of the Elections Act 2011 and Regulation 21 (2) of the Election (Party Primaries and Party List) Regulations 2017.

b. THAT the Learned Magistrate erred in law by dismissing the Appellant's Petition in failing to find that the Appellant was nominated as the 11<sup>th</sup> member in ODM party list contrary to the provisions of section 36 (2) (7) of the Elections Act, 2011.

c. THAT the Trial Magistrate erred in Law in failing to consider the Dispute Resolution Committee decision in Complaint No. 13 of 2017 Emmaculate Muasya & Others Vs Hasfa Mohammed Khalif and others being decision IEBC/NM/PL/13/2017 and in complaint no. 434 of 2017 Roselyn Grace Osoo Vs. Orange Democratic Movement Party.

d. THAT the Learned Magistrate erred in Law in delivering a judgment that was undated. .

5. This being a first appeal, the role of this court will be to re-evaluate the evidence that was before the lower court and determine whether that appeal is to stand or not. In the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia v. Duncan Mwangi Wambugu [1982]-88 1KLR 278** it was held that the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.

6. From the Record of Appeal and the grounds of Appeal, the issues for determination therefore are;

a. Whether the Respondent violated the provisions of the Constitution and Electoral laws governing nomination and party list ; and

b. Whether the Respondent acted ultra vires and amended the final ODM party list for the nominees submitted to it.

7. The Appeal was canvassed by way of written submissions which I have considered together with the authorities relied on by the respective parties.

8. From the Petition and the Supporting Affidavit, the Appellant's case is that the Respondent failed to rely on the ODM Party list presented to it via a letter dated 7<sup>th</sup> August, 2017 in which the Appellant was listed as the 11<sup>th</sup> potential nominee and the 6<sup>th</sup> woman in the list. It is alleged that the Respondent therefore flouted the Electoral laws governing nomination from party list when it gazetted the successfully nominated MCAs on 28<sup>th</sup> August, 2017 in which list the Appellant was excluded. The Appellant also avers that the respondent ignored the Letter dated 2<sup>nd</sup> September, 2017 from the ODM party leader Hon. Raila Odinga indicating that the Appellant has been nominated as the 11<sup>th</sup> person in the list and ought to have been considered for nomination, as ODM party was allocated 14 seats. It is alleged that the Respondent relied on the list which had been published on 23<sup>rd</sup> July, 2018 in which the Appellant had been listed in position number 51 instead of the final list forwarded via the letter dated 7<sup>th</sup> August, 2018 after amendments were done on the previous list published on 23/7/2018 pursuant to the ruling issued by the Respondent..

9. The Respondent further avers that it did not flout any constitutional provision and Electoral laws in nominating the Members of County Assembly for ODM party. It avers that it considered the final list delivered to it by the ODM party on 10/8/2017 via a letter dated 7/8/2017 in which the Appellant is listed in position number 51 and not number 11. The Respondent contends that it did not preside over the alleged dispute no. 434 Roselyn Grace Osoo Vs. ODM in which the Appellant is alleged to have been placed in position 11. It is the Respondent's contention that the final list submitted by ODM party indicated the Appellant as having been position 51 and not 11. On the letter from the ODM Party leader, the Respondent acknowledged receipt of the same but stated that the same was written too late after gazettelement and after the term had started.

10. This court is alive to the requirement that this being the first appellate court, it must re-evaluate and analyse all the evidence that was produced in the trial court. The Appeal is also substantially on points of law and it is important for the court to re-examine the laws alleged to have been flouted.

11. The Respondent is the body mandated with the supervision of nomination of Members of National Assembly, the Senate and the County Assembly in Accordance with the provisions of Article 90 of the constitution which provides for allocation of party list seats as follows;

*90. (1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.*

*(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) ...*

12. Article 88 (4) (e) of the constitution confers on the Respondent herein the mandate to resolve disputes emanating from nominations wherein it is provided that the Respondent shall be responsible for; *“the settlement of Electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”*

13. The Respondent has the mandate to accept or reject the party list if it does not conform to the Electoral laws or the Political Parties' rules. Section 34 (6A) of the Elections Act 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 regulations and—(a) issue the political party with a certificate of compliance; or (b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list. Section 34 (10) provides that; a party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.*

14. The IEBC does not have the power to amend a party list but it can only refer it back to the party for amendment in situations where it does not conform to the Constitution and the Electoral Laws and/or the regulations made thereunder. This is captured in Regulation 21 (2) of the Elections (Party Primaries and Party Lists) Regulations 2017 that-

*“Where, after scrutiny of the lists, the Commission is of the opinion that a party list does not conform to the requirements of Articles 97(1) (c), 98 (1) (b), (c), (d), and 177(1) (b) and (c) of the Constitution, the Act or these Regulations, the Commission shall require the political party to review and amend the party list so that it conforms to the requirements of the law and guidelines by the Commission.”*

15. From the above provisions of the law, it is trite that the role of IEBC in conducting and supervising the elections is in the context of the

Article 90 which is given effect by the provisions of the Elections Act and the Regulations thereunder. The respondent is obliged to accept party lists as long as the provisions of the law are adhered to. Regulation 55 (2) of the Elections (General Regulations) 2012 enjoins the IEBC to ensure that the party lists comply with the requirements of the Constitution, the Elections Act and the Regulations.

16. The core dispute in this matter is whether the Respondent used the final ODM party list for Nairobi County Gender top up provided by the Party. The Appellant accuses the Respondent of amending the list whereas the Respondent insists that it used the final list which was provided to it by the Appellant's party. The Appellant produced a letter dated 19<sup>th</sup> July, 2017 from ODM Chair – Subcommittee on party list to IEBC forwarding what she refers to as the initial Party list which was contested. The list is annexed to the letter and the Appellant's name appears as number 51.

17. I have perused the list relied on by the respondent in nominating the MCAs on gender top up from ODM Party. The said list was forwarded vide a letter dated 7/8/2017 and received by the Respondent on 10/8/2017. In that list, the Appellant's name appears as number 51. It appears that the list in question is the same referred to by the Appellant having been forwarded vide the letter dated 19/7/2017. The Appellant also produced the letter dated 7/8/2017 forwarding the final list, however, the list annexed thereto is different from the one annexed to the Respondents' letter dated 7/8/2017. In the final list produced by the Appellant she appears as number 11. The Respondent's case was that the list they produced was the final list forwarded to them whereas the appellant insists that her list was the final one.

18. I have perused the letter dated 7/8/2017 and the contents are thus; *“please find attached the final ODM list which has incorporated the corrections that were made after the publication of the first party list. The detailed minutes and explanatory notes are herewith attached that demonstrate the deliberations of the committee and the decisions reached therewith”*

19. The court notes that, the mentioned detailed minutes and explanatory notes that were meant to demonstrate the deliberations of the committee and the decision reached thereat were never attached. The party lists produced by the parties are not dated such that it is not possible to ascertain which party list accompanied the letter dated 7/8/2017. If the mentioned minutes and explanatory notes on the deliberations from ODM party were produced, it would have been easier for the court to make a comparison between the two lists produced in order to ascertain which list was the final one.

20. What is clear from the record is that there was an initial party list which was contested via complaint number 13 of 2017 Emmaculate Muasya & Others Vs Hasfa Mohammed Khalif and others in which there were 11 complainants. The Respondent heard the dispute and rendered a decision on 28/7/2018. The decision is annexed to the Respondent's Replying Affidavit. I have perused the decision and noted that the Appellant herein was not among the complainants. The complaint was made by Roselyn Grace Osoo who, according to that decision, complained that Nimo Omar Hassan who appears as number 11 is neither a life member nor a registered voter in Nairobi.

21. The Appellant deponed in her Supporting Affidavit that the Respondent presided over Complaint no. 434 of 2017, Grace Osoo Roselyn V ODM in which the complaint was allowed and her name was replaced with that of the nominee as the said nominee was not a registered voter. In its Reply as well as in the submissions herein, the Respondent has maintained that it never presided over the said complaint and didn't make such a decision. I have looked at the annexure marked “HKK 4” which appears to be a tabulation of 42 entries showing summary of cases and outcome. There is no such decision/ruling from the Respondent as averred in that annexure.

22. The burden of proving any allegations of electoral breach, misconduct and/or irregularity lies upon the petitioner. In the case of **GEDION MWANGANGI WAMBUA VS. IEBC & 2 OTHERS E.P. 4 OF 2013** it was held that it is a presumption of law that elections were properly conducted and as such the burden is always upon the petitioner to prove otherwise. This was further buttressed in the case of **JOHO VS. NYANGE & ANOTHER (2008) 3 KLR E.P.**, where the court in upholding the position that the burden of proof lies with the petitioner held that *“Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence.....The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election .....*”.

23. I have re-evaluated the evidence on record and the legal principles applicable in allocation of party list seats. The burden of proving that the Respondent amended the party list and/or did not rely on the final party list was upon the Appellant. The Appellant has failed to produce any concrete evidence to show that the party list relied on by the Respondent was not the final list. The Appellant failed to produce the alleged decision in complaint no. 434/2017 (Roselyn Grace Osoo Vs. ODM) in which she was to be placed as no. 11 since the nominee was not a registered voter. The appellant did not produce the minutes and deliberations mentioned in the letter dated 7/8/2017 from her party forwarding the party list which could have shed some light on whether there were such deliberations and whether there was indeed a decision made to replace her name as number 11.

24. It should be remembered that in Election petitions, the degree of prove is higher than that on a balance of probability but less than beyond reasonable doubt. Considering all the material placed before this court, the Appellant failed to prove that she was nominated as number 11 in the party list. She also failed to prove that the Respondent amended the final list that was forwarded to it by the ODM party. For these reasons, the Appeal fails. In the upshot, the Appeal herein is hereby dismissed with costs to the Respondent.

25. Dated, Signed and Delivered at Nairobi this 28<sup>th</sup> Day of June, 2018.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Appellant

.....For the Respondent