

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELECTION PETITION APPEAL NO. 1 OF 2018

MILLICENT CHEROTICH.....APPELLANT

-VERSUS-

OMARI ESHA WANJIKU.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

THE JUBILEE PARTY.....3RD RESPONDENT

(Appeal from the Judgment and decree of the Chief Magistrate's Court at Nyeri delivered by Hon. Wendy K. Micheni on 31st January 2018 in Nyeri Election Petition no. 1 of 2017)

Between

OMARI ESHA WANJIKU.....PETITIONER

And

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE JUBILEE PARTY.....2ND RESPONDENT

MILLICENT CHEROTICH.....3RD RESPONDENT

JUDGMENT

1. In our Constitution of 2010, the people of Kenya, in the bid to ensure that the interests of minorities and marginalised communities and groups were properly represented and protected, entrenched affirmative action by creating the positions of nominated member to represent these special interests. Political Parties were given the mandate to prepare and present the requisite party lists.

2. Omar Esha Wanjiku, a woman professing the Muslim faith, a registered voter in Nyeri County and member of the Jubilee Party made an application for nomination as a representative in the 'Minority' category, ostensibly to represent the interests of Muslims or women who profess the Islamic faith, in Nyeri County. Though she featured in the final published party list as no. 3 she was not to be gazetted as the nominee. Matters took a turn and the name of one Millicent Cherotich '*took her place*' in the Gazette Notice Number 4992 issued on 28th August 2017 as representing the special interest category of minority. It indicated that she was representing the Kalenjin ethnic minority.

3. The fact of Millicent's nomination to represent the special interests of her ethnic community, named as Kalenjin, in Nyeri County Assembly was attributed to a directive by the Political Parties Dispute Tribunal, to the Jubilee Party, following a complaint by other persons not party to these proceedings, to reconstitute its list and make it more inclusive.

4. However, two twists stood out in this case. Firstly, that no reconstituted list was published before the gazettelement, Secondly, that she was gazetted as the Nominated member of the County Assembly of Nyeri to represent the special interests of the Kalenjin minority in Nyeri County yet, she was a resident of Nyeri County by virtue of her marriage to a person from the Kikuyu ethnic community.

5. Omari Wanjiku Esha was caught by surprise. She filed the Election Petition against the election and /or nomination of Millicent as the Member of County Assembly Nyeri County representing Ethnic Minority. Her contention was that county assemblies are expressly exempted from the consideration of ethnic and regional representation by article 90(2) (c) of the Constitution and that the only considerations permitted for nomination in special interests category to the county assembly, in addition to the two thirds gender rule, were community and cultural diversity.

6. In that petition she sought the following declarations:

a) A declaration that the said *MILLICENT CHEROTICH* was not validly elected/nominated as member of County Assembly Nyeri

County representing ethnic minority.

b) A declaration that the election/nomination of MILLICENT CHEROTICH was illegal, unlawful and void and the same should be invalidated as the constitution does not provide for ethnic reflection in county seats.

c) A declaration be made that the petitioner OMARI WANJIKU ESHA was validly nominated as member of County Assembly Nyeri County to represent minority category in the said assembly.

d) THAT costs of the petition be borne by the respondents jointly and severally.

7. On the 31st January 2018, the learned magistrate allowed the petition and rendered herself thus:

A. The First prayer was that the court declares that Millicent Cherotich was not validly nominated as a member of the County Assembly Nyeri representing the ethnic minority. The court has considered all the constitutional and statutory requirements and is in agreement that Millicent was not validly nominated. This is because;

- 1) We have seen that her application procedure was opaque. This was demonstrated in the body of the judgment.
- 2) She did not appear in any of the lists that Jubilee Party published. That is the list of those shortlisted and even the list that was published in the newspapers as per the statutory requirements.
- 3) In fact, even when the PPDT ordered that the Jubilee list be reconstituted, this court did not see the list from the said Jubilee party to IEBC and even the letter purporting to forward that "invisible list" to IEBC was from suspicious sources.
- 4) Millicent's name only emerged in the list by IEBC which appeared in final gazette notice and this is unprocedural.
- 5) The decision by the PPDT was therefore not followed and the court declares that Millicent Cherotich was not validly elected/nominated as a member of the County assembly of Nyeri County.

B. The 2nd Prayer was for a declaration that the election /nomination of Millicent Cherotich was illegal, unlawful and void and the same should be invalidated as The Constitution does not provide for ethnic reflection in county seats.

- 1) The court has examined Article 90 (2) [c] of the Constitution which specifically exempts County Assembly seats from requirement to reflect regional and ethnic diversity of the people of Kenya.
- 2) The court also notes that Article 197 [2] (a) of the Constitution and Section 7(2) (a) of the County Assembly Act specifically refer to "Community and Cultural Diversity " and not ethnic consideration.
- 3) The court finds that the "inclusion" of "ethnic diversity" especially Kalenjin interests within Nyeri County is illegal and more so, Millicent who is married in Nyeri County cannot purport to champion of other ethnic interests.

Accordingly, the court declares her nomination illegal, unlawful and void and accordingly nullifies her nomination and election as gazetted in the Kenya Gazette Notice No.4992 of 28th August, 2017.

C. The 3rd Prayer was for a declaration that the petitioner was validly nominated as a member of the County Assembly to represent the minority category.

- 1) The court findings are that, the petitioner applied the nomination and she was shortlisted and her name appears on all the published lists save for the final gazette notice. In all these lists she was position number 3 and was shown to represent the minority. Her evidence was that in Nyeri, the seat for the minority was reserved to the Muslims. She was however, challenged as to how that reservation came up and she did not do that... the court will throw the ball back to the 1st and 2nd Respondents to determine whether or not the Petitioner herein remains as their choice for the minority, and complete her election by gazetting her name or conduct a fresh nomination on that particular post, taking into account all the constitutional and statutory requirements. The court therefore, declines to grant the 3rd prayer.

8. Aggrieved by the above findings the appellant filed an appeal on the following grounds:

i. THAT the learned magistrate erred in law in interpreting Article 90 (2) (c) of the Constitution of Kenya arriving at the wrongful conclusion that the Constitution of Kenya does not provide for ethnic reflection in the County Assembly seats.

ii. THAT the learned magistrate erred in law in failing to consider the appellant submissions in respect to the interpretation of Articles 90 (2) (c) the Constitution of Kenya thereby misdirecting herself and arriving at the wrong constitutional interpretation.

iii. THAT the learned magistrate erred in law in interpreting the import of the decision of the Political Parties Dispute Tribunal (PPDT) in Tribunal Case no 345 of 2017 Margaret Nyathogora & 7 others vs The Jubilee Party delivered on 27th July 2017 whereby she quashed the decision of the PPDT by finding that ethnic minorities inclusion in the County Assembly of Nyeri to be an unlawful and illegal.

iv. THAT the learned magistrate erred in law in setting out the procedure to be followed in nominating candidates pursuant to the judgment of the PPDT in Tribunal Case no 345 of 2017 Margaret Nyathogora & 7 others vs The Jubilee Party delivered on the 27th July 2017 thereby arriving at the wrongful conclusion that there were procedural defects in the nomination of the appellant.

v. THAT the learned magistrate erred in law in finding that the 3rd respondent did not reconstitute its party list which finding is contrary to the evidence adduced before her.

vi. THAT the learned magistrate erred in law in finding that the appellant did not apply for nomination in the County Assembly of Nyeri a finding which is wholly unsustainable going by the weight of evidence adduced before her.

vii. THAT the learned magistrate erred in law in placing reliance on the 3rd respondent's party lists that had been invalidated by the PPDT in Tribunal Case no 345 of 2017 Margaret Nyathogora & 7 others vs The Jubilee Party and failing to appreciate that the only valid party list was the one dated 17th August 2017 which the 3rd respondent submitted to the 2nd respondent after the judgment of the PPDT.

viii. THAT the learned magistrate erred in law in delving into extraneous matters not in any way pleaded by the parties in their pleadings exhibiting an outright bias against the appellant.

ix. THAT the learned magistrate erred in law in failing to find that the appellant was not validly nominated in the County Assembly of Nyeri per the dictates of the Constitution of Kenya, the Elections Act, The County Governments Act, The Political Parties Act and the Judgment of the PPDT in Tribunal Case no 345 of 2017 Margaret Nyathogora & 7 others vs The Jubilee Party.

9. The appeal was argued by Mr. Ngunjiri and Mr. Macharia for the appellant, and Mr. Muhoho for the 1st Respondent. There was no appearance by the 2nd and 3rd Respondents though the court was told that the 3rd Respondent was in support of the appeal. Parties filed written submissions, which were supported by oral highlights.

10. Both the appellant and the 1st respondent argued each ground separately. The 1st respondent's view was that the learned magistrate was right in all aspects of her judgment except that she denied the 1st respondent, who was the petitioner before her; the declaration that she was the validly nominated member of the Nyeri County Assembly and, the costs of the petition.

11. I read the record, heard the rival arguments, read the written submissions and supporting authorities, and upon considering all of these I formed the opinion that despite the number of the grounds of appeal, this appeal is about the interpretation of Article 90(2) (c) of the Constitution with regard to the nomination of the appellant herein; whether the 1st respondent ought to be declared the validly nominated member of the Nyeri County Assembly representing minority special interests and, who gets the costs here and below.

12. The powers of this court in this appeal are set out under the Elections Act no 24 of 2011 and the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The Act at s. 75 provides *inter alia*:

(1A) 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.

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected; (b) a declaration of which candidate was validly elected; or (c) an order as to whether a fresh election will be held or not.

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be— (a) filed within thirty days of the decision of the Magistrate's Court; and (b) heard and determined within six months from the date of filing of the appeal. The Rules at section 34 (10) state:

The High Court to which the appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.

13. For the sake of order and flow, I tried to examine each ground as set out by the appellant and the 1st respondent.

14. These were summarized as follows:

1. *The Interpretation of Article 90 (2) (c) of the Constitution of Kenya*

2. *The holistic and harmonious interpretation of the Constitution.*

15. The appellant argued that the trial magistrate had given the provisions of Article 90(2) (c) a very narrow interpretation contrary to existing authorities. She relied on the following cases;

- i. Commissioner for the Implementation of the Constitution vs Attorney General & 2 others (2013) eKLR
- ii. Lydia Nyaguthii Githendu vs The Independent Electoral and Boundaries Commission (IEBC) & 17 Others (2015) eKLR
- iii. Communications Commission of Kenya & 5 others vs Royal Media Services Ltd. & 5 others (2014) eKLR “***The Constitution of Kenya has to be interpreted holistically within its context and in its spirit***”
- iv. In Matter of the Kenya National Human Rights Commission Sup. Ct. Advisory Opinion No. 1 of 2012
- v. Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR

16. The 1st respondent was of the contrary view. That the trial magistrate clearly followed the authorities and applied the correct interpretation.

17. The question then is whether ethnic minority is a special interest group for consideration for the nomination of members to the County Assembly as envisaged by article 177 of the Constitution.

18. It is common ground that the appellant was nominated to represent the special interest of ethnic minority in the County Assembly of Nyeri. The central argument in the Petition was that the appellant’s nomination on that rendered it unconstitutional in the light of Article 90(2) (c) of the Constitution.

19. Article 90(2) (c) of the Constitution provides: ***(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.***

20. This is to be read together with article 177 (1) (c) which provides for the Constitution of County Assemblies as follows: ***(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;***

21. In this case the Act of Parliament is the County Governments Act no. 17 of 2012, Section 7(2) which provides: *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.*

22. Article 197 requires that the County assembly to ensure gender balance and diversity in the following terms: ***(1) Not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender. (2) Parliament shall enact legislation to— (a) ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and (b) prescribe mechanisms to protect minorities within counties.***

23. Reference was made article 100 which provides for the **promotion of representation of marginalised groups**. It states: *Parliament shall enact legislation to promote the representation in Parliament of— (a) women;(b) persons with disabilities;(c) youth; (d) ethnic and other minorities; and (e) marginalised communities.*

24. The applicant also referred the court to the provisions of the Constitution regarding membership of the Senate, and Article 27 that prohibits discrimination.

25. All were to be read together with the decision of the PPDT in Political Parties Dispute Tribunal (PPDT) in Tribunal Case no 345 of 2017 Margaret Nyathogora & 7 others vs The Jubilee Party: ‘***...On the contrary the respondent list is hardly inclusive ethnically and falls short of compliance with section 7 (2) (a) and (b) of the County Governments Act, 2012 which requires county assemblies to reflect ethnic diversity of the county in question. The respondent part lists of nominees for the county assembly of Nyeri only contains persons of the Kikuyu Ethnic origin. We hold that the respondent party list does not reflect the special interests in the sense required by the law.***

26. It was argued that to uphold the narrow interpretation by the learned magistrate would amount to a claw back on the rights of minorities and marginalised persons.

27. In Commissioner for the Implementation of the Constitution Vs Attorney General & 2 others (2013) eKLR the Court of appeal stated:

‘Article 90 of the Constitution decrees that the party lists must comply with two discernible principles namely;

2. The requirement for the lists to reflect regional and ethnic diversity of the people of Kenya. This is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties. The exception to this, naturally, is the county assembly which from the nature of things may be from an ethnic majority or from the one region which the county is located. We would venture that on proper reading of article 90 (2) (c), the requirement for the regional and ethnic diversity should apply so as to reflect the face or diversity not of the people of Kenya necessarily, but definitely of the county in question.

28. In Lydia Nyaguthii the same court said:

‘A plain reading of Article 90 (1) (c) appears to exempt county assemblies from the requirements of Article 96 (b) complying with

regional, ethnic and cultural diversity in their nomination lists. But article 177, the Electoral Act and the case law assessed herein appears to suggest otherwise.

29. The issue then becomes what is the definition of marginalised and minority? The marginalised groups referred to under 177(1) (c) of the Constitution are defined under two heads: “marginalised community” means—(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; or d) pastoral persons and communities, whether they are—(i)nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole; “marginalised group” means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4);

30. The term ‘minority’ is not defined. “There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority) ... The term minority as used in the United Nations human rights system usually refers to national or ethnic, religious and linguistic minorities, pursuant to the United Nations Minorities Declaration... in 1977 Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,^[1] defined a minority as: ‘A group numerically inferior to the rest of the population of a State, 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 population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.’^[2]” (emphasis all mine)

31. The foregoing passage demonstrates, perhaps, the reason why there is no definition of minority in the Constitution. The minorities in the county could be any group of people in the county showing, “**if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language**”. For obvious reasons, ethnicity was not a consideration, instead, pointing to the factors of community and cultural diversity of the people within the County. The PPDT ruling in *Margaret Nyathiogora* pointed out that the list nominees from the Kikuyu ethnic community only. It directed the 3rd respondent to ensure that the party list reflected the ethnic diversity of the County and special interests as expected by the law. I think the question it was posing was whether it was possible that there are no members of any other community living within Nyeri County who could represent some of special interests without necessarily representing the interests of their ethnic communities.

32. The appellant herein testified that she was nominated to represent the ethnic minority group of the Kalenjin people. The 1st respondent’s position was that she had all along been in the party list of the 3rd respondent as a representative of the minority group made up of Muslim women within Nyeri County.

33. No evidence was placed before the learned magistrate to demonstrate that the 3rd respondent had made any effort to comply with the ruling of the PPDT. The only evidence of an alleged reconstituted list was the gazetted list which had merely replaced the name of the 1st respondent with that of the appellant.

34. To get back to article 177 and 197, representation in the county assembly and county executive committee must respect gender balance, and take into consideration the community and cultural diversity of the county. When it comes to minorities, the county is specifically required to put in mechanisms for their protection. This is why in my view there is a clear statement of the special interest groups viz; marginalised groups, youth, persons with disability.

35. Certainly, there will be circumstances where residents of the counties and even the courts will be called upon to determine whether a group of people qualify to be identified as a minority group (see *RM v the AG and others [2010] eKLR*) in the context of representation. There is a difference between representation of special interests and diversity in representation to ensure the protection of minorities.

36. This court was urged to give Article 90(2) (c) a holistic interpretation taking into consideration the provisions of Article 27 and the National values at article 10.

3. In doing so we must keep in sight the real reason for the existence of these provisions for the representation of special interest groups: Affirmative Action; as defined under article 260: as ‘including ‘any measure designed to overcome or ameliorate an **inequity or the systemic denial or infringement of a right or fundamental freedom**’.(emphasis mine)

37. I would be hesitant to take it that these two cases cited to me have interpreted Article 90(2) (c) to set a fast and hard rule stating anything else other than its plain language. They appear to me to be invitations to consider further whether we can read into Article 177 **(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament** ethnic minorities and regional representation. There cannot be a hard and fast rule because as observed by the Court of Appeal Counties are also diverse in nature. It would be difficult to have a similar provision on ethnic and regional representation as that for Parliament obviously because from the *nature of county assemblies they could be from an ethnic majority or from the one region which the county is located*. Hence the proposal that the county assembly should definitely reflect the face and diversity of the county.

38. It also appears to me that the Court of Appeal did not hold or determine that the County Assemblies would be henceforth required to comply with ‘regional, ethnic and cultural diversity’. The Court of Appeal noted that the exception to comply was natural for historical and geo-political reasons. The Court went on to ‘venture’ that regional and ethnic diversity ‘should’ apply to reflect the ***face and diversity*** of the County in question. And as if to confirm that the matter is not settled, the Court pointed out stated that the Constitution, Electoral law, and case law appeared to suggest a position contrary to the plain reading of Article 90(2) (c).

39. All the foregoing point to support the plain reading of Article 90(2) (c) as exempting the counties from including the representation of ethnic minority and regional representation in the nomination of a representative of the special interest group into the County Assembly, except where it can be justified.

4. Disregard of the Appellant's Submissions

40. Under this ground the appellant argued that the learned magistrate had ignored the submissions place before her with regard to the provisions of Articles 177 (1) (c), 260 and 27 (4) of the Constitution of Kenya. She had also not considered the two cases Commissioner for Implementation of the Constitution Vs Attorney General & 2 others and Lydia Nyaguthii Githendu vs The Independent Electoral and Boundaries Commission (IEBC) & 17 Others. Having considered the matters aforesaid, I formed the opinion that the learned magistrate considered the submissions at length in her judgment.

5. The Import of the decision of the PPDT

41. It was argued that the trial magistrate over reached her jurisdiction and quashed the decision of the PPDT no. 345 of 2017-Margaret Nyathogora & 7 others vs The Jubilee Party. That it is only this court that can overturn the decision of the PPDT. The appellant cited Section 41 of the Political Parties Act which states ***(1) The tribunal shall hear and determine any dispute before it expeditiously, but in any case shall determine a dispute within three months from the date the dispute is lodged. (2) An appeal shall lie from the decision of the tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.***

42. It was also argued that if 1st respondent had any issues with that decision it was her right to follow the law and file her appeal in the appropriate forum.

43. ***'...On the contrary the respondent list is hardly inclusive ethnically and falls short of compliance with section 7 (2) (a) and (b) of the County Governments Act, 2012 which requires county assemblies to reflect ethnic diversity of the county in question. The respondent part lists of nominees for the county assembly of Nyeri only contains persons of the Kikuyu Ethnic origin. We hold that the respondent party list does not reflect the special interests in the sense required by the law.'***

44. The appellant cited the case of Moses Mwigigi & 14 Others Vs Independent Electoral and Boundaries Commission & 5 Others (2016) eKLR

I found this argument misleading. In the Mwigigi case the Supreme Court was categorical that once the nominees had been gazetted, the nominees were considered to have already been elected, and the only avenue available for the 1st respondent was the election court as appointed by the Chief Justice.

Secondly, by merely pointing out the words of the Constitution and relying on them for her determination did not amount to an act of quashing the PPDT decision. In any event the appellant and the respondents herein were relying on it. How could she have made a decision without mentioning it? She did, but clearly demarcated the parameters within which she could deal with it. I have read the record and it speaks for itself. The learned magistrate was alive to the limits of her jurisdiction and the fact that she could not pry into the correctness or otherwise of the PPDT decision.

6. Procedure to be followed in nominating candidates pursuant to the decision of the PPDT.

45. It was argued that learned magistrate erred in finding that found that the procedure for nominating the candidates who were finally gazetted and who included that appellant had not been followed. In arriving at this she set out the elaborate procedure in Regulation 54 of the Elections (General) Regulations 2012. From the record I discerned that he 2nd and 3rd respondents produced no evidence to show that they indeed had followed the procedure as laid down under the law. The appellant through counsel submitted that it was not necessary to publish the new list as it had already been published before.

46. I found this line of submission, unfortunate. The PPDT had directed that the 3rd Respondent to comply with the law. One provision of that law is the publication of the list for purposes of public participation as was stated in National Gender and Equality Commission vs Independent and Electoral Boundaries Commission & Another (2013) eKLR The judges said at paragraph 83.

We shall therefore order IEBC to publish as required by regulation 54(8) of the General Regulations the party lists of those parties which have qualified under Article 90(3). Thereafter, any person dissatisfied with the list shall be at liberty to file a complaint with the IEBC in accordance with Article 88(4)(e) as read with section 74 of the Elections Act, 2011. We shall impose time limits in order to ensure that the process comes to an end.

It was not left to the 2nd and 3rd Respondents' whims to decide as and when to publish the list. It is a legal requirement, and in this case, that omission was admitted. The trial magistrate was right to find that regulation 54 had not been complied with, and hence the finding that the appellant's name was surreptitiously sneaked into the unpublished list and gazetted.

7. The Reconstituted Party list by the 3rd respondent

47. It was argued at length that there was a reconstituted party list which the learned magistrate refused to see and on that basis proceeded to find that the appellant was never on any list.

48. Reading the record, I found that in her sworn testimony before the learned magistrate the appellant stated ***"I have not seen that list from***

Jubilee that was forwarded by Jubilee to IEBC. When I was sued, I did not go to the party to ask for the list. The only time I appeared, in any list is the Kenya Gazette. I was nominated under the Ethnic Minority... I am aware of all the newspaper advertisements that were made. In the lists Aisha was No.3.

49. There was a list before the PPDT complaint and its ruling therein. There was an advertisement in the Newspapers publishing the same. After the ruling no reconstituted list was published and none was produced in court. The appellant told the court that before the gazette notice where her name appeared in place of the 1st respondent as the nominee under ethnic minority, no list had been published. What the appellant was referring to was the disputed list whose source the learned magistrate found to be suspect, a fact none of the respondents made any effort to dislodge by way of evidence. Having perused the record, I am persuaded that no list was reconstituted, as none was published as required by law.

8. Whether the appellant applied to be nominated to the County Assembly of Nyeri

50. With regard to her application this is what the appellant stated;

“The party can prove that I applied. My online Application does not have any entry on the part for Ward. I saw a list from the party, showing all the Applicants. My name is not there. I have no other list where my name appears, as an applicant I did not read the judgment. The judgment did not say that my name be substituted. Even after the judgment, I have not seen any list with my name from Jubilee. It is the party which can answer that. I am rightfully before the court. I did not take anyone’s position.

What else can the applicant produce to prove she was an applicant, if she herself saw a list with all the applicants’ names except hers? The evidence she produced in court did not support her contention that she had made the application. She testified that it was the 3rd Respondent who could prove that she had applied. This 3rd respondent did not call any evidence to prove that she had made her application and none was tendered before the trial magistrate. There appears to be more than meets the eye in the manner in which the appellant’s name got into the gazette notice without having ever appeared in a party list, or even an applicant’s list.

51. It was submitted that in the 2nd and 3rd Respondents affidavits the two respondents admitted to the forwarding and receipt of the reconstituted list hence confirming the appellants’ application. However, the evidence of the document examiner with regard to the signature on the forwarding letter was damning- it pointed out to the possibility of an attempt to present a forged letter purporting it to have been signed by one Raphael Tuju, Secretary General of the 3rd Respondent, purporting to forward the alleged reconstituted list to the 2nd Respondent. In any event, this evidence was contradictory to what the appellant stated on oath. The only inference here is that there was no reconstituted list, none was published, making it clearly doubtful that the appellant applied for nomination as alleged.

9. The fate of the 3rd respondent party lists prior to the decision of the PPDT on 27th July 2017

52. It was submitted that the trial magistrate wrongfully placed weight on the party lists that were set aside by the PPDT where the 1st respondent appeared as no. 3. What I understand from the judgment is that the 3rd Respondent was ordered to reconstitute its party list. It was to do so from a certain point of reference which were the party lists before that. The court could not ignore the fact of the list before the PPDT. The 1st respondent relied on it was to demonstrate that she was in the favorable position of becoming the Nominated member of the County Assembly, and that the alleged reconstituted list was the same list that was set aside by the PPDT, the only difference being the removal of her name to be replaced with the appellant’s. However, the reference by the learned magistrate that the fact that the appellant had not appeared in the previous lists had any bearing to her application for nomination was erroneous because the PPDT had by the time of the appellant’s gazette set aside any previous lists.

10. Whether the learned magistrate delved into extraneous matters not pleaded by the parties.

53. The appellant relied on Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others (2014) eKLR. The ethnicity of the appellant was central to this petition because she was nominated to represent the ethnic minority- Kalenjin in the Nyeri County Assembly. The learned magistrate wondered loudly whether a Kalenjin woman resident of Nyeri County by virtue of her marriage could be heard to champion the rights of her ethnic group in her county of marriage? It was submitted for the appellant that this was an extraneous matter that was not placed before her for determination.

54. This is not a simple matter. It brings into interplay the provisions of Article 27 of the constitution, gender, equality and affirmative action in political representation. It is not disputed that the appellant came to the county by virtue of marriage. It is also not in dispute that it is on the fact of her marriage, as confirmed by her local chief, that the appellant became a registered voter in Nyeri County, and it is on this marriage card that she was nominated as a representative of the ethnic minority known as the Kalenjin resident in Nyeri County.

55. I think the trial magistrate posed a relevant question that goes to the root of the constitutional requirement for affirmative action, and for counties to put in mechanisms for the protection of minorities within the county. The applicant’s ethnicity should not stand against her in the political or any arena, that would be discriminatory. However, this is a case for the representation of special interests’ groups within the County assembly. The people of Nyeri County would want to read this from the community and cultural diversity angle and ask whether she would be best placed to champion for the rights of her people, where she came from? Another question they may wish to ask to accommodate the appellant would be whether the women from the Kalenjin Community married in Nyeri County could be considered a minority group deserving representation in the county assembly? Or again, whether women married from other communities into Nyeri County could be considered a minority group as envisaged by the Constitution? I think these are questions for the people of Nyeri County to ask and respond to. This is the opportunity they were denied when no reconstituted list was published for purposes of public participation.

56. In rejecting the suitability of the appellant to represent the special interests of the Kalenjin ethnic group learned magistrate, cited the case of Virginia Edith Wambui Otieno vs Joash Ochieng & Another (1987) eKLR. In the current Constitutional dispensation, I would be wary to

cite the *Wambui Otieno* case because of its patriarchal undertones. There things there I do not agree with and it shifts the discussion to other levels not within the ambit this case. Be that as it may the lived reality of many Kenyans is that culture is dynamic. It is not cast in stone. In the life of our Nation today, Inter -ethnic marriages would naturally be expected to feed that dynamism, growth and change, and create greater diversity, melting away those aspects that may bring conflict and disharmony.

57. Let us be clear, I am not saying, and I do not think the learned magistrate was, that a married woman cannot seek for political office or any position of leadership in the place where she is married. Perish the thought. Far from it. On my part I am simply posing the question whether she can by virtue of her marriage be defined as a minority from her tribe and champion the interests of her community within the community where she is married. It could be flying into the face of the real purpose of affirmative action at the County level. Viewed in the light of community and cultural diversity, it appears retrogressive, standing in the way of birthing of the new, that is the coming together of the two ethnic communities in marriage. I would therefore not agree with the submission that that was an extraneous issue. It was at the center of the Petition and the learned magistrate was in order to put her mind and time and on it.

11. Whether the appellant was validly nominated to the County Assembly of Nyeri per the dictates of the Constitution of Kenya, the Elections Act, the County Governments Act, the Political Parties Act and the Judgment of the PPDT

58. This ground must be determined together with the additional ground raised by the 1st respondent *Whether, based on the prayers in the petition in the lower court, the court ought to have declared the 1st respondent as properly nominated?*

59. From the foregoing it is clear that I am of the same view as the learned Magistrate that the appellant was not properly nominated to the Nyeri County Assembly. Should the 1st respondent have been declared as the proper nominee?

60. It was submitted for the 1st respondent that the learned magistrate ought to have declared the 1st respondent as the proper nominee for that position. I was referred to s. 34 (10) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 which states:

The High Court to which the appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction

61. That the powers referred to above are found at Section 75(3) of the Elections Act which states:

In any proceeding brought under this section, a court may grant appropriate relief, including—(a) a declaration of whether or not the candidate whose election is questioned was validly elected; (b) a declaration of which candidate was validly elected; or (c) an order as to whether a fresh election will be held or not.

The learned magistrate chose (c). Is there any reason to fault her decision?

62. Counsel submitted that the 1st respondent had fulfilled every requirement and was as good as elected were it not for the sneaking in of the appellant's name to replace hers. That the 1st Respondent was not a party to the PPDT complaint, *Political Parties Dispute Tribunal (PPDT) in Tribunal Case no 345 of 2017 Margaret Nyathogora & 7 others vs The Jubilee Party* that the decision of the PPDT did not affect her, that the learned magistrate found that there was no reconstituted list, that the Jubilee Party upon being served with the ruling of the PPDT was adamant that the list was compliant with the law, and had filed an appeal against PPDT's ruling. Hence the 3rd Respondent could not be heard to support the nomination of the appellant herein. And that her petition was successful. That the learned magistrate was empowered to declare her the rightfully nominated representative in that category.

63. This position was opposed by counsel for the appellant. He submitted that this court could not move *in vacuo*. That while this court was empowered to assume jurisdiction over the matters in the lower court, the 1st respondent could not ride on the appellant's appeal to get orders that she never sought.

64. The record will show that the Petition included a prayer for a declaration that the 1st respondent, the petitioner therein, was validly nominated as a member of the County Assembly Nyeri County to represent the minority category in that assembly. In the memorandum of appeal, the appellant invited this court to set aside the learned magistrate's judgment in its entirety. This placed everything that took place in the subordinate court before this court.

65. Going by s. 34 (10) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, I am of the view that this issue is properly before me.

66. While I am at it I may as well point out that on the same footing, the issue as to who is to bear the costs here and below is equally properly before me.

67. Is the 1st respondent the validly nominated MCA on the minority seat?

The 1st respondent featured in the final Jubilee Party list that was published in the *Party Lists as submitted by Political Parties Pursuant to Sections 34(6a) and 35 of the Elections Act, 2011 in the Sunday Nation Edition of the 23rd day of July 2017.*

I go back to the ruling of the PPDT. *'...On the contrary the respondent list is hardly inclusive ethnically and falls short of compliance with section 7 (2) (a) and (b) of the County Governments Act, 2012 which requires county assemblies to reflect ethnic diversity of the county in question. The respondent part lists of nominees for the county assembly of Nyeri only contains persons of the Kikuyu Ethnic origin. We hold*

that the respondent party list does not reflect the special interests in the sense required by the law.’

1.	BETH NYAWIRA KIMAILI	27917423	FEMALE	27	BUSINESS WOMAN	N/A	YOUTH CATEGORY	N/A	JP24824	NYERI	KIKUYU
2.	MUTHONI PATRICK MUTAHI	26667315	MALE	29	KIKUYU	N/A	YOUTH CATEGORY	N/A	JP14264	NYERI	KIKUYU
3.	OMARI WANJIKU ESHA	13727925	FEMALE	43	BUSINESS WOMAN	N/A	MINORITY CATEGORY	N/A	JP16983	NYERI	KIKUYU
4.	WAMBUGUTHIONG’O WILLIAM	0350461	MALE	59	NULL	N/A	MINORITY CATEGORY	N/A	JP MEMBER	NYERI	KIKUYU

5.	GICHUKI NYOKABI PAULINE	13101145	FEMALE	50	CASUAL LABOURER	N/A	MARGINALIZED CATEGORY ETHNICITY	N/A	JP MEMBER	NYERI	KIKUYU
6.	NDEGWA ANTHONY NDIRANGU	29687734	MALE	42	DISABILITY SERVICE OFFICER	N/A	MARGINALIZED CATEGORY ETHNICITY	N/A	JP13456710	NYERI	KIKUYU
7.	NJOROGE DAVID MUNENE	24597282	MALE	31	BUSINESS MAN	N/A	PERSONS DIABILITY WITH	N/A	JP7755856	NYERI	KIKUYU
8.	KABURU PENINAH WAITHERA	25361041	FEMALE	33	BUSINESS	N/A	PERSONS DIABILITY WITH	N/A	JP577	NYERI	KIKUYU

68. Looking at the list I think what the PPDT noted was that all the *marginalised and minority* categories were filled with names of persons of Kikuyu ethnicity. For example, may be it was asking is whether there was no person, say disability, from another ethnic community, because disability has no ethnicity, or whether there no persons from other communities within Nyeri County who could represent any of these categories? These were the issues would only be answered in the reconstituted list or in the appeal that was apparently abandoned by the Party.

69. The 1st respondent conceded that just in the same way there was an exemption of ethnic minorities, there was no specific requirement for representation of religious minorities at the County assembly. And while I do recognize that women of the Islamic faith or Muslims in general within Nyeri County could be a minority group falling into special interest’s category, my view is that the 3rd respondent is yet to comply with the orders of the PPDT to reconstitute a list that was compliant with the law. Hence this court cannot at this stage make the order sought.

70. The final question is *who is to bear the costs and Whether, following the event of the Petition being allowed, the 1st respondent was entitled to costs based on the principle that costs follow the event.*

71. It was argued for the 1st respondent that the learned magistrate denied her costs, yet she had succeeded in her petition. He submitted that costs follow the event. He referred the court to Morgan Air Cargo Limited vs Everest Enterprises Limited [2014] eKLR. That the learned magistrate’s reason for denying costs that the parties were in this mix while trying to enforce the decision of the PPDT was not tenable. The counsel for the appellant opposed this on the ground that the learned magistrate complied with the law and gave reasons as to why she denied the 1st respondent costs.

72. With regard to costs the learned magistrate stated:

As for the costs, the court has considered all the circumstances of this case including the argument that the respondents were enforcing the judgment of the PPDT and accordingly orders each party to bear its costs.

73. Section 27(1) of the Civil Procedure Act states: ‘the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.’”

74. Was there a good reason? I find help in the Morgan case where Justice Gikonyo analysed in detail the issue of award of costs, and in particular the application of the principle that costs follow the event. He found as I do, grounding in Justice Kuloba’s Judicial Hints of Civil Procedure Kuloba, where he states:

“The law of costs as it is understood by the courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributable to him, which would induce the court to deprive him of his costs – the court has no discretion and cannot take away the plaintiff’s right to costs. If the Defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course;” (emphasis mine)

75. The 1st respondent having done everything right, was entitled to an explanation as to why her name was removed from the list, yet she was not a party to the PPDT, neither was the complaint to the PPDT directed towards her. More importantly, the petition succeeded as two of her prayers were allowed. My view is that she was entitled to the costs of the petition and the learned magistrate had no discretion in denying her the same.

76. In conclusion I find that the appeal fails and is dismissed with costs to the 1st respondent. The 1st respondent will also have costs of the petition. Costs be assessed by the taxing master.

Delivered, dated and signed this 25th Day of June 2018 at Nyeri

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant

Appellant

Counsel For

Appellant

1st Respondent

2nd Respondent

3rd Respondent

[1] 1/ E/CN.4/Sub.2/384/Rev.1, para. 568.

[2] <https://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx>