



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION APPEAL NO. 02 OF 2018

ALEXANDER KHAMASI MULIMI.....APPELLANT / RESPONDENT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT/APPLICANT

AMANI NATIONAL CONGRESS2ND RESPONDENT

THE COUNTY ASSEMBLY OF KAKAMEGA.....3RD RESPONDENT

(Appeal from the judgment and decree of B. Ochieng, CM, in Kakamega CM'S Court Election Petition No. 7 of 2017 dated 5/2/2018)

J U D G M E N T

A. INTRODUCTION

1. The petitioner herein has filed an appeal against the judgment of the Chief Magistrate, Kakamega, after his petition in election petition number 7 of 2017 was dismissed with costs to the 1st and 2nd respondents. The petitioner is seeking for orders that:

- a. The judgment of the Chief Magistrate in election petition No. 7 of 2017 dated 5th February 2018 dismissing the appellant's petition be set aside.
- b. The order of the Chief Magistrate in election petition No. 7 of 2017 dated 5th February 2018 ordering the appellant to pay costs capped at Kshs . 500,000/= for the 1st and 2nd respondent be set aside.
- c. The appellant's prayers in his petition dated 4/9/2017 be granted.
- d. The costs of this appeal be provided for.

2. The petition in the lower court was seeking for the following reliefs:-

- a. A declaration that Gazette Notice No. 8380 of VOL. CXIX – No. 124 published on 28th August , 2017 be declared null and void ab initio to the extent that it provided that the nominees for the position of Member of County Assembly for Kakamega county in respect of ANC party were validly nominated as members of County Assembly.
- b. A declaration that under article 88 and 90 of the constitution the 2nd Respondent had no power to alter the list of members of county assembly nominated to the county assembly by ANC party by rearranging the names of the nominees.
- c. An Order quashing and /or invalidating Kenya Gazette Notice No. 3508 dated 28th August, 2017 to the extent that it specified that the nominees for the position of member of County Assembly for Kakamega County in respect of ANC party were validly nominated as members of County Assembly pursuant to Article 90 of the Constitution.
- d. Spent
- e. That an order be made that the 2nd Respondent to submit a fresh list of nominees to the 1st Respondent that is compliant with the

orders of the court issued on 27th June, 2017.

f. Any other relief and redress that the court may grant and that the petitioner's costs be borne by the 2nd Respondent.

3. The grounds of appeal as per the memorandum of appeal are:-

1. That the Hon. magistrate erred in law and fact in failing to put into consideration all material facts and evidence laid before him by the appellant before arriving at his decision.
2. That the trial magistrate erred in law by failing to find that the 2nd Respondent had correctly exercised its ultimate discretion over nomination to special seats by nominating the appellant as number one vide the consensus agreement dated 25/5/2017.
3. That the trial magistrate erred in law in holding that nomination to special seats by consensus is in conflict with the spirit and letter of the constitution.
4. That the trial magistrate erred in law and fact by interpreting and holding that the appellant, being a member of a minority clan, did not fall within the purview of a 'marginalized group' deserving a special seat.
5. That the trial magistrate erred in law by failing to consider and interrogate the first list submitted by the 2nd respondent and find that it was in full compliance with Article 117 (4), (4A) (5) (6) of the constitution, the Elections Act, 2011 and the Elections (General) Regulations 2012 and hence did not require any further amendments as alleged by the respondent.
6. The trial magistrate erred in law by failing to consider at all the Court of Appeal decision in **Commissioner of the Implementation of the Constitution Vs The Attorney General & others CA No. 351 of 2012** on the interpretation of Article 97(1)(c) upon which the appellant relied to prove that the first list that was submitted by the 2nd Respondent was compliant and did not require any amendments.
7. The trial magistrate erred in law by failing to find that the party list that was being challenged by the appellant had been impugned by both the Political Parties Disputes Tribunal (PPDT) and the High Court and by upholding and validating the list, the trial magistrate purported to sit on appeal on the decision of the PPDT, a jurisdiction he did not have.
8. The trial magistrate erred in law and fact in putting across a contradictory opinion in the final judgment contrary to his finding on the Preliminary Objection regarding the forum and in extent, the jurisdiction of the Honourable Court.
9. The trial magistrate erred in law by failing to find that the party list that was being challenged by the appellant had been impugned by both the Political Parties Disputes Tribunal (PPDT) and the High Court hence the validity of Gazette Notice No. 8380 dated 28/8/2017 had been called into question.
10. The trial magistrate erred in law and fact in holding that the minority category had already been filled by a candidate not a member of the appellant's Party which wasn't a party to the proceedings, a holding devoid of merit and in total disregard of the expression of the Elections Act and all related laws and as such prejudicial to the appellant.
11. The trial magistrate erred in law by holding that the 2nd Respondent had complied with the orders of the PPDT made on 27th July, 2017 when there was no evidential proof to confirm withdrawal of the list, reconstitution of the list, restoration of the name of the appellant as number one, resubmission of the list to the 1st Respondent and communication to the affected persons as ordered by the PPDT.
12. The trial magistrate erred in law in that he failed to exercise his discretion on award of costs judiciously and further failed to take into account the available judicial precedents on award of costs in Petition of similar nature.

B. BACKGROUND

4. The petitioner is a party member of the 2nd respondent and participated in the 2nd respondent's party primaries within Mahiakalo ward, Lurambi Constituency in Kakamega County and came second. The petitioner was dissatisfied with the outcome of the primaries and as a result filed a complaint before the party's Internal Disputes Resolution Committee (IDRC). The committee ordered a fresh nomination exercise to be carried out in respect of Mahiakalo ward or for the party to use other legal means to identify the most suitable candidate to carry the party flag. The party did not comply with the decision of its IDRC which prompted the appellant to move to the High court. The High Court ordered the party to comply with the decision of the IDRC.

5. Pursuant to the ruling of the High court, the 2nd respondent called for a meeting with all the aspirants for Member of County Assembly who had participated in the nomination process. A consensus was then reached that the appellant would forgo his quest to stand for election on the 2nd respondent's ticket, but that the party would instead give him the first slot for nomination to the county assembly as a minority on the party's nomination list. Consequently, the 2nd respondent prepared and sent to the 1st respondent the party's nomination list which had the appellant's name as the first in the list. Upon scrutinizing the list the 1st respondent found it non-compliant with the law and sent it back to the 2nd respondent. The party then changed the order of names in the list and put the appellant as number 4 in the list. The 1st respondent published the list in its website prompting the appellant to lodge a complaint to the Political Parties Disputes Tribunal (PPDT) for the 2nd respondent's list to be corrected. In its decision the PPDT directed, inter alia, that the 2nd respondent withdraws the final list of the nominees

submitted to the 1st respondent in respect of Mahiakalo ward and restore the appellant's name as number one under the category of the minority on the re-constituted party list. The 2nd respondent did not comply with the directions of the PPDT. The 1st respondent consequently nominated members of the county Assembly as per the party lists submitted to it. The appellant was not picked. The nominated members were then gazetted as required by the law. The appellant felt short-changed and thereupon filed an election petition at the chief magistrate's court.

C. FINDINGS OF THE TRIAL COURT.

6. The learned trial magistrate made a finding that the 1st respondent had no role to play in the generation of the party list by the 2nd respondent and that its role was merely supervisory. That the generation of party list is the duty of political parties as provided under section 34(6) of the Elections Act as read with Regulation 55(1) of the Elections (General Regulations), 2012. That the 1st respondent was under an obligation to ensure equality and proportional representation was achieved in the submission of party lists to the 1st respondent. That the number of seats entitled to the 2nd respondent was pegged on the number of seats it won in the general election in accordance with regulation 56 (2) of the Elections (General) Regulations and that the minority seat that the petitioner was gunning for was filled by Orange Democratic Party (ODM) thereby leaving the 2nd respondent with the gender top-up and the youth category which the appellant did qualify for nomination. Therefore that the 1st and the 2nd respondents had acted within the law.

7. Further that the final party list named the petitioner as number one under the category of minority and that he was the only nominee under that category. Therefore that there was compliance with the directions of PPDT.

8. That those nominated by the 1st respondent and subsequently gazetted as members of the County Assembly were not made parties to the election petition yet it is a cardinal rule of natural justice that a person should not be condemned unheard. That if orders sought were made against them they would be condemned unheard. That the minority category has already been filled by a candidate who is not a member of the 2nd respondent and as such the orders sought could not be granted for lack of joinder of parties. The learned magistrate consequently found that the gazette notice No. 8380 dated 28th August, 2017 in respect to the 2nd respondent's party list for Kakamega County Assembly was valid.

D. SUBMISSIONS

(a) Submissions by Advocate for appellant

9. The advocate for the appellant **Miss Khadenyi**, submitted that the role of the 1st respondent in nominations is supervisory to confirm whether the party list complies with the law. If the party list does not meet the criteria set out in the law, it should be sent back to the party. That the 2nd respondent admitted in their affidavit that the 1st respondent made recommendations to the 1st respondent. The 1st respondent therefore outstepped its mandate when it made recommendations regarding the composition of the list. The replying affidavit also indicates that the 1st respondent submitted the final list after proceedings of the PPDT. This admission is an indication that the 2nd respondent did not comply with the decision of the PPDT.

10. It was submitted that the trial magistrate erred in law by stating that nomination by consensus is contrary to the provisions of the constitution and the law. That article 159 (2) of the constitution allows for alternative dispute resolution mechanisms. Section 34(6) of the Elections Act empowers political parties to prepare party lists. The constitution of the 2nd respondent allows for alternative dispute resolution. The trial court therefore erred when it purported to disregard and review the decision of the PPDT and the High Court regarding the consensus agreement and the first list submitted after the consensus agreement.

11. Counsel submitted that the learned trial magistrate fell into error by holding that the appellant did not fall within the marginalized group deserving a special seat. That the appellant was identified by the 2nd respondent as a person deserving nomination to the County Assembly of Kakamega and the trial court fell into error when it relied on the explanation by the 1st respondent that he did not deserve to be nominated for the reason that he did not belong to the special groups deserving such nomination. The appellant relied on the authority of **Lydia Mathia Vs Naisula Lesuuda & Another (2013) eKLR** which cited with approval the case of **Rangal Lemeiguran Vs AG (2006) eKLR** in which the High Court listed the people who qualify to be viewed as special interest as ethnic minorities, the youth, the blind, the deaf and the physically disabled.

12. It was submitted that the trial magistrate erred in law by failing to find that the party list that was being challenged by the appellant had been impugned by the PPDT and the High Court and by upholding and validating the list, the trial magistrate purported to sit on the appeal of the decision of the PPDT. The tribunal had ordered the withdrawal of the final list and therefore the trial magistrate did not have jurisdiction to review the decision of the tribunal and come to a contrary opinion. The appellant relied on the court of Appeal decision in **Commission of the Implementation of the Constitution Vs The Attorney General & Others CA No. 351 of 2012** on the interpretation of Article 97(1) (c) to prove that the first list that was submitted by the 2nd respondent was compliant and did not require any amendments.

13. Counsel submitted that the trial magistrate erred in law by holding that the 2nd respondent had complied with the orders of the PPDT when there was no evidential proof to confirm withdrawal of the list, reconstitution of the list, restoration of the name of the appellant as number one, resubmission of the list to the 1st respondent and communication to the affected persons as ordered by PPDT.

(b) Submissions by advocates for 1st respondent

14. The advocate for the 1st respondent, **Mr. Rono** instructed by the firm of **Sing'oei, Murkomen & Sigei Advocates**, submitted that the role of the 1st respondent in party nominations was limited to scrutinizing the lists so submitted to ensure that they complied with the law

governing submission of party lists . That the 1st respondent rejected an initial list sent by the 2nd respondent for want of compliance. However that it was satisfied that the second respondent's final list as resubmitted was in compliance with the constitution of Kenya, 2010, the Independent Electoral and Boundaries commission Act (No. 9 of 201), the Elections Act (No. 24) of 2011, the Elections (General) Regulations 2012, the Elections (Party Primaries and Party Lists) Regulations, 2017 and the 2nd respondent's party constitution.

15. It was further submitted that the consensus agreement only bound the 2nd respondent and the appellant and not the 1st respondent or indeed the court. That where the law is clear regarding nomination to specific seats and specific categories then such consensus agreements are of little value.

16. Counsel submitted that the 1st respondent was tasked with ensuring that the nominees to represent the special interest groups in the assembly were equally distributed based on the party strength after the elections of 8th August, 2017. Further that it was its role to ensure that there was compliance with the two – thirds gender rule. That in exercise of this mandate, the 1st respondent nominated candidates in the party lists based on their party strength and in order of priority listed.

17. In this case therefore, whereas the appellant was listed as minority nominee number one in order of priority with respect to the 2nd respondent's list, the ethnic minority seat fell to Orange Democratic Movement Party. The allocation is done on the basis of proportional representation and factors in the categories of persons representing special interest groups from all the parties. That in this case the quota for the 2nd respondent was exhausted before the appellant's name was reached. The appellant's submissions that the trial court failed to consider that the appellant belonged to a marginalized group is misleading.

18. Counsel submitted that the petition before the lower court was an election petition arising from the election of the members of the County Assembly of Kakamega. That the court was properly clothed with the jurisdiction to hear and determine the matter before it. Further that the law with respect to an election case where a member has been gazetted is as was held in the case of *Rosemary Njeri Nyambura Vs independent Electoral & Boundaries Commission & 2 Others(2015) eKLR* that it has to be through an election in petition.

19. It was further submitted that the dispute before the lower court was distinct from the previous proceedings. Once the various nominees for party lists were gazetted by the 1st respondent, the jurisdiction to handle any disputes arising there from vests in the magistrate's court designated by the Chief Justice. The petition in the lower court was founded on a new set of facts and legal dispensation and therefore the lower court did not sit on appeal of any decision as alleged.

20. Counsel submitted that failure to enjoin the individual nominees who stood to be affected by the proceedings before the lower court was a grave omission and rendered the petition defective as it deprived the concerned the right to be heard.

(c) Submissions by advocates for 2nd respondent

21. The advocate for the 2nd respondent, **Mr. Ngome**, instructed by the firm of **Mukele Ngacho & Company Advocates**, submitted that regulation 54 and 55 of the Elections (General) Regulations clearly underscore the role of the 1st respondent in party lists. That the 1st respondent undertook due diligence as required by the law and identified the areas where the second respondent's party list had not complied with law and returned the list to the 2nd respondent. That the 2nd respondent rectified the errors identified by the 1st respondent and resubmitted the list to the 1st respondent which confirmed compliance and proceeded to publish the list in the local dailies.

22. It was further submitted that the initial party list submitted by the 2nd respondent was not the final list as the appellant would want the court to believe but that the list was subject to checks and balances by the 1st respondent.

23. Counsel submitted that the judgment by the PPDT relates to the 2nd respondent's party list for Mahiakalo ward in Lurambi Constituency. That the appellant was the only nominee from Mahiakalo ward on the 2nd respondent's party list for the entire Kakamega County. The decision of PPDT was specific that the appellant be restored as number one under the minority category.

The advocates submitted that the appeal is devoid of merit and should be dismissed with costs.

E. THE APPLICABLE LEGAL LEGISLATION

24. The role of the 1st respondent in nominations of special interest seats is provided for under article 90 of the constitution that states as follows:

“(1) Elections for the seats in Parliament provided for under Article 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 clauses –

(1) and shall ensure that –

(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause(1) , within the

time prescribed by national legislation;

(b) except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed ; and

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

25. Article 177 of the constitution states as follows:-

(1) A county assembly consists of –

(a) Members elected by the registered voters of the wards, each ward constituting a single member constituency , on the same day as general election of Members of Parliament, being the second Tuesday in August, in every fifth years;

(b) the number of special seat members necessary to ensure that no more than two – thirds of the membership of the assembly are of the same gender;

(c) the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament ; and

(d) The speaker, who is an ex officio member.

(2). The members contemplated in clause (1) (b) and (c) shall , in each case , be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.

(3) The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward.

(4) A county assembly is elected for a term of five years.”

26. Section 34 of Elections Act, 2011 states as follows:

“ (1) the election of members for the National Assembly, Senate and County assemblies for party list seats specified under Article 97 (1) (c) and 98(1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97 (1) (a) and (b) shall submit to the commission a party list in accordance with Article 97(1) (c) of the constitution.

(3) A political party which nominates a candidate for election under Article 98(1) (a) shall submit to the commission a party list in accordance with Article 98(1) (b) and (c) of the constitution.

(4) A political party which nominates a candidate for election under Article 177(1) (a) shall submit to the commission a party list in accordance with Article 177(1) (b) and (c) of the constitution.

(4A) In the case of a person nominated pursuant to Article 177(1) (c) of the constitution, the party list shall include a certification in the manner prescribed by the commission.

(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.

(6) 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.

(6A) 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.

27. Section 36 states as follows;

“ (1) A party list submitted by a political party under –

(a) Article 97 (10) (c) of the Constitution shall include twelve candidates;

(b) Article 98(1) (b) of the Constitution shall include sixteen candidates;

(c) Article 98(1) (c) of the constitution shall include two candidates;

(d) Article 98(1) (d) of the Constitution shall include two candidates;

(e) Article 177(1) (b) of the constitution shall include a list of the number of candidates reflecting the number of wards in the county; (f) Article 177 (1) (c) of the constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group.

(2) A party list submitted under sub section (1) (a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.

(3) The party list referred to under subsection (1) (f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.

(4) Within thirty days after the declaration of the election results, the commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

(5) The allocation of seats by the commission under Article 97(1)(c) of the constitution will be proportional to the number of seats won by the party under Article 97(1) (a) and (b) of the constitution.

(6) The allocation of seats by the commission under Article 98(1) (b), (c) and (d) of the constitution shall be proportional to the number of seats won by the party under Article 98(1) (a) of the constitution.

(7) For purposes of Article 177 (1) (b) of the constitution, the commission shall draw from the list under subsection (1) (e), such number of special seat members in the order given by the party, necessary to ensure that no more than two – thirds of the membership of the assembly are of the same gender.

(8) For purposes of Article 177(1) (c) of the constitution, the commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.

(9) The allocation of seats by the commission under Article 177(1) (b) and (c) of the constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the constitution.”

28. Other provisions in furtherance of the provisions of the constitution and the Elections Act are to be found in Regulations 54-56 of the Elections (General) Regulations Act No. 24 of 2011.

F. ANALYSIS AND DETERMINATION

Section 75 of the Elections Act, 2011 provides that an appeal as to the validity of the election of a member of a county assembly lies to the High Court only on matters of law. In **Hon. Mohamed Abdi Mohamed Vs Ahmed Abdullahi Mohamad & 2 others, Nairobi Court of Appeal No. 2 of 2018 (2018) eKLR**, the court held that :

“ We are quite clear in our minds that in electoral matters there is no such thing as “ questions of mixed law and fact” and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent. We reiterate what this Court stated in **M’ IRUNGU Vs R (1983) KLR 455 at p 466;**

“ In conclusion, we would agree with the views expressed in the English case **Martin Vs Glyneed Distributors Ltd** that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law ... unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision *is bad in law*. *We have resisted the temptation,*” (Emphasis supplied).

I will thereby confine myself within the questions of law raised in the appeal.

29. The questions for determination before the court are:

1. Whether the 1st respondent outstepped its mandate in party nominations;
2. Whether nomination by consensus is in conflict with the law;
3. Whether the appellant fell within a marginalized group;
4. Whether there was compliance with the decision of PPDT;
5. Whether the trial court should have enforced the decision of PPDT;
6. Whether nominees for ANC party were validly nominated and
7. Whether there was lack of joinder of parties.

Whether the 1st respondent outstepped its mandate in party nominations:-

30. It was submitted that the 1st respondent made recommendations to the 2nd respondent regarding composition of the party list and that in doing so the 1st respondent outstepped its mandate. Section 34(6) of the Elections Act, 2011 requires that the party lists submitted to the commission to be in accordance with the constitution or nomination rules of the political party concerned.

Section (6 A) requires the commission upon receipt of the party list from a political party to review the list to ensure compliance with the prescribed regulations and issue the political party with a certificate of compliance or require the political party to amend the party list to ensure such compliance failing which the commission shall reject the list.

31. Regulation 55 of the Elections (General Regulations) 2011 provides that:-

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

(2) The Commission may reject any party list that does not comply with the requirements of the Constitution , the Act or these Regulations.

(3) The political party whose party list or nominee has been rejected by the commission under sub regulation (2) shall resubmit the party list or nominee within such period as the commission may specify.

(4). A political party submitting a party list under regulation 54 shall submit a declaration to the effect that the political party has complied with its rules relating to the nomination of the names contained in the list.”

32. It is then clear from the foregoing provisions that the responsibility of identifying persons for nomination to the County Assembly falls squarely on the hands of political parties. The role of IEBC is supervisory to ensure that the list sent to it by political parties complies with the provisions of the constitution, the Elections Act, and the Elections Regulations. Where a list sent to IEBC does not comply with the law, IEBC can send the list back to the party requiring it to rectify any anomaly. This was stressed by the Supreme Court in the case of **Moses Mwigigi and 14 others Vs independent Electoral and Boundaries Commission & 5 Others (2016) eKLR**, where the court held that :-

“(93) The foregoing provisions place upon the IEBC the duty to ensure that the party lists submitted comply with the relevant provisions of the law, as set out earlier on. IEBC is expressly designated as the regulatory body to ensure compliance with the law. The constitution, by Article 88(4) (e), mandates the IEBC to intervene and settle disputes relating to, or arising from nominations. The constitution, at the same time, denies the IEBC the competence to adjudicate election disputes, and disputes subsequent to the declaration of election results.

(94) 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 (paragraph 50):

“ Section 34 (6) of the Elections 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 list, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria.”

(95) The effect is that, the process of preparation of the party list is an internal affair of the political party, which ought to proceed in accordance with the national constitution, the political party constitution, and the nomination rules as prescribed under Regulation 55.

(96) A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the

requisite steps to finalize the “ elections” for these special seats. In the event of non- compliance by a political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.”

33. It was submitted by the advocate for the appellant that the first list that was submitted by the 2nd respondent was complaint with the law. The list was filed with the petition . A look at the list clearly shows that it was not complaint. For instance; the first three names in the list are all of one gender, male, yet the law required the list to alternate between male and female. The list was thereby not complaint with the law.

34. The fact that the 1st respondent sent back the first list with a request for them to comply with the law cannot be construed as interference with the nomination process. The 1st respondent was within its mandate to require that the 2nd respondent complies with the law. There was no evidence that the 1st respondent demanded the change of the name of the appellant to number 4 in the list. This was done by the 2nd respondent in the re- submitted list. I therefore hold that the 1st respondent did not outstep its mandate in the nomination process.

Whether nomination by consensus is contrary to law:-

35. The trial magistrate in his judgment held that:-

“It is my considered opinion, the consensus agreement which generated the first party list was designed to use the special interest seats as trade in for pacifying loses in the competitive nomination process with the effect of depriving those who are really deserving these special seats because of their inability to compete fairly in the ordinary political process. To allow nomination based on consensus by the aspirants would certainly defeat the letter and spirit of the constitution to accommodate special interest groups.... the upshot of the foregoing is that the 1st respondent cannot be faulted for failing to uphold the letter and spirit of the consensus agreement by party aspirants , which generated the first party list submitted by the 2nd respondent , as such consideration is not envisaged or recognized by the relevant provisions of the law governing party nominations.”

36. It was submitted that the trial court disregarded the consensus agreement between the appellant and the 2nd respondent by holding that it was in conflict with the spirit and letter of the constitution. Article 159(2) of the constitution of Kenya 2010 requires courts and tribunals when exercising judicial authority to be guided by, inter alia, the principle of alternative forms of dispute resolution including reconciliation, mediation and arbitration. It was submitted that the constitution of the 2nd respondent provides for alternative dispute resolution mechanism. The trial magistrate did not interrogate the constitution of the 2nd respondent to find out whether that method of dispute resolution was provided for or not. The magistrate thereby erred in holding that nomination of candidates by political parties through consensus was illegal. It is political parties who have the final say as who is nominated to County Assemblies through the lists forwarded to IEBC. How political parties arrive at the names to be forwarded to IEBC is their own mandate and not that of IEBC. If the decision is reached through consensus, it is not the business of IEBC as long as the list complies with party’s rules and the relevant law. This proposition was stressed by the Court of Appeal in **Linet Kemunto Nyakeriga and another Vs Ben Njoroge & 2 others (2014) eKLR** where the court held that :-

“It follows that it is the responsibility of the parties to choose their preferred candidate and rank them in order of priority of preference. The seats won by each party are filled by candidates in the order they appear on the party’s respective list. The definition of “ party list” under section 2 of the Elections Act suggests ownership of the list by the political party that has prepared it. The practice, indeed the law, in jurisdiction’s with a closed list system is that the power over who gets the reserved seats reside with the parties themselves and no other authority.”

There was no evidence before the magistrate from which he could reach at a finding that the nomination by consensus was outside the law.

Whether the appellant fell within purview of marginalized group:-

37. There is nowhere in the judgment that the trial magistrate stated that the appellant did not fall within the purview of a marginalized group. The holding of magistrate was that the first three positions were taken up by other marginalized groups- persons with disabilities and the youth- ahead of the appellant who was placed in position four in the priority list submitted to the 1st respondent by the 2nd respondent. Section 34 (5) of the Elections Act 2011 requires the submitted party list to be in order of priority.

37. The 1st respondent did not reject the name of the appellant on the basis that he did not represent a minority. The fact that they retained his name in the party list meant that they recognized him as representing a minority. The appellant thereby fell in the purview of a minority. The trial magistrate justified the placement of the appellant’s name as number 4 in the list so as accommodate more deserving special interest groups – the youth and persons with disabilities. However it is the appellant’s party which changed his name to number 4 in the list and not the 1st respondent. The 1st respondent was not to blame for that fiasco.

Whether there was compliance with the decision of PPDT:

38. It was submitted by the advocate for the appellant that the trial magistrate reviewed the decision of the PPDT in holding that there was compliance with the order of PPDT when there was no evidence of withdrawal of the list as ordered by PPDT.

39. The consensus agreement stated as follows:

“ 4. That Alexander Khamasi Mulimi shall be nominated to the party list Kakamega County Assembly under the minority category

number one.”

The party then proceeded to send a party list of nominees to the 1st respondent wherein the name of the appellant was number one in the list. The 1st respondent published the list in its website. Later the 1st respondent sent back the list to the 2nd respondent after which the name of the appellant was ranked number 4 in the party list. That is the final party list that the 1st respondent published in its website. The appellant then filed a complainant with the PPDT seeking that the list of ANC party be rectified so that he could remain number one as before. The tribunal issued the following orders:

(a) The respondent be and is hereby directed to withdraw the final list of nominees submitted to the Independent Electoral and Boundaries Commission in respect of Mahiakalo ward, Lurambi Constituency Kakamega County.

(b) The respondent shall re – consider the composition of the party list in compliant with section 7(2) and (b) of the County Governments Act,2011 within 48 hours from the delivery of this judgment.

(c) The respondent is further directed to restore the complainant’s name as number one under the category of “ minority “ on the re-constituted party list.

(d).....

40. On the question as to whether there was compliance with the ruling of the tribunal, the trial magistrate held the following:-

“Considering the foregoing, first, the decision by PPDT addressed issues of party primaries and having rendered a decision this court cannot relitigate on the issue otherwise the court will be sitting on appeal to the decision of PPDT. Secondly, a perusal of the final party list reveal that the petitioner’s name appear as number one under the category of minority and indeed is the only nominee under the category. It is therefore clear that there was compliance with the directions of PPDT.”

41. The dispute that was before the tribunal was for the name of the appellant to be restored as priority number one in the submitted party list and as published in the initial website of the 1st respondent. The final list placed the appellant as number 4 in the published list. The trial magistrate conceded to this fact though at the same time held that the appellant’s name appeared as number one under the category of minority. There was no second list before the trial court that indicated anything of the sort. The trial magistrate indicated that the appellant was the only nominee under the minority category yet there were other nominees in the list. The operative words used by the tribunal was to “restore the complainant’s name as number one ..”. The restoration was in reference to the initial list where the appellant’s name was priority number one in the submitted party list and in the initial published list. The orders were specific that the appellant be restored as number one in the published list. This was not complied with. I therefore hold that the trial magistrate erred in finding that there was compliance with the order of the Political Parties Disputes Tribunal. There cannot have been compliance when the list was not withdrawn and continued to place the appellant as number 4 in the party priority list.

Whether the trial court should have enforced the decision of PPDT:-

41. It has been held by our courts that an election is not a one single event but a process. Party nominations is part of the electoral process. Article 92 of the constitution empowers parliament to enact legislation to provide for, inter alia, the regulation of and the role and functions of political parties. Parliament as a result passed the Political Parties Act No. 11 of 2011. Section 39 of the said Act established the Political Parties Disputes Tribunal whose mandate is to determine, inter alia, disputes between a member of a political party and a political party. Section 41(3) provides that the decision of the Tribunal shall be enforced in the same manner as a decision of a magistrate’s court.

42. Where the law provides a procedure of dispute resolution, parties are bound to follow that process. In **Idris Abdi Abdullahi vs Ahmed Bashaf & 2 others, Nairobi EP Appeal No. 19 of 2018**, the Court of Appeal held that:

“ It is trite that where a particular mechanism for resolution of a dispute has been prescribed , particularly by the constitution, parties are not at liberty to ignore those mechanism, for they are not established in vain. While we agree that an election is a process rather than an event, where the law and in particular the constitution has deliberately provided a dispute resolution mechanism for a particular stage of the election , such mechanism should be strictly resorted to unless it can be demonstrated that it does not offer a meaningful remedy.

In **Hon. Mohamed Abdi Mahamud Vs Ahmed Abdullahi Mohamad (2018) eKLR** the Court of Appeal stated that:

‘ ... there is a substantial body of law that is quite categorical and authoritative that election is a process and not an event and that being so, the High Court as an election court, is possessed of jurisdiction to enquire into matters nomination ..

Suffice to say that nominations or determinations of qualification to run are part of the “ continuum” consisting in “ a plurality of stages” that make up an election as expressed by the supreme court in Advisory opinion No. 2 of 2012 *In the Matter of the Gender Representation in the National Assembly and the Senate.*

It is my considered view that an election court is not precluded from enquiring whether a party which ignored to comply with the orders of such a tribunal as then PPDT can be said to have validly nominated its candidates.

43. There was no allegation that the appellant was unqualified to be nominated as a member of County Assembly. There was no allegation by

IEBC that the position he had been nominated for, for minority was not recognized in law or that he did not qualify for it. The appellant forgo the contest for Maliakalo ward on promise that he would be offered the first slot in the party's list of nominees for County Assembly. The party benefited in that it did not conduct repeat elections as ordered by the Internal Disputes Resolution Committee which order was confirmed by the High Court. It was obvious that in ranking the appellant in position number one in the party priority list gave him a higher chance of being nominated than the eventual rank of position number 4. The appellant had legitimate expectation of being appointed member of County Assembly by being ranked number one in the party's preference list. I hold that the 2nd respondent was bound by the consensus agreement unless it could be proved that it was illegal. There was no such a contention.

44. The tribunal ordered the 2nd respondent to restore the name of the appellant as number one in the party's priority list that was sent to the 1st respondent. The party did not appeal the decision of the tribunal neither did it comply with the decision of the tribunal. The order of the tribunal was part of the electoral process. As a political party and a public entity, the 2nd respondent was under duty to uphold the rule of law and promote constitutionalism. It could not do so when it acted in utter contempt of a legally binding order of a tribunal. It was meaningless for the parties to have followed the laid down procedure only for the 2nd respondent to ignore the outcome.

It could not be allowed to benefit from its own contempt. It is therefore my considered view that the nominees for ANC party were not validly nominated by their party as the 2nd respondent failed to comply with the order of the PPDT. The trial court should in the circumstances have enforced the decision of the tribunal, subject to the proper joinder of parties.

Whether there was lack of joinder of parties:-

45. The appellant was seeking for orders to quash and or invalidate the gazette of nominees in respect of ANC party. The trial magistrate held that the gazetted persons were not enjoined as parties in the petition yet if orders were made against them they would lose the positions that they are holding. The nominees were apparently sworn in after the petition had been filed.

46. It is a cardinal rule of natural justice that a person should not be condemned unheard. The appellant did not enjoin the gazetted persons as co-respondents in the petition. After they were sworn in, he did not make an application to amend the petition to enjoin them as parties in the case. I agree with the trial court that the appellant ought to have enjoined the individual nominees who stood to be affected by the proceedings before the lower court. Failure to do so was a grave omission that rendered the petition defective. It deprived those affected of the right to be heard and offended the rule of natural justice. In **Aboub Ali Vs Independent Electoral and Boundaries Commission & 2 others (2013) eKLR**, Kimaru J held that:-

“The constitution, the Elections Act and the Election Petition Rules require the successful candidate be made a party to the petition because such candidate is the primary target of such election petition. He is the one who will be the first person to suffer the consequences of the nullification of the particular election result. Where the petitioner does not include the successful candidate as a party in the petition such petition lacks legal substratum and is liable to be struck out.”

In **Rosemary Njeri Nyambura Vs Independence Electoral and Boundaries Commission & 2 Others (2015) eKLR**, it was held that:-

“... Once the interested party was gazetted as a member of Kaimbu County Assembly, she could only be removed by way of an election petition lodged in accordance with the provisions of section 75(1A) of the Elections Act and Rule 6(1) of the Elections(Parliamentary and County Elections) Petition Rules , 2013.”

In the foregoing the orders sought, though merited, could not issue for want of joinder of parties. The appeal thereby fails.

Costs

47. The trial magistrate capped the costs for the respondents at Kshs. 500,000/-, subject to taxation .

The appellant's advocate submitted that the awarded costs were unmerited, excessive and punitive. The advocate cited several authorities dwelling on the rationale for payment of costs. In one of the cited authorities, **Martha Wangari Karua Vs Independent Electoral and Boundaries Commission & 3 Others (2018) eKLR**, the Court of Appeal stated that:-

“ It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice.”

48. The advocate also cited 7 authorities from the lower courts where costs were awarded. In four of them, costs were capped at Kshs. 500,000/= while in the fifth case costs were capped at Kshs.300,000/=. In one other case costs of Ksh. 100,000/= were awarded. In the last case the parties were ordered to bear their own costs. The advocates for the 1st respondent submitted that the capped costs at Kshs. 500,000/= was a reasonable amount.

49. Costs are at the discretion of the trial court. An appellate court cannot interfere with that discretion unless it is demonstrated that the trial court departed from the principles on award of costs which are that the court failed to take into account relevant factors or took into account irrelevant factors and thereby arrived at a manifestly excessive or low award – see **Kohli Vs Popatlal (1964) EA 219**. In this case it was not demonstrated that the trial magistrate departed from these principles.

50. I have considered that most of the magistrates in the lower courts have been capping costs for election petitions at Kshs.500,000/=. I find

that to be a reasonable amount. The appeal on costs is therefore unmerited.

In the foregoing the appeal herein is dismissed in its entirety with costs to the 1st and 2nd respondents. The costs for each of the respondents in this appeal are capped at Kshs. 150,000/=. The same to be taxed by the Deputy Registrar.

Delivered, dated and signed in open court at Kakamega this 15th day of August, 2018.

J. NJAGI

JUDGE

In the presence of:

.....for appellant

.....for 1st respondent

.....for 2nd respondent

GeorgeCourt assistant.

Parties:

Appellantpresent

1st respondentpresent

2nd respondentpresent