



IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION APPEAL NO. 4 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

MUSA JUMAAPPELLANT

AND

CLERK KISII COUNTY ASSEMBLY.....1ST RESPONDENT

SPEAKER KISII COUNTY ASSEMBLY.....2ND RESPONDENT

KISII COUNTY ASSEMBLY.....4TH RESPONDENT

MOKUMI EDWARD ANTHONY.....5TH RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....6TH RESPONDENT

JUBILEE PARTY.....7TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.S.N. Makila, SRM dated 23rd February 2018 at the Chief Magistrates Court at Kisii in Election Petition No.10 of 2017)

JUDGMENT

1. This is an appeal arising from dismissal of the appellant's election petition by the subordinate court. The appellant contested the nomination of the 5th respondent ("Mokumi") as the representative of the Jubilee Party ("Jubilee") in the Kisii County Assembly under the Marginalized Category, published in Gazette Notice No. 8380 dated 28th August 2017. The appellant had contended before the trial court that the process used to nominate Mokumi was unprocedural since he was not a member of Jubilee and he was neither nominated nor his name forwarded by the Jubilee leadership in Kisii County. He also complained that Mokumi was not a voter in Kisii County and did not represent any special interest in the County.

2. Mokumi and the 6th respondent ("the IEBC") denied the appellant's claim in their separate responses. Mokumi maintained that he was a Jubilee member and a registered voter and that he was procedurally nominated by the party. He stated that his name was submitted by Jubilee to the IEBC and that thereafter, IEBC published the names of persons nominated by parties in two mainstream national newspapers. Mokumi contended that since the appellant did not complain to the party nor follow the established dispute resolution mechanism to object to the nomination, it was too late for the appellant to contest the nomination.

3. The case by IEBC was that it fulfilled its mandate under **Article 90** of the Constitution in accordance with the Constitution, the **Elections Act, 2011** and the **Election (General) Regulations, 2012**. IEBC stated that Jubilee submitted the names of 7 nominees; Mokumi representing the marginalized on the basis of ethnicity, the appellant and Wambui Wanjiku Joyce under the minority category, Anyieni Esther Okenyuri and Rambeka Evans Nyaoga under the Youth Category and Valencia Bosibori Monumbe and Samwel Gatiro Ngare representing persons with disability. Following the General Elections, IEBC gazetted only one out of the seven nominees from Jubilee in Kisii County as the party won only 9 seats, entitling it to one slot under **section 36(9)** of the **Elections Act, 2011**. Since Mokumi was first on the priority list, he was selected and therefore deemed as duly elected for that position.

4. On the issue germane to this appeal, the trial magistrate analysed the evidence and found as fact that the party list submitted to the IEBC by Jubilee showed that Mokumi's name was first and the appellant was third on the Jubilee party list and that IEBC published the list in the newspapers and invited any aggrieved members of the public to file their complaints before the Political Parties Tribunal. The trial magistrate

further found as a fact that the appellant and Mokumi were members of Jubilee and that Mokumi was properly nominated.

5. In the Memorandum of Appeal dated 7th March 2018, the appellant challenged the judgment of the trial court on several grounds. Among them was that the trial magistrate erred in not finding that Mokumi was not chosen or selected by the Kisii Jubilee leadership. That the trial magistrate erred in law and fact by not finding that two party lists were submitted, with one submitted by the Jubilee leadership in Kisii County through Christopher Obure and another submitted by the Jubilee Secretariat in Nairobi contrary to the rules governing party list nominations. That the learned magistrate erred in law and in fact in not finding that Jubilee nomination rules were only valid where one was a registered voter and not otherwise.

6. Only the appellant, Mokumi and the IEBC filed submissions in this appeal as the other respondent did not participate in the proceedings before the trial court and in the appeal.

7. It is important to appreciate the scope of the High Court's intervention in election appeals as a preliminary issue. **Section 75** of the **Elections Act, 2011** which governs the jurisdiction of the Magistrates Court and the High Court in respect of an election of a member of the county assembly provides as follows;

75.(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.

(1A) A question as to the validity of the election of a member 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. [Emphasis mine]

8. A reading of the provisions I have set out show that the appellate jurisdiction of this court in election matters is circumscribed by reference to matters of law thus the iteration that the trial magistrate erred in law and fact does not add to this court's jurisdiction.

9. A similar provision limiting the appellate jurisdiction of the Court of Appeal in election matters is to be found at **section 85A** of the **Elections Act, 2011**. The nature and scope of the meaning of "matter of law" has been the subject of determination by the Supreme Court. In the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, S.C. Petition 2B of 2014** at paragraphs 81-82, the Court stated as follows;

[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase 'matters of law only', means a question or an issue involving:

(a) the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

(b) the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

(c) the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on 'no evidence', or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were 'so perverse', or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.

[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative

value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand. [Emphasis mine]

10. In the case of **John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR**, the Court of Appeal that “matters of law” means:

[T]he interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.” [Emphasis]

11. Before I deal with the gravamen of this appeal, I will dispose of two issues. First, the issue whether the Mokumi is a member of Jubilee is a question of fact and the trial magistrate came to the conclusion that he was a member of the party. I do not find any reason to depart from that finding. Second, the trial magistrate correctly decided Mokumi's eligibility by holding that there is no requirement that the nominee be a registered voter in the place they are nominated. **Article 193** of the Constitution which deals with qualifications for election as member of county assembly provides, in part, as follows;

193. (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least five hundred registered voters in the ward concerned. [Emphasis mine]

12. Although the appellant has raised several issues for determination, in my view, the main issue for determination is whether the trial magistrate erred in finding that the Gazette Notice 8380 was valid and that Mokumi was duly nominated as a member of the County Assembly of Kisii under the category of marginalized group.

13. The appellant's case before this court and the subordinate court is that he ought to have been nominated in place of Mokumi. The appellant relied on the affidavit of Christopher Obure, the Chairman of Jubilee in Kisii County, sworn on 9th May 2017 in which he deponed that Jubilee leadership in Kisii, by a letter dated 23rd June 2017, included the appellant's name as the second nominee under the category of special interests in its party list but did not include Mokumi's name. When the IEBC published the party lists in the mainstream media, he wrote a letter dated 26th July 2017 to the Jubilee Executive Director in which he stated:

The Jubilee Leadership in Kisii County is surprised to see the name of Mokumi Edmond Anthony among the names proposed under the category of Marginalised Category-Ethnicity. We do not know the person. His name was not in the list of names submitted to you. We request you to delete the name.

14. Salome Oyugi, the IEBC Manager Political Parties and Campaign Finance, deponed that the Jubilee Secretariat submitted its party list and after reviewing the list as directed by IEBC, Jubilee re-submitted a fresh list by its letter dated 12th July 2017. In the re-submitted list, the Mokumi was listed first on the list under the marginalised Category – Ethnicity while the appellant was placed third on the list under the minority category.

15. The facts as I have set out were not disputed and the legal question is whether the Mokumi was properly nominated. It is clear that the list that was sent to IEBC was from the Jubilee Secretariat. The letters and list sent by Christopher Obure and relied on by the appellant were addressed to the Jubilee Secretariat and not to IEBC hence IEBC cannot be implicated in any breach for failing to comply or give effect to a list that was sent by the Kisii County Jubilee branch.

16. Distilled to its essence, the appellant's complaint is that he ought to have been on the Jubilee party list in place of Mokumi. This was a party matter and that is why IEBC invited aggrieved persons to raise any dispute before the Political Parties Tribunal which is the forum for resolution of such disputes. In **National Gender and Equality Commission v Independent Electoral and Boundaries Commission & Another NRB HC No. 147 of 2013 [2013] eKLR**, the Court delineated the role of the political party and the IEBC in preparing party lists to represent special interests. It observed that:

While the parties have submitted at length on the need to define the terms such as “special interest” to give clarity to the process of nomination, we are of the view that it is not necessary to do so in this case. The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC. The IEBC is required to scrutinize the lists forwarded to it to ensure that the lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists.”

17. **Article 90** of the **Constitution** obliges IEBC to conduct and supervise the party election process for the special seats on the basis of proportional representation through nomination of candidates by political parties by use of party lists. The manner of compiling the party lists is clearly set out in **Regulations 54, 55, 56** of the **Election (General) Regulations, 2012** and the evidence before the trial court was that IEBC directed Jubilee to alter its list to comply with Constitutional and legal requirements before it was published.

18. The complaint by the appellant that he was not chosen to represent the party was a matter that was within the province of the party. Again, in **National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another (Supra)**, the Court held that:

Article 90(2) does not deal with elections leading to the constitution of party lists nor concern itself with the manner in which parties come up with the names on the lists. How the election of persons on the list is carried out is a matter entirely within the mandate of the respective political parties.

19. After Jubilee had presented its list, which complied with the Constitution and the law, the IEBC could not go beyond the party list to nominate the appellant as suggested by him. This position was affirmed in **Moses Mwicigi & 14 Others v IEBC & 5 Others [2016] eKLR** where the Supreme Court held that:

[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.....

20. For the reasons I have outlined above, I find that the 5th respondent was properly nominated and that the 6th respondent complied with the Constitution and the law in gazetting the 5th respondent as the duly nominated member of the County Assembly of Kisii.

21. The appeal is dismissed. The appellant shall pay costs to the 5th and 6th respondents which I assess at Kshs. 50,000/- for each respondent.

DATED and DELIVERED at KISII this 1st day of August 2018.

D.S. MAJANJA

JUDGE

Mr Sagwe instructed by S. M. Sagwe and Company Advocates for the appellant.

Mr Kaburi instructed by Kaburi Henry and Company Advocates for the 5th respondent.

Mr Kubebea instructed by Mukele Moni and Company Advocates for the 6th respondent.