



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
ELECTION PETITION APPEAL NO.74 OF 2017

OSCAR LORE OTIENO.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT (ODM).....1ST RESPONDENT

JARED OKOTH OKODE..... 2ND RESPONDENT

JUDGMENT

The Appellant, Oscar Lore Otieno and the 2nd Respondent, Jared Okoth Okode were candidates in the party primary nomination held by the 1st Respondent, Orange Democratic Movement political party on 30th April 2017 in respect for the Member of County Assembly seat for Mathare North Ward of Ruaraka Constituency in Nairobi County. According to the Appellant, he won the nomination exercise and was issued with a provisional certificate by the Returning Officer, one Abraham Oyugi Dullah after the completion of tallying. The 2nd Respondent, on the other hand, appeared to have also been declared as the winner of the nomination exercise. One Abdalla Onyango Oyugi lodged a dispute before 1st Respondent's Special County Appeals Tribunal challenging the decision that declared the 2nd Respondent as the winner of the nomination exercise. In a ruling delivered on 6th May 2017, the Party's Internal Dispute Resolution Mechanism (IDRM) dismissed the complaint. It directed that the nomination certificate be issued to the 2nd Respondent. Interestingly, the Appellant in this appeal was not a party in the said dispute.

Be it as it may, when the Appellant discovered that the 2nd Respondent had been issued with the final nomination certificate by the 1st Respondent, he lodged a complaint before the Political Parties Disputes Tribunal (PPDT). The Appellant alleged that he was unfairly denied the final nomination certificate by the 1st Respondent yet he was the one who had been declared the winner in the said nomination exercise. The Appellant alleged, *inter alia*, that his certificate was destroyed by the 2nd Respondent. He sought the PPDT's declaration that he was the actual winner of the nomination exercise. The 2nd Respondent opposed the complaint. He alleged that the Appellant had secured the nomination certificate after he had intimidated the Returning Officer. In paragraph 12 of its judgment, the Tribunal had this to say:

“We also take note all parties agree that the Returning Officer was Abraham Oyugi Dollah and that he was the one to announce the results and declare the winner. In this instant, the Returning Officer submission is that he was waylaid and forced to announce the Complainant as the winner. Further that according to the tallied results the 2nd Respondent had emerged the winner having garnered 1245 votes. We also take into account that the Complainant despite

claiming that he won in the elections did not provide any evidence to support this averments.”

In paragraph 14, the Tribunal stated that:

“From the guideline, and submissions of parties we find that, the declaration that the Complainant was the winner and nominee for Mathare North was done unprocedurally and in total contravention of the party’s rules and regulation. As such we are guided by the Returning Officers own pronouncement that the 2nd Respondent was the duly nominated candidate for Mathare North Constituency having garnered 1245 votes against the Complainants 1024 votes.”

The Appellant was aggrieved by this decision. He filed an appeal to this court. In his memorandum of appeal, the Appellant raised several grounds of appeal challenging the decision of the Tribunal. The Appellant was of the view that the Tribunal did not properly evaluate the evidence placed before it which pointed to the fact that the Appellant had been nominated in the said primaries after garnering the most votes as compared with the votes obtained by the 2nd Respondent. The Appellant took issue with the fact that the Tribunal had given undue weight to the allegation made by the Returning Officer that he had been intimidated into issuing the first provisional nomination certificate to the Appellant. In the Appellant’s view, this allegation was not established to the required standard of the law. In the premises therefore, the Appellant urged the court to allow the appeal and set aside the decision of the Tribunal confirming the 2nd Respondent as the 1st Respondent’s nominee for MCA seat for Mathare North Ward.

During the hearing of this appeal, this court heard oral rival submission made by Mr. Ochich and Mr. Arrum for the Appellant and by Mr. Mombo for the 2nd Respondent. The 1st Respondent was served but did not attend court during the hearing of the appeal. However, the 1st Respondent’s parliamentary and legal affairs head Mr. Anthony Muturi swore a replying affidavit essentially agreeing with the Appellant that the basis upon which the Tribunal reached its verdict was unsupported by evidence. This court has carefully considered the said submission. Due to exigencies of time, the said submission shall not reproduced in this judgment other than for this court to state that the material aspects of the arguments presented shall become apparent in the decision of this court.

The issue for determination by this court is who as between the Appellant and the 2nd Respondent is the rightful nominee as the 1st Respondent’s candidate for the MCA seat for Mathare North Ward. In support of his case, the Appellant attached what he claimed to be a tallying sheet. This court has perused the said document which appears at page 29 of the record of appeal. Whereas the said document lists the alleged results of candidates who participated in the said primary nomination, the document is not signed. Neither does it indicate who prepared the document nor under whose authority the document was made. The 2nd Respondent has relied on the document which appears at page 59 and 60 of the record of appeal. Likewise, the page in which the result is indicated is not signed by the Returning Officer. The 2nd Respondent submitted that page 59 continued to page 60 (being the overleaf). In that page, the Returning Officer Abraham Oyugi Dollah signed the results. The Appellant claimed that after the results were announced, he was declared the winner. He was issued with a provisional certificate. He has attached the provisional certificate at page 31 of the record of appeal. This court perused the said provisional certificate and noted that the same was signed by the Returning Officer Abraham Oyugi Dollah. It is dated 1st May 2017. The Appellant has also attached the final nomination certificate issued by the 1st Respondent on 3rd May 2017. On his part, the 2nd Respondent also attached the final certificate issued to him by the 1st Respondent on the same 3rd May 2017. On the face of it, both nomination certificates appear genuine. They bear the same signatures of the 1st Respondent’s party officials.

Since both the Appellant and the 2nd Respondent have presented documents which apparently recognize both of them as nominees of the 1st Respondent’s party of the said Ward, it is clear to this court that one of the two parties has not been candid to this court. In an affidavit sworn before the Tribunal, the Returning Officer Abraham Oyugi Dollah claimed that he was intimidated into issuing the provisional certificate to the Appellant. In particular, he claimed that he was threatened with a gun. He was in fear of his life hence his decision to issue the nomination certificate under duress to the Appellant. In the

affidavit sworn by the Legal Officer of the 1st Respondent, he denied the allegation that the Returning Officer was threatened or was in fear for his life when he issued the provisional certificate to the Appellant. He deponed that in actual fact, it was the 2nd Respondent who committed acts of violence against the Appellant when the Appellant's provisional nomination certificate was forcefully taken and destroyed. On his part, the 2nd Respondent reiterated that the Tribunal did not err when it awarded him the nomination certificate. He urged the court to uphold the decision of the Tribunal.

As the first appellate court, this court has a duty to reconsider and to re-evaluate the evidence adduced before the Tribunal, in light of the submission made before it on appeal, and reach its own independent determination. In the present appeal, this court was also required to be mindful of the fact that it is the members of the 1st Respondent's political party registered in Mathare North Ward who have the mandate to nominate the person who shall be their candidate in the August 8, 2017 general elections. In the present appeal, the primary document that declares the winner of the nomination exercise is the tallying sheet. In this case, the only tallying sheet that is signed and which has been authenticated by the Returning Officer is the one that was issued to the 2nd Respondent. Although the 1st Respondent's legal officer swore a replying affidavit apparently disowning the averment made by the Returning Officer to the effect that he had been intimidated when he issued the provisional nomination certificate to the Appellant, this court, upon re-evaluation of affidavit evidence was neither persuaded nor convinced by this assertion. If that was the case, nothing would have been easier than for the Returning Officer himself to be called to swear another affidavit to disavow the said averments that he made in the affidavit sworn on 17th May 2017. This court cannot rely on hearsay and secondary evidence of the 1st Respondent Legal Officer to controvert the primary evidence adduced in form of affidavit evidence by the Returning Officer.

The Appellant's claim to the effect that he was the one who was in fact a victim of electoral violence perpetrated by the 2nd Respondent does not in any way lessen the overwhelming evidence that was placed before the Tribunal and before this court which established to the required standard of proof on a balance of probabilities that the 2nd Respondent was the winner during the nomination exercise that was held by the 1st Respondent. The events that the Appellant claimed occurred at Panafric Hotel where his provisional nomination certificate was allegedly torn, and the 2nd Respondent arrested by the police, occurred long after the nomination process had concluded. Upon re-evaluation of the facts of this appeal, this court resolves that the apparent disparity in the evidence adduced by the Appellant and the 2nd Respondent by agreeing with the decision of the Tribunal that the Returning Officer was intimidated and threatened with physical harm by the Appellant that he announced, under duress, the Appellant the winner of the nomination exercise. A declaration of nomination results obtained under duress cannot constitute valid basis upon which a claim for appropriate relief can be made before either the PPDT or to this court.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The decision of the PPDT declaring the 2nd Respondent Jared Okoth Okode as the 1st Respondent's candidate for the MCA seat for Mathare North Ward, Kasarani Constituency in Nairobi County is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF MAY 2017

L. KIMARU

JUDGE