



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 72 OF 2017**

**NICHOLAS ZANI .....APPELLANT**

**VS.**

**ISAA BOY .....1<sup>ST</sup>RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Primary for the Kwale Senatorial Seat for Orange Democratic Movement (**ODM**) attracted two bids. The Bidders were Nicholas Zani (**The Appellant**) and Issa Boy (**The 1<sup>st</sup> Respondent**).

2. Unhappy about the Elections, the Appellant lodged an Appeal to the Party National Appeals Board but says that the Board did not consider his Appeal.

3. The Appellant then escalated the Dispute to the Political Parties Dispute Tribunal (**PPDT**) which delivered its verdict on 10<sup>th</sup> May 2017. One of the holdings of the PPDT was that,

“It is unclear under what circumstances the Claimant was issued with the Certificate of Nomination. The Claimant has made averments in paragraph 7 and 8 of his Claim that the Nomination process was irregular and totally unable to produce a nominee. The Claimant cannot on one hand claim the irregularities whilst also seek to be issued with a Certificate arising from such process”.

4. In the Statement of Claim filed at the PPDT there are two Complaints. That the 1<sup>st</sup> Respondent applied for the Nomination out of time. Secondly, that the Election was marred with irregularities of Voter bribery and violence in which the 1<sup>st</sup> Respondent was involved.

5. This Court is moved on Appeal on both Law and Facts (Section 41(2) of The Political Parties Act) and is obliged as a first Appellate Court to review the evidence placed before the PPDT with a view to drawing its own conclusions. The Tribunal Record is the Record of the Trial and it is the evidence therein that is reviewed.

6. The Memorandum of Appeal raised ten grounds but revolves around the following issues:-

a) That the Tribunal misapprehended the evidence and facts and thereby reached an erroneous decision that the 1<sup>st</sup> Respondent's Application was not out of time.

b) That the Tribunal failed to address itself on the issue of qualification of the 1<sup>st</sup> Respondent and did not consider that the 1<sup>st</sup> Respondent did not pay Nomination Fees.

c) That the PPDT erred in Law and Fact by not considering the evidence of Electoral malpractices.

Both in the Memorandum of Appeal and at the Hearing, the Appellant emphasized that neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Respondents led any evidence and the Appellant's evidence was therefore uncontroverted.

7. To be fair to the Appellant, the Tribunal Decision did not review the evidence on record. However, this Court wholly endorses the Tribunal's holding that notwithstanding lack of any evidence on the part of the Respondents, the Legal burden of proof remained with the Appellant to prove his case.

8. As I now turn to assess the evidence before the Tribunal, I will observe that the Appellant's Claim was captured in the Statement of Claim

and any issues raised outside it would be unpleaded and unavailable for consideration. In this respect, the Complaint that the 1<sup>st</sup> Respondent did not pay Nomination Fees was not raised on the Claim and does not fall for consideration at all.

9. In the Affidavit filed at Trial, the Appellant averred that the 1<sup>st</sup> Respondent's candidature was obtained after the Nomination deadline had passed. In the Appeal to the Party IDRM, it was asserted that the Application by the 1<sup>st</sup> Respondent was made on 15<sup>th</sup> March, 2017 which was 5 weeks after the deadline of 10<sup>th</sup> February 2017. When this Court asked where it would find the evidence of the deadline, Counsel for the Appellant Mr. Owaga asked Court to take Judicial Notice that it was 10<sup>th</sup> February 2017 and that this was not disputed.

10. Section (59) of The Evidence Act provides:-

“No fact of which the court shall take judicial notice need not be proved”

Section 60 of The Act sets out facts which a Court shall take Judicial Notice. That Section provides:-

“(1) The Court shall take judicial notice of the following facts-

- (a) All written laws, and all laws, rules and principles, written or unwritten, having the force of law , whether in force or having such force as a foresaid before, at or after the commencement of this Act, in any part of Kenya.
- (b) The general course of proceedings and privileges of Parliament, but not the transactions in their journals.
- (c) Articles of War for the Armed forces.
- (d) (deleted by L.N 22/1965)
- (e) The public seal o Kenya; the seals of all the Courts of Kenya; and all seals which any person is authorized by any written law to use.
- (f) The accession to office, names, titles, functions and signatures of public officers, if the fact of their appointment is notified in the Gazette.
- (g) The existence, title and national flag of every State and Sovereign recognized by the Government.
- (h) Natural and artificial divisions of time, and geographical divisions of the world, and public holidays.
- (i) The existence of the territories comprised in the Commonwealth.
- (j) The commencement, continuance and termination of hostilities between Kenya and any other State or body of persons.
- (k) The names of the members and officers of the Court and of their deputies, subordinate officers and assistants, and of all officers acting in execution of its process, and also of all advocates and other persons authorized by law to appear or act before it.
- (l) The rule of the road on land or at sea or in the air.
- (m) The ordinary course of nature
- (n) The meaning of English words.
- (o) All matters of general or local notoriety.
- (p) All other matters of which it is directed by and written law to take judicial notice.

I presume that the Appellant is asking Court to find that the deadline for the application for Nomination is a matter of general or local notoriety.

11. I am unable to agree. The date for the forthcoming National General Election may well be a matter of general notoriety as its date is prescribed by the Constitution and is a matter of wide Public Debate. I cannot say the same of the deadline for applications to participate in the Party Primaries and I must say that this Court was not aware of the date before the Appellant had suggested that it was 10<sup>th</sup> February 2017.

12. Is it an undisputed fact? I have gone through the Pleadings that originated the Complaint and note that no specific date was pleaded at all. I would have to find that if the deadline was 10<sup>th</sup> February 2017, then Appellant was under an obligation to lead some evidence to prove it. As it is not proved then this Court cannot hold that it was breached.

13. Further I am unable to fault the 1<sup>st</sup> Respondent's bid as there was no allegation that Section 31(2B) of The Election Act was not complied with. That provision reads:-

“A Political party shall, at least twenty-one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary.”

14. On irregularities on Polling day, the Appellant had averred that one Polling Station was marred with violence throughout the day and another was closed at 5pm although there were Voters still on the queue and were therefore unable to cast their Votes. The Tribunal was referred to a video clip marked as NZ5 a-e.

15. This Court has looked at the video clips. Clip NZ5 a shows a group of people arguing. An Aspirant (seems to be the Appellant) is attempting to make entry into a room and states that he has a right to do so as he is an Aspirant. In clip NZ5 (b), the Aspirant is extremely agitated. Clips NZ5 (c) and NZ5 (d) are a continuation of the other two clips. In clip NZ5 (e) the Aspirant appears to be leaving the room after failing to get entry. In the clip are either one or two Policemen dressed in Riot gear. However, none of these clips shows any physical violence.

16. It was also alleged that the 1<sup>st</sup> Respondent bribed Voters. The Court is asked to find proof of this in video clip NZ4. The video is said to have been shot at Catholic Hall. In it is a man addressing some Members of Public. He tells them that he has brought them money given by various Aspirants including the 1<sup>st</sup> Respondent. It is not said that the 1<sup>st</sup> Respondent is in the Hall. However as he announces a contribution of Kshs.25,000 allegedly from the 1<sup>st</sup> Respondent he points at someone who is not shown in video. Does this incriminate the 1<sup>st</sup> Respondent?

17. I think not because the Court is not told who the person is and his connection and relationship with the 1<sup>st</sup> Respondent. Secondly there is no clear evidence that the 1<sup>st</sup> Respondent is in the Hall. And if he was in the Hall, then one would ask why he was not captured on video. This allegation is in my view unproved.

18. The two allegations are unproved. This Court finds that even if the Tribunal had reviewed the Evidence on record, it would still reach a Decision that the Appellant had not proved its Claim.

19. For reasons that are different from those given by Tribunal, I hold that the Appellant's Claim fails and the Appeal is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 29<sup>th</sup> day of May, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Owaga for Appellant

Kadima for 1<sup>st</sup> Respondent

Alex - Court Clerk