



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NUMBER 69 OF 2017**

**ASWIM FAUD RUDAINY.....APPELLANT**

**VERSUS**

**KAZUNGU WANJE BAYA.....1<sup>ST</sup> RESPONDENT**

**JUBILIEE PARTY.....2<sup>ND</sup> RESPONDENT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....INTERESTED PARTY**

*(An appeal from the whole of the judgment and orders made by the Political Parties Dispute Tribunal Nairobi on 19<sup>th</sup> May, 2017 in compliant No. 265 of 2017 before Hon. M. O. Lwanga, Paul Ngotho and Dr. Adelaide Mbithi)*

**BETWEEN**

**ASWIM FAUD RUDAINY.....APPELLANT**

**VERSUS**

**KAZUNGU WANJE BAYA.....1<sup>ST</sup> RESPONDENT**

**JUBILIEE PARTY.....2<sup>ND</sup> RESPONDENT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....INTERESTED PARTY**

**J U D G M E N T**

The Appellant, **Aswani Faud Rudainy**, the Respondent **Kazungu Wanje Baya** and one **Mohammed Masoud Shaaban** are member so the Jubilee Party who participated in the Jubilee Party (2<sup>nd</sup> Respondent) nomination exercise held on 26<sup>th</sup> April, 2017 for the position of Member of Country Assembly Shella Ward Malindi Constituency. He garnered 707 votes against the 1<sup>st</sup> Respondent’s 740 votes. He claims that he lost to the 1<sup>st</sup> Respondent due to the collusion of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent which resulted in the illegal closure of his stronghold Nidhamia Hall Polling station. He filed Appeal No. 230 of 2017 with the 2<sup>nd</sup> Respondent’s National appeals Tribunal (IDRM). He claims that he served the

1<sup>st</sup> Respondent with notice of proceedings in the tribunal but the 1<sup>st</sup> Respondent refused to appear. As such, the hearing at the Appeals Tribunal proceeded ex parte.

The tribunal found that the change of polling stations from Nidhamia Hall to Malindi High School without notice to the voters was wrong. It decided to exclude the results from Malindi High School and tally the results from the other four polling stations to come up with the winner. Using these results, the complainant alleges to have garnered the most votes. He is aggrieved because the 2<sup>nd</sup> Respondent subsequently issued the nomination certificate to the 1<sup>st</sup> Respondent.

The Jubilee National Appeals Tribunal in its ruling dated 9<sup>th</sup> May, 2017 ruled that: -

***“In the appeal herein, nullifying the nominations conducted at Malindi High School Polling station has a net effect on the general outcome of the results. The Complainant garnered Seven hundred and Seven Votes (707) and the 1<sup>st</sup> Respondent had a total of Seven Hundred and Forty Votes (740); the difference is Thirty Three votes. We find that the moving of polling stations form one area to another without giving notice to the votes of the ward was wrong. The Complainant is rightly aggrieved by the arbitrary and abrupt movement of the polling station.***

***On this basis our finding is that, the results declared for Malindi High School should be excluded from the final tally and the results for the other four polling stations namely Karira primary school, Upweoni Primary School, Sir Ali Primary School and Uhuru Gardens Primary School be used to come up with the final tally.”***

Apparently this ruling was challenged at the party as one Mary Karen Kigen Sorobir the Deputy Executive Director legal Affairs of the 2<sup>nd</sup> Respondent by affidavit sworn on 8<sup>th</sup> May, 2017 deponed: -

***“1) That when the Claimant appeared before the Elections Tribunal, the matter was heard ex parte hence the ruling was made in his favour. Thereafter, the party was able to establish the following: -***

***a) That the Claimant had not effected service of the Complaint upon the 1<sup>st</sup> Respondent herein contrary to the rules of procedure.***

***b) The Jubilee party was presented with evidence from Kilifi Elections Board that the 1<sup>st</sup> Respondent had not colluded with the 2<sup>nd</sup> Respondent to change polling station as alleged by the Complainant.***

***2) That, based on the foregoing, the judgment by the elections tribunal was overturned since it was based on misrepresentation to the knowledge of the claimant and the nomination certificate awarded to the 1<sup>st</sup> Respondent as a candidate for Member of Country Assembly seat of Shella Ward elections in August, 2017.***

***3) That before making the decision to overturn the ruling, the party machinery did not own inquiries and establish that indeed there was no collusion s alleged to change polling station. It also established as fact that all aspirant were duly informed on the change of polling station.”***

The Appellant approached the Political Parties by Notice of Motion dated 16<sup>th</sup> May, 2017 seeking several prayers and more particularly: -

***(1) The Honourable Tribunal be pleased to order that the Nomination certificate issued to the 1<sup>st</sup> Respondent for Member of County Assembly Shella Ward, Malindi Constituency, Kilifi County was issued illegally and fraudulently.***

***(2) The Honourable Tribunal be pleased to order the 2<sup>nd</sup> Respondent to issue a nomination certificate to the complainant for Member of Country Assembly Shella Ward, Malindi Constituency, Kilifi County.***

***(3) The 2<sup>nd</sup> Respondent be restraining from submitting the 1<sup>st</sup> Respondent name to IEBC as the Jubilee Party Candidate for for Member of Country Assembly Shella Ward, Malindi Constituency, Kilifi County pending the hearing and determination of this application.***

The Political Parties Dispute Tribunal ruling dated 19<sup>th</sup> May, 2017 dismissed the application thereby prompting this appeal. The Appellant faults the Political Parties Dispute Tribunal's ruling on the following grounds: -

***1) The Honourable Tribunal erred in law and in fact in failing to realize that there were irregularities that affected the outcome, which irregularities were admitted even by the parties themselves.***

***2) The Honourable Tribunal erred in law and in fact by failing to uphold the well researched finding of the Jubilee Tribunal.***

***3) The Honourable Tribunal erred in law and in fact by failing to realize that by the introduction of a new polling station the Swahili people were disadvantaged and the nomination exercise could not be said to have been done in a free and fair way.***

***4) The Honourable Tribunal erred in law and in fact in failing to realize that by closing the polling stations earlier in the Swahili Areas and extending the time for polling station at the Mijikenda areas to 8 p.m. was a factor that affected the overall result.***

Mr. Makori, counsel for the Appellant submitted that prior to the nomination day the aspirants had agreed on the 5 polling stations. On the Swahili side there were 2 polling stations, Uhuru Gardens and Nadhamia Hall on the Mji Kenda side there were 3 stations, Upweoni Primary School, Sir Ali Primary and Karima Primary. He submits that the relocation of Nadhamia Hall polling station to Malindi High School moved the polling station from the Swahili side to Mji Kenda side thus disenfranchising his supporters. This led to his supporters not voting and, therefore, swayed the results. He submitted that when the total tally of votes was taken including Malindi High School polling station, the Appellant garnered 707 votes and the 1<sup>st</sup> Respondent 740 votes. When Malindi High School Polling station votes are removed from the tally, the Appellant garnered 692 votes and the 2<sup>nd</sup> Respondent 602 votes and, therefore, the Appellant becomes the winner. This was the finding of the Jubilee Tribunal upon which it declared ex parte that the Appellant be issued with a nomination certificate. He finally submits that that decision was never overturned.

Mr. Washe for the 1<sup>st</sup> Respondent Kazungu Wanje Baya submitted that the choice of polling stations was not based on Swahili or Mji Kenda population. He submitted that the closure of Nadhamia Hall was communicated to all the aspirants as the hall was not available because the Ksh.20,000/- demanded by the owners had not been paid. He submitted that the Appellant participated in the nomination without objection and he garnered votes at Malindi High School and his agents signed the form. He submits that the ruling of the Jubilee Tribunal was ex parte and the 2<sup>nd</sup> Respondent reviewed the same when further evidence was adduced. He submits that the Appellant's argument that Malindi High School Polling Station votes should be removed from the tally is untenable as the results of the nomination for Shella Ward will be incomplete.

Mr. Omuganda for the 2<sup>nd</sup> Respondent Jubilee Party associated himself with the submissions of the 1<sup>st</sup> Respondent. He urged the court to be guided, in its decision by the materiality principle and find that where the irregularities complained of do not affect the outcome of elections, the court should not set aside the election.

Considering the record of appeal and submissions by the parties, I find the following is not in dispute and/or agreed. First it is not in dispute both the Appellant and 1<sup>st</sup> Respondent and another participated in the nomination held on 26<sup>th</sup> April, 2017. It is also not disputed that it had earlier been agreed that the nomination was to be held in 5 polling stations which included Nidhamia Hall. It is also not in dispute that Nidhamia Hall was not used for the nomination of 26<sup>th</sup> April, 2017 but instead Malindi High School was used.

The only issue that remains for determination is the fate of the votes of Malindi High School Polling station in the ward tallying totals.

The Appellant submits that the change of the polling station from Nidhamia hall to Malindi High School was made without notice and was detrimental to him. Mr. Farhan a Member of the County Election Board Kilifi in a letter dated 3<sup>rd</sup> May, 2017 explained to the Chairman, National Election Board that he was informed to make the changes on 25<sup>th</sup> May, 2017 at 10 p.m.. On the voting day he and the Returning Officer opened Malindi High School Polling Station and Closed Nidhamia H5all as a Polling Station. The aspirants were not happy about the decision and in his view it interfered with the nomination being free and fair. Despite their displeasure the aspirants were made aware of the changes and each participated. Indeed at Malindi High School Polling according to the tally the Appellant garnered **15** votes, 1<sup>st</sup> Respondent **138** votes and Mohammed **92** votes. The total number of votes cast was **245** which compares well with the other polling stations. It is, therefore, my finding that the shift of the polling station did not affect the Appellant alone but all parties were unhappy and were also affected.

The Appellant, both at the Political Parties Dispute Tribunal and here prays that the Malindi High School Polling Station votes be removed from the tally which will man that he will be declared the winner. With respect that approach will distort the votes and will not reflect the will of the people of Shella Ward. This will clearly lock out the **245** voters who exercised their free will in the nomination. In my view, it will be an act of distortion of the electoral process to exclude the votes from a polling station in the final tally. If the court had found the relocation of the polling station disenfranchised the voters, it would have ordered a repeat of polling at the polling stations. The will of the people in an electoral process is expressed by deliberate choice of their representative in a free and fair election or nomination process. This is expressed by the number of votes cast for the candidates. The candidate who garners the highest number of votes is barring any material irregularities declared the winner. In this appeal, even the Appellant admits that in the total tally of the 5 polling stations the 2<sup>nd</sup> Respondent garnered 740 votes and the Appellant garnered 707 votes. It is, therefore, follows that the 2<sup>nd</sup> Respondent garnered the highest number of votes cast in Shella Ward. He was, therefore, in my view validly nominated by the 2<sup>nd</sup> Respondent as the Jubilee Party Candidate, for Member of Country Assembly Shella Ward, Malindi Constituency, Kilifi County. I, therefore, find no merit in this appeal which is dismissed. In view of the findings above, I do not find it necessary to make a finding if the Appellant is a member of another party other than Jubilee Party. I make no orders as to costs.

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of May, 2017.

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**S N RIECHI**

**JUDGE**