



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NUMBER 59 OF 2017**

**JOHN REX OMOLLEH. .... APPELLANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT. . ....1<sup>ST</sup> RESPONDENT**

**MAURICE GARE OTIENO .....2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Decision of the Political Parties Dispute Tribunal in Case No. 179 of 2017 delivered on 12<sup>th</sup> May, 2017 by Kyalo Mbobu, James Atema and Hassan Abdi)*

***BETWEEN***

**REPUBLIC OF KENYA**

**IN THE POLITICAL PARTIES DISPUTE TRIBUNAL**

**CASE NUMBER 179 OF 2017**

**MAURICE GARE OTIENO. .... COMPLAINANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT ..... 1<sup>ST</sup> RESPONDENT**

**JOHN REX OMOLLEH. ....2<sup>ND</sup> RESPONDENT**

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

The Appellant, **John Rex Omolleh** and the 2<sup>nd</sup> Respondent, **Maurice Gare Otieno** are all members of the Orange Democratic Movement Party. They together with 6 others participated in orange Democratic Movement Party nomination exercise that was carried out on 30<sup>th</sup> April, 2017. The Appellant was dissatisfied with the outcome and filed a complaint at the Special County Appeals Tribunal which delivered its judgment on 8<sup>th</sup> May, 2017 declaring that he be awarded the nomination certificate.

Aggrieved by the decision of the Special County Tribunal, the 2<sup>nd</sup> Respondent Maurice Gare Otieno filed an appeal to the Political Parties Dispute Tribunal in Complaint No. 179 of 2017. The Tribunal by its ruling dated 12<sup>th</sup> May, 2017 allowed the appeal and ordered that the nomination certificate issued to the Appellant is null and void and of no effect in law. The Tribunal ordered that the 2<sup>nd</sup> Respondent be issued

a nomination certificate for Member of County Assembly, Nairobi West Ward by the 1<sup>st</sup> Respondent Orange Democratic Movement.

Dissatisfied with the orders given the Appellant filed the Appeal herein with the following main grounds:

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**1. The learned tribunal erred in law and fact in its judgment delivered on 12<sup>th</sup> May, 2017 by totally ignoring the evidence presented before it to wit; that there was a competent complaint filed before the Special County Appeals Tribunal by the Appellant and signed by all the candidates that participated in the nomination process and placed before the tribunal.**

**2. The learned tribunal erred in law and fact in its judgment delivered on 12<sup>th</sup> May, 2017 by totally ignoring the evidence presented before it to wit: that there was cogent evidence presented before the tribunal in the form of sworn affidavits by votes depositing to have been hired by the 2<sup>nd</sup> Respondent to participate in election malpractices.**

**3. The learned tribunal erred in law and fact by giving more weight to an averment by the 2<sup>nd</sup> Respondent denying having been aware of the manner before the 1<sup>st</sup> Respondent as opposed to clear evidence that the other candidates that participated in the botched nomination process were aware of and indeed appended their signature(s) on the complaint filed before the 1<sup>st</sup> Respondent's internal dispute body.**

**4. The learned tribunal erred in law and fact and demonstrated mischief by purporting to refuse to apply its mind to the merits of the nomination process by weighing the evidence presented before it that suggested that the nomination process was not free and fair and instead chose to allow the appeal based technically on the right to fair hearing as substantive a right as it might be, then ultimately making an order so substantive as in the issuance of the nomination certificate to the 2<sup>nd</sup> Respondent herein.**

The Political Parties by its judgment dated 12<sup>th</sup> May, 2017 which is the subject of this appeal rendered itself as follows: -

***“From the evidence on record, we are satisfied that the Complaint was never informed of the proceedings before the ODM Country Appeals Tribunal prior to the withdrawal of his certificate. As the Complainant properly contends, the 1<sup>st</sup> Respondent action was a violation of his right to fair administrative action under Article 50(1) of the Constitution of Kenya. We nullify the decision as well as the resulting nomination certified issued to the 2<sup>nd</sup> Respondent or any other candidate.***

***We have deliberately avoided making any comments on the allegations of voter transportation to avoid pre-judging any subsequent proceedings in that regard.***

**Relief: In order to conclude this matter, we make the following orders: -**

***a. A declaration be and is hereby issued to the effect that the 1<sup>st</sup> Respondent's decision to nominate and the nomination certificate issued to, any candidate other than the Complainant herein, for position of Member of County Assembly, Nairobi West Ward, Nairobi County is null, void and of no effect in law.***

***b. An order be and is hereby issued compelling the 1<sup>st</sup> Respondent to issue the Complainant with a nomination certificate for the Member of Country Assembly, Nairobi West Ward, Nairobi County within 12 hours from pronouncement of this judgment.”***

Mr. Makokha faults the decision of the Political Parties Dispute Tribunal on two grounds: - First, that it is

not true that 2<sup>nd</sup> Respondent was not served with the hearing notice to appear at the Special County Tribunal and he has annexed an affidavit sworn by one George Koko Mogire who deponed that he served the 2<sup>nd</sup> Respondent at Gracia Hotel Nairobi where the Tribunal was sitting. Counsel further submitted that the 2<sup>nd</sup> Respondent participated in the Tribunal hearings. Secondly counsel submits that the Special County Appeals Tribunal had made a finding that the primaries were marred by irregularities and that the 2<sup>nd</sup> Respondent was involved in the malpractice. On appeal to the Political Parties Dispute Tribunal, this issue grave as it was, was ignored and the Political Parties Dispute Tribunal did not interrogate on that finding of the Special Tribunal and make a finding either to uphold it or dismiss it. He submits that the findings of the Special Country Appeals Tribunal on this issue stands. He, therefore, urged the court to uphold the decision at the Special County Appeals Tribunal.

Mr. Osiemo for the 2<sup>nd</sup> Respondent opposed the appeal. He submits that the affidavit of service annexed was not filed at the tribunal, was sworn after the judgment; and is sworn by an unlicensed process server. He submits that the 2<sup>nd</sup> Respondent did not participate in the proceedings at the Special County Appeals Tribunal and that the complaints raised at the Special Tribunal were general and none pointed to the 2<sup>nd</sup> Respondent as the perpetrator of any of the malpractices. Both counsel informed the court from the bar that they have no issue as to the tallying of votes which were made by the Returning Officer. Indeed the Returning Officer as per the memorandum of claim lodged at the Political Parties Dispute Tribunal by the 2<sup>nd</sup> Respondent in paragraph 5 states: -

***“5. On 1<sup>st</sup> May, 2017 the duly appointed Returning Officer declared the Appellant (Maurice Gare Otieno the winner having garnered 477 votes while the 2<sup>nd</sup> Respondent (John Rex Omolleh) had 245 votes.***

***6. The Appellant (Maurice Gare Otieno) was subsequences issued with a Provisional Certificate dated 1<sup>st</sup> May, 2017.***

It is not in dispute, therefore, that upon tallying of the votes the 2<sup>nd</sup> Respondent Marcie Gare Otieno had more votes than the Appellant. What Mr. Makokha is submitting is that the 2<sup>nd</sup> Respondent did not obtain those votes in a free and fair nomination process. He, therefore, urges this court to on the basis of the malpractices during the nominations find that the 2<sup>nd</sup> Respondent was not validly nominated.

The complaints which form the basis of the Appellants contention that the nominations were not free and fair are those addressed to the 1<sup>st</sup> Respondent in a letter dated 1<sup>st</sup> May, 2017 signed by all the 7 aspirants except the 2<sup>nd</sup> Respondent. The malpractices complained of were as follows: -

***1. At no time were the candidates summoned to meet with the Returning Officer or the polling clerks for a brief and/or consultation on the election day and some candidates spent the most or all part of the day without knowing who was in charge.***

***2. Candidates were not aware of the number of polling stations until the day of the elections despite Nairobi west having only 2 polling station, no information was forthcoming.***

***3. Candidates were not able to access or meet the election officials as the police were instructed to keep them out of the polling station after they had voted and the little information they could gather was during this process when they cast their vote, then ushered out.***

***4. The polling opened after 11.00 a.m. contrary to the expected time and despite assurances form the part, the voting process was stopped at 6.00 p.m. and the polling station closed.***

***5. The officials arbitrarily allowed for voting by the use of identity cards only without consulting the candidates and then selectively started turning away some voters while allowing others.***

**6. Members of the public were able to vote 3 or more times without any hindrance.**

**7. Some agents with the help of the police intimidated cameramen from recording the electoral process with threats of dire consequences and destruction of equipment.**

**8. Candidates were not allowed to participate in the opening or to present at the counting of votes.**

**9. Some agents reported ballot papers having the same serial numbers.**

The Special County Appeals Tribunal after considering the complaints and evidence and in the absence of the 2<sup>nd</sup> Respondent ruled:-

**“Having considered this appeal we hereby make the following directions: -**

**1. The Appeal has been allowed.**

**2. The Interim Nomination Certificate and the Nomination is hereby awarded to John Rex Omolleh, the Applicant.**

The Political Parties Dispute Tribunal in the judgment dated 12<sup>th</sup> May, 2017 did not make any finding on the allegations of malpractice alleged by the Appellant and specifically stated: -

**“8. We have deliberately avoided making any comments on the allegations of voter transportation to avoid pre-judging any subsequent proceedings in that regard.”**

This is the first appeal. The duty of the first appellate court is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusion reached by the tribunal are to stand or not and give reasons either way.

**What was the evidence before the Special County Appeal Tribunal?** Before the tribunal were complaints by aspiring candidates about the process of nomination which have been reproduced above. In an attempt to bolster the allegations of voter transportation the Respondent filed an affidavit sworn by Vincent Kibendi Kuniya who deponed as to how he was transported from Mlolongo to Madaraka Estate the home of 2<sup>nd</sup> Respondent and later voted for him at the polling station without stating which polling station he voted in.

Maurice Gare Otieno the 2<sup>nd</sup> Respondent was not informed and did not participate in the proceedings and therefore, although these allegations were not contested they appear general.

In the case of **Joho Vs Nyange & another [2008] 3 KLR 500 at page 507**. Maraga J, (as he then was said: -

**“Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance - Kibaki Vs Moi, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents’ social and economic activities. It is for these reasons that I concur with the Elections Court’s decision in Wanguhu Nganga & Another Vs George Owiti & Another, Election Petition No. 41 of 1993, that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.”**

In the absence of such evidence, it appears to me that the appellant did not discharge his burden of proof to the required standard. These to me seem to be generalized allegations yet for the court to act on them

there must be credible and cogent evidence to support them.

The Special County Appeals Tribunal stated in the finding.

***“The following are findings of the Tribunal: -***

***1. There were election malpractices and the voting process was not free and fair.***

***2. There was sufficient evidence to show that the Applicant won the nomination fairly.”***

These two findings in the same judgment cannot be compatible. If the tribunal made a finding that there were electoral malpractices and the voting process was not free and fair; then how then could John Rex Omolleh would have won the nomination fairly? There is no evidence that the Special County Appeals Tribunal was told of how many votes each candidate garnered. In my view, therefore, there decision to direct that the Appellant John Rex Omolleh to be issued with a nomination certificate was clearly wrong.

It is not in dispute that after the tallying of votes for the ward by the Returning Officer, the 2<sup>nd</sup> Respondent George Gare Otieno garnered 477 votes and the Appellant John Rex Omolleh had 245 votes and therefore, that if the process was fair, he had won the nomination being the one with the highest number of votes cast. The propose of party nomination processes or primaries is to enable members of the party to express their free will as to who will be nominated by the party to stand for elective posts declared in a general election. The will of the people is expressed the determining the person who garnered the highest number of votes who then will be entitled to be issued with nomination certificate by the Political Party. Barring any electoral malpractices the person with the highest votes is declared the winner by the Returning Officer. In this appeal, it is common ground that the 2<sup>nd</sup> Respondent Maurice Gare Otieno garnered the highest number of votes cast at 477 while the Appellant garnered 245 votes.

Mr. Makokha for the Appellant submitted that contrary to the finding of the Political Parties Dispute Tribunal, the Maurice Gare Otieno was served and participated in the proceedings at the special country appeal tribunal proceedings. With respect, we do not find any evidence of such service or participation by the 2<sup>nd</sup> Respondent. The affidavit relied on by Mr. Makokha was sworn after the judgment and was not even filed at the proceedings at the Political Parties Dispute Tribunal where the appellant participated and the non-attendance of the 2<sup>nd</sup> Respondent at the Special Tribunal was the main issue for determination. It is indeed the issue upon which the appeal was determined. This submission and the attendant affidavit filed is in my view an afterthought. I consequently find no merit in this appeal which is hereby dismissed.

In the final analysis, I agree with the judgment of Political Parties Dispute Tribunal that the will of the ODM members of Nairobi West Ward was expressed clearly by nominating Maurice Gare Otieno as the ODM Nominee for the Nairobi West Ward which also found expression in the decision of the Political Parties Dispute Tribunal delivered on 12<sup>th</sup> May, 2017. I, therefore, order that the 1<sup>st</sup> Respondent Orange Democratic Movement Party to issue the 2<sup>nd</sup> Respondent **Maurice Gare Otieno** with final Nomination Certificate for Member of County Assembly, Nairobi West Ward, Nairobi County within 12 hours from the date of this judgment. I make no order as to costs.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> day of May, 2017.**

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**S N RIECHI**

**JUDGE**