



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(R. MWONGO, PJ)
ELECTION PETITION APPEAL NO 56 OF 2017

FREDERICK OKOLLA OJWANG.....APPELLANT /APPLICANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

FADHILI MWALIMU MAKARANI.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

Brief Background

1. After the Orange Democratic Movement (ODM) nominations in Port Reitz Ward, Changamwe Constituency, Mombasa County on 29th April 2017, the Appellant was handed the ODM provisional nomination certificate by one Maurice Onyango, the County Returning Officer. Simultaneously, the 2nd Respondent was issued a similar certificate by one Mohamed Abdalla, the Constituency Returning Officer.

2. On 30th April, there was already a dispute about the results, because the appellant wrote a letter to the Chairman National Elections Board pointing out that he had been declared the winner. He urged that the 2nd respondent's complaints raised at the tally centre should be addressed following due procedure by the party dispute tribunal or other legally recognised body.

3. By a letter dated 7th May, 2017, Maurice Onyango, the ODM County Returning Officer, appears to have written to the Chairman of the ODM National Elections Board re-asserting the results in which the Appellant allegedly obtained 430 votes against the 2nd Respondents' 423 votes , a thin margin of 7 votes. He also pointed out that the 1st Respondent's request for a recount was impossible as the ballot papers had not been secured. The aforesaid letter is not acknowledged by the ODM Party.

4. It is not clear exactly when, but the 2nd Respondent was issued with the ODM final nomination certificate for Port Reitz Ward MCA nomination. It is dated 29th November, 2017. In his disputed

Replying Affidavit dated 16th May, 2017, the 2nd Respondent says that he was declared the winner of the nomination having garnered 422 votes against the Appellant's 419 votes, an even thinner margin of 3 votes.

5. The appellant having not received the final nomination certificate, filed a Complaint (No 247 of 2017) before the Political Parties Disputes Tribunal (PPDT) on 12th May, 2017. The PPDT proceedings of 13th May, 2017 show that the complainant/appellant was ordered to serve the complaint and parties were directed to file skeletal submissions for hearing on 15th May, 2017. According to the Appellant he duly served the pleadings digitally via *whatsapp* and email platforms. He also filed skeletal submissions.

6. On 15th May, 2017 the Appellant was before the PPDT and confirmed filing skeleton submissions, which he relied on. The 2nd Respondent did not attend the hearing. Judgment was notified for 17th May, 2017.

7. On the same 15th May, 2017 the 2nd Respondent's counsel filed a notice of appointment at the PPDT together with the 2nd Respondent's Replying Affidavit of 15th May, 2017. The 2nd Respondent must have learned of the PPDT's order for filing written submissions, as he also filed the same.

8. Surprisingly, on 16th May, 2017, the 2nd Respondent filed another Replying Affidavit at the PPDT, in which he made the following significant depositions:

“14: ...the Complainant in attempt to misguide this Honourable Tribunal has adduced forged document's (sic) purporting to be signed by the County Returning Officer whose sole mandate was to oversee the Nominations exercise for Women Representative, Senator and the Governor.

15: THAT the Party's Nominations and Elections rules 18.6 clearly states that the results for Constituency and Wards shall be announced by the Constituency Returning Officer”

9. In its decision rendered on the same day, 16th May, 2017, the PPDT relied on the filings of the parties. In particular, it relied heavily on the 2nd Respondent's Replying Affidavit filed after the hearing, as in paragraph 4 of the judgment, the PPDT stated:

“The 2nd Respondent also faults the Complainant's documents relying on Rule 18.6 of the 1st Respondent's Nomination and Election Rules which provides that the results for the constituency and wards shall be announced by the Constituency Returning Officer.....”

10. In holding that the appellant's complaint had no merit, the PPDT without much consideration of the documents, agreed with the 2nd Respondent that Rule 18.6 of the Party Rules grant the mandate of declaring MCA results to the Constituency Returning Officer, and not the County Returning Officer, as urged by the Complainant. The PPDT dismissed the complaint.

The Appeal

11. The appellant appeals against the whole judgment of the PPDT. His memorandum of appeal is premised on the following grounds and seeks the orders hereunder:

“1. The Honourable Tribunal erred in law and fact by dismissing the Complainant's claim without considering its merits.

2. The Honourable Tribunal erred in law and fact by arriving at its judgment without evaluating the evidence tendered by the Complainant.

3. The Honourable Tribunal erred in law and fact in dismissing the Complainant's claim when the evidence he tendered before it was uncontroverted during trial.

4. The Honourable Tribunal erred in law and fact by considering the replying affidavit of the 2nd Respondent after the conclusion of the hearing without leave of the court.

5. The Honourable Tribunal erred in law and fact by considering wrongful information contained in the 2nd Respondent's Replying affidavit.

6. The Honourable Tribunal erred both in law and fact in considering the 2nd Respondent's Replying affidavit without giving the Complainant an opportunity to respond to the averments therein."

The appellant seeks the following orders from this court, that:

1. The Appeal be allowed and the Decision of the Political Parties Disputes Tribunal to be set aside.

2. The Nomination Certificate issued to Fadhili Mwalimu Makarani be nullified.

3. The Orange Democratic Party be ordered to nominate Fredrick Okolla Ojwang as its nominee to vie for Member of County Assembly for Port Reitz Ward, Changamwe Constituency.

4. The 1st interested Party do accept the re-issued nomination certificate of the Orange Democratic Movement Party for Member of County Assembly, Port Reitz Ward, Changamwe Constituency and process it appropriately.

5. In the alternative, a mandatory order be issued against Orange Democratic Movement Party to conduct fresh nominations for Member of County Assembly, Port Retz Ward, Changamwe Constituency.

6. Costs of the suit in the Tribunal and in this Appeal be to the Appellant.

12. The court, in determining the appeal is entitled to consider both the facts and the law as though it were hearing the matter in exercise of its original jurisdiction. Hence the court has both original and appellate jurisdiction with the same powers to perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction (see **Section 41(2) Political Parties Act** and **Section 78(2) of the Civil Procedure Act**)

Parties' Representations and analysis of evidence

13. Mr Kanjama, for the appellant submitted that the PPDT took into account, considered the 2nd Respondent's affidavit filed after the hearing of the complaint; and that it relied on it to dismiss the complaint on the basis of facts deposed in the affidavit.

14. Counsel urged that from the results tallied from three polling stations, the Appellant was declared the winner by 7 votes over the 2nd Respondent. Whilst the 2nd Respondent requested a recount, that was not possible as the ballot materials had not been secured. The County Returning Officer confirmed the Appellant's win.

15. Counsel took issue with the returns filed by the 2nd Respondent. According to him, the polling result sheets had not been signed, neither did they add up. Counsel also took issue with the PPDT's decision that one Mohammed Abdalla was the Returning Officer and as such, his declaration prevailed. The Appellant states that the initial Returning Officer appointed was one Hamed Abubakar.

16. Counsel in conclusion urged the court to consider the following issues:

a. Whether the PPDT erred in admitting an affidavit after the hearing without giving an opportunity

to the Appellant to respond to it. On this issue, Counsel referred to **Moses Wachira v Niels Bruel & 2 Others [2013] eKLR pgs 15-17** for the proposition that the rules of natural justice abhor a situation where, as in this case, the PPDT considered documents filed after the hearing and which the appellant has not had an opportunity to interrogate.

b. Whether the PPDT was right, in the event it was entitled to consider the Respondent's Replying affidavit, in preferring the evidence of the party without the signed tally sheets. On this, counsel relied on **Steven Kariuki v George Mike Wanjohi & 2 Others [2014] eKLR**. There, the court noted that, as in this case, the winner there:

“ ‘emerged triumphant by a whisker’ . in view of these conflicting figures we cannot therefore declare the 1st respondent the winner we were urged to do. As a matter of fact we are unable to determine the winner of that election”

c. What is the standard of proof and legal test that the PPDT should have used in determining what orders to issue. On this, counsel relied on **George Onyango Oloo v Orange Democratic Movement & Others Election Petition Appeal No 14 of 2017** at page 17 paragraph 25 for the proposition that the PPDT was under duty to determine where the will of the people lay

17. Mr. Cohen, for the 2nd Respondent submitted that the case essentially raises the problem of the issuance of two nomination certificates. One by the County Returning Officer and the other by the Constituency Returning Officer.

18. With regard to the contested affidavit, counsel submitted that the Appellant had admitted to being served with the 2nd Respondent's affidavit before the judgment of the PPDT. Thus, the 2nd respondent contends that the PPDT considered only evidence that had been tendered before it.

19. On the question of which nomination certificate ought to supersede the other, Counsel's submission was that where two provisional nomination certificates are issued, the County Returning Officer has no mandate as that the mandate rests only with the Constituency Returning Officer who can make a final tally as provided under the Party Nomination Rules. Counsel further urged the court to consider Rule 4.1.2 and 4.1.3 on the roles of the County Returning Officer and the Constituency Returning Officer.

20. Mr. Cohen also relied on the case of **George Onyango Oloo** which, he argued, affirmed his contention that :

“...the mandate of announcing the results of an Elections of a Constituency primary falls on the Constituency Returning . it is also that officer who issues a certificate of return which is forwarded to County Elections Board”

21. In his rejoinder, Mr. Kanjama's submitted that where, as in the present case there is no Constituency Returning Officer for whatever reason, the doctrine of necessity is triggered, and the person on the ground automatically takes the role.

Issues

22. In my view, the following issues are for determination by this court:

- 1. Who had authority to declare the nomination results and issue the nomination certificate?**
- 2. Whether in the circumstances and the evidence before it, the PPDT should have endorsed the certificate issued by the Constituency Returning Officer.**

Analysis and Determination

Who has authority to declare nomination results?

23. As correctly found by the Tribunal, under the ODM Party Elections and Nominations Rules, the Constituency Returning Officer is the person authorised to announce the result of nominations. **Rule 18.6** provides:

“Presiding Officers shall count and tally votes cast at each Polling Station and forward them to the Constituency Returning Officer who shall make the final tally before announcing the result...” (emphasis supplied)

24. From that rule, it is clear that, for want of a better word, the aboriginal source of voting results is the Presiding Officer’s tally from a Polling station.

25. To “tally” is defined in the **Roget’s Thesaurus** to mean”

“to account, add, list, calculate”

In the **Concise Oxford Dictionary** “tally” means:

“to score, reckoning, record, agree, correspond”

Thus, the role of the Constituency Returning Officer is to receive listed, added or accounted for results from each of the polling stations from the Presiding Officers. These are the results as availed on the ground. He then tallies them; adds, calculates accounts, scores, records and lists them, and only then, can he announce the outcome. The Constituency Returning Officer cannot work the results in a vacuum. He obtains the figures from an initiating source and scores, adds or calculates them.

26. The problem arises where, as in this case, there is no evidence by the Constituency Returning Officer of the counted and tallied votes received from the Presiding Officers as obtained at the polling station. In particular, where the outcome of the voting is a razor thin margin of votes, this is all the more important and critical. Does the result of the Constituency Returning Officer automatically become the election result if the Presiding Officer’s tallies are not availed to ascertain the tallies from the polling stations? I think not.

27. Two original copies of the Replying Affidavit of the 2nd Respondent dated 16th May, 2017 were filed in the PPDT Complaint file. I have carefully perused them. Paragraph 6 of the said affidavit states :

“6 THAT after the final tallying of the results by the Constituency Returning Officer the official results were as follows (attached herein and marked FMM 1 is a copy of the final tallied results)

i. Fadhili Mwalimu Makarani - 422 votes

ii. Frederick Okolla Ojwang - 419 votes”

28. The annexure of the tallied results is in the Polling Results Form. Both copies of the affidavit annex similar forms showing the following vote tallies:

<i>“Polling Station Name</i>	<i>Okolla Frederick Ojwang</i>	<i>Fadhili Mwidau Makarani</i>
<i>1. Mwijabu Primary</i>	<i>148</i>	<i>134</i>
<i>2. Lilongwe</i>	<i>38</i>	<i>22 “</i>

When the totals for the two stations are added for each candidate the result is:

Frederick Ojwang – 186 votes; and Fadhili Makarani 156 votes.

Without further evidence therefore, the results deponed to by the 2nd Respondent and availed to the

Tribunal do not equal the results alleged as having been attained by each of the candidates by the deponent, to justify the issuance of the nomination certificate to the 2nd Respondent.

29. In light of this discrepancy, it was improper for the PPDT, whilst relying on the 2nd Respondent's Replying Affidavit, to ignore the discrepancy in the results attributed thereby when it said in paragraph 8 of the judgment:

“Without much consideration of the documents, it is clear that under the 1st Respondent's Nomination and Election Rules, the mandate to declare results in respect of the position of Member of County Assembly rests with the Constituency Returning Officer under Rule 18.6”
(emphasis supplied)

30. Having correctly made the determination that the Constituency Returning Officer was the right person to announce the results, the PPDT ought to have ascertained that that officer issued the properly tallied results based on the Presiding Officers' tallies in accordance with the Rules. It did not, and the attached results were either incomplete or patently wrong.

31. Whilst I agree with the PPDT that the Constituency Returning Officer has the right to announce the results for MCA, I find and hold that such results must be based on the tallies from the Presiding Officers' results at the polling stations, and they must be tallied by the Constituency Returning Officer to reflect the correct result. This was not shown to be the situation in this case.

Whether in the circumstances and the evidence before it, the PPDT should have endorsed the certificate issued by the Constituency Returning Officer

32. The answer to this issue flows directly from the outcome of the previous issue. In my view, an election or nomination exercise, regardless of the position a party seeks should be one that reflects the will of the people. By conducting a competitive process, it is thereby a recognition that the electoral process is a democratic exercise undertaken by the citizens in the exercise of their rights to be represented by a person of their choice. See the case of **Gideon Mwangangi Wambua & another vs. Independent Electoral & Boundaries Commission & 2 others [2013] eKLR**.

33. Accordingly, for the PPDT to be able to determine and endorse one person as the “winner”, it must be satisfied that the evidence adduced before it clearly reflects the will of the people in terms of the rules and procedures adopted and complied with in the voting exercise. In this case, I find and hold that the PPDT clearly failed to identify the will of the people and should therefore not have endorsed any person as the winner.

Disposition

34. In the result, I am unable to and cannot uphold the decision of the PPDT which is hereby set aside.

35. As the results alleged to have been received by the disputants herein was extremely thin, it is impossible, without the tallies provided by the Presiding Officers of the Polling Stations, to determine what the will of the people of Port Reitz was. Accordingly, I order the ODM Party to repeat the Port Reitz MCA nominations exercise within 72 hours of the delivery of this judgment, in accordance with the law and Party Rules. The results shall be announced no later than Saturday, 27th May, 2017 at midnight.

36. There is no order as to costs as the appeal has an element of public interest.

37. Orders accordingly.

Dated and Delivered at Nairobi this 24th Day of May, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

Mr Marwa h/b for Kanjama for the Appellant/Applicant

N/R for the 1st Respondent

Mr Cohen for the 2nd Respondent

N/R 3rd Respondent

Court Clerk Jeff Omuse