



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 54 OF 2017

BETWEEN

HERBERT MUGANDA..... APPELLANT

AND

ORANGE DEMOCRATIC MOVEMENT..... 1ST RESPONDENT

HON. WILFRED OLUOCH ODALO..... 2ND RESPONDENT

INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION..... INTERESTED PARTY

JUDGEMENT

1. This is an Appeal brought under the Provisions of Section 41 of the Political Parties Act. It arises out of a dispute in respect to a Primary held on 30th April, 2017 for the nomination of the position of Member of County Assembly (MCA) for Mabatini Ward for the Orange Democratic Movement (ODM) Party.

2. The contest was between 5 Aspirants, amongst them were Herbert Muganda (the Appellant herein) and Hon. Wilfred Oluoch Odalo (the 2nd Respondent). At the close of polling, a dispute arose on the outcome. Mr. Jared Owade (Owade), allegedly the Returning Officer for Mathare Constituency declared Herbert the winner with votes of 57. Another person, Thomas Odoyo Omune (Odoyo) also alleging to be the Returning Officer declared Odalo to be the victor with votes of 759. That set the stage for this controversy which has quickly found its way to this Court.

3. The first port of call for the dispute was the Party Special County Appeals Tribunal. There, it was resolved in favour of Herbert with the attendant result that the Interim Certificate that had been issued to Odalo was revoked.

4. Odalo was not one to give up and moved the Political Parties Disputes Tribunal (PPDT) for a second bite. On this occasion he emerged victorious.

5. In this Appeal, the Appellant narrowed his attack to the finding of the PPDT found in paragraph 7 of the Decision. There the PPDT held,

“From the evidence on record, we are satisfied that having been declared winner with 759 votes by the Ward Returning Officer, the Constituency Returning Officer later declared the 2nd Respondent winner with 57 votes. We hold that the Constituency Returning Officer had no authority to declare Member of County Assembly result. We uphold the declaration by the Ward Returning Officer.”

6. This is a first Appeal and this Court is duty bound to reevaluate the evidence received by the Trial Tribunal for purposes of making its own finding.

7. The party, as required by Law submitted its Election and Nomination Rules to the Independent Electoral and Boundaries Commission (IEBC), Rule 18.6 of Election and Nomination Rules reads as follows:-

“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 result of the Elections in respect of the Member of Countt Assembly Representatives and Member of National Assembly”.

8. As correctly submitted by Counsel for the Appellant, it is the Constituency Returning Officer who declares the outcome of a Nomination for an MCA Primary. There is no such position as ‘Ward Returning Officer’ and to that extent there would be an error in paragraph 17 of the decision of the PPDT.

9. Conceding that, Counsel for the 2nd Respondent posed the question ‘what is in a name, as long as the declared outcome reflected the Will of the people?’

10. I would like to think that Counsel for the 2nd Respondent was asking the Court to resolve this matter on the second of the three propositions made in the often quoted case of **Morgan Vs. Simpson** [1974] 3ALL ER 722, Lord Denning had stated:-

“Collating all these cases together, I suggest that the law can be stated in these propositions (1) if the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or no ...(2) if the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Election, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated.”*(my emphasis)*

11. And I agree, there will always be flaws in an Election but where there is substantial compliance with the Law or Rules governing the election and an Election Court is able to ascertain the Will of the people then it should as much as possible endeavor to give it effect as a primary objective of an Election, such as this, is to give the Voters an opportunity of expressing their choice of who should bear the flag of the Party in the upcoming National Election.

12. From the rival evidence, two people hold out themselves as the Returning Officer for Mathare Constituency. That is, Owade and Odoyo. Before the Tribunal was an Affidavit by Odoyo in which he swore to his position and annexed a copy of a Letter of Appointment. On the part of Owade, there was a copy of a Letter which he had written to the Chairman of the Party National Election Board. In that letter he describes himself as the Returning Officer. There was also a copy of a letter from the Party’s National Election Board confirming that he was the duly appointed Returning Officer.

13. However, for purposes of ascertaining the Will of the people, what is more crucial would be the outcome of voting at the Polling Station. It is at this ground zero where by casting the Ballot Paper, the Voter expresses his choice and therefore a count of the votes cast is the outcome of the election at the Polling Station.

14. It is common ground that for Mabatini Ward there were two Polling Stations being at “Special’ and “Polytechnic”. Before the Tribunal was an Affidavit by one Mark Wayoyi Wanyanga in which he deponed that he was the Presiding Officer for Mabatini Ward. His Letter of Appointment dated 29th April, 2017 is annexed to that Affidavit. His Affidavit evidence was that the election process started off well at around 10.39am in both Polling Centres, that is, Special and Polytechnic.

15. Because of violence and darkness at the place designated for counting of votes, the votes were counted at the Party Headquarters. Mr. Wanyanga depones that the decision to move the Counting Centre was made in consultation with the Returning Officer and the Agents of the Candidates.

16. That after the tallying of votes, in the presence of Clerks and Agents of the Aspirants, Odalo emerged the winner. Attached to one Affidavit of Wanyanga was a ‘polling Result Form’ for the two Polling Stations showing the following result:-

Herbert Muganda Mulah – 490

John Otieno Obonyo – 430

Wilfred Oluoch Odalo – 759

Kevin Ochieng Onyango – 392

Silas Miranda Odero - 138

17. Against this evidence was evidence of John Otieno Obonyo who was also an Aspirant in the impugned Elections. His evidence was that after the close of polling, the votes for “Special” were first counted. However, violence erupted when the votes for Polytechnic had been sorted out and were ready for counting as it was ‘obvious’ that he had more votes than any other Candidate. At the disruption, Ballot Boxes were broken and Votes scattered (read ballot paper). As a result there was no counting of Votes.

18. Mr. Owade who was the acclaimed Returning Officer choose not to give any Affidavit evidence and the Appellant was content to rely on a copy of his Letter to the National Election Board. In the Letter he says that violence broke out and disrupted the voting. He goes on to say,

“I learnt later that the Presiding Officer in consultation with the Clerk agreed to take the Ballot Papers to Orange House without any notification to me”.

At Orange House the only results of Special were counted and that in respect to Polytechnic he wrote,

“...before we started counting security Agents became hostile when we wanted to count Undugu Polytechnic. The Agents decided to disrupt the counting. We secured the Ballot Boxes to the tallying Centre at Nyayo Station. Taking into account the incident leading to this I declared Herbert Muganda the duly elected MCA Mabatini County Ward. I therefore make the return for Mabatini MCA”

19. What is to be made of this evidence? Although the Tribunal was provided with a Letter dated 10th May, 2017 from the Chairman of the Nairobi County Elections Committee (ODM) naming one Michael Omollo as the Presiding Officer for Mabatini Ward, neither Mr. Omollo nor the Chairman gave sworn affidavit evidence to this effect. Further the Instrument /letter of appointment of Mr. Omollo, if it existed, was not produced in evidence.

20. Contrast this with the Mr. Wanyanga's evidence. He swore an Affidavit of his position and produced a Letter of Appointment. On a balance of probabilities, the evidence tilts in favour of Mr. Wanyanga as his evidence is on Oath and backed by documentary evidence.

21. Under Rule 18.6 of the Election and Nomination Rules, the person responsible for counting votes at Polling Stations is the Presiding Officer. The evidence is that Mr. Wanyanga was the Presiding Officer for the only two Polling Stations at Mabatini. He gave evidence on circumstances under which the votes were counted. He gave the outcome. Curiously, Mr. Owade, on whom the Appellant sought to rely, did not swear Affidavit evidence as to who counted the votes. Neither was there sworn evidence by him discounting the version of Mr. Wanyanga.

22. The evidence of Mr. Wanyanga remained, by large measure, uncontroverted. His evidence was by far the strongest indication as to what the Will of the People was. It is from that evidence that this Court can ascertain the Will of the people. The evidence is that the 2nd Respondent was the winner of the Primary with votes of 759 cast in his favour. This Court upholds that result.

23. Taking a wholly different route from the PPDT, this Court comes to the same decision. The Appeal is without merit and hereby dismissed with costs.

24. The Orders granted by the PPDT on 11th May 2017 are affirmed and stand.

Dated, Signed and Delivered in Court at Nairobi this 23rd day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT:

Ochich for Respondent

Kabene for Ochieng for Appellant

Wandati for 1st Respondent

Alex – Court clerk