



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(R. MWONGO, PJ)
ELECTION PETITION APPEAL NO 29 OF 2017

CLIFFORD ODHIAMBO MWALLO.....APPELLANT /APPLICANT

VERSUS

ROY OCHIENG SAMO.....1ST RESPONDENT

ORANGE DEMOCRATIC PARTY..... 2ND RESPONDENT

ODM NATIONAL ELECTIONS BOARD.....3RD RESPONDENT

JUDGMENT

Background

1. The Appellant (Mr Mwallo) and the 1st Respondent (Mr Samo), among others, participated in the Orange Democratic Party (ODM) Nominations on 25th April, 2017, for the Kajulu Ward Member of County Assembly seat, in Kisumu County.
2. According to Mr Samo's Complaint in the Political Parties Disputes Tribunal (PPDT) Case No 204 of 2017, he won the nominations and was issued with an interim nomination certificate dated 25th April, 2017. Subsequently, he was issued with the final nomination certificate on 29th April, 2017. To his surprise, the 2nd and 3rd Respondents also issued to Mr Mwallo, the appellant herein, a final nomination certificate who according to the 1st Respondent had garnered less votes.
3. On 9th May, the Mr Samo filed a complaint at the PPDT (No 204) challenging the ODM Party's action of issuing a certificate to a person who had not won the nomination.
4. At the PPDT, Mr Samo filed a Supporting Affidavit to which was attached:
 - a. his provisional Nomination certificate and final nomination certificate, respectively dated 27th and 29th April, 2017;
 - b. a copy of the final nomination certificate of the appellant, Mr Mwallo, also dated 29th April, 2017;

a hand-written two-page letter dated 29th April, 2017 by a Thomas M Riaga, who described himself as the Returning Officer Kisumu East. The letter, *inter alia*, declared Mr Samo the winner;

d. a Party form indicating the results of each candidate showing that Mr Samo won the seat with 2,174 votes out of 6,431 votes, against his nearest rival, the appellant who got 1,354 votes. At the bottom of the form are gaps where the agents were required to sign, but it is indicated in hand-script at the bottom:

“Agents declined to sign”

e. A letter under his hand to the Party’s National Elections Board dated 7th May, 2017

5. In response to the complaint, Mr Mwallo (the Interested Party in the PPDT Complaint) filed his provisional and final nominations certificates, and a photograph showing him receiving a certificate from a Party official. Importantly, through the supporting affidavit of Lamech Onyango K’Onyango who also described himself as the Returning Officer, he too filed: a summary of Ward results; Party forms showing results from various polling stations, as follows:

- a. Okok station, Presiding officer Patrick Ramogi; signed by 11 agents;
- b. Angira station, Presiding officer Manyali; signed by 7 agents;
- c. Wathorego station, Presiding officer Omollo; signed by 4 agents;
- d. Bukna station, Presiding officer Daniel Aloo; signed by 9 agents;
- e. Mamboleo station, Presiding officer L Otieno; signed by 7 agents;
- f. Obwolo station; Presiding officer O.K Lamech for RO; signed by 7 agents;
- g. Kindu Pry station, Presiding officer George Owira; signed by 2 agents;
- h. Oriang station, Presiding officer Ishmael Orago; signed by 12 agents;
- i. Kianja station, Presiding officer not indicated; signed by 1 agent;

A summary of the results was also included showing that the appellant won by a “*landslide*” with 2,268 votes against his nearest rival Michael Aura who had 1309 votes.

6. Due to pressure of work, the PPDT directed the parties to file written submissions. The record of proceedings also discloses that there was no appearance for either the Party or the appellant. The Applicant’s (1st Respondent’s) written submissions dated 12th May, 2017, are on record.

7. In its judgment dated 13th May, 2017, the PPDT allowed Mr Samo’s case, restrained the Party from issuing a nomination certificate to any person other than Mr Samo

The Appeal and the Issues

8. Aggrieved by this decision, the appellant has appealed to this court. He filed the record of appeal containing all the documents that were before the PPDT. The grounds of his appeal are as follows:

“a. The Tribunal erred in law and fact in failing to consider the Appellant’s reply and submissions to the 1st Respondent’s complaint and thereby denied the Appellant a right to fair hearing.

b. The Tribunal misdirected itself on fundamental issues of law and fact by relying on the sole evidence presented by the 1st Respondent despite the overwhelming evidence on the face of the same that cast doubt on their authenticity and validity.

c. The Tribunal ignored and/or neglected fundamental flaws in the evidence submitted by the 1st Respondent relative to the claims made by the 1st Respondent in its pleadings that showed glaring inconsistencies that ought to have put to doubt the bonafides of the complaint in the first instance.

d. The Tribunal erred in law and fact in failing to consider and interrogate the bonafides of the documents presented by the 1st Respondent in the face of overwhelming evidence presented by the Appellant on the same.

e. The Tribunal made a fundamental error of law in failing to apply the appropriate weight to the totality of the evidence before it in making the decision it did. The said Judgment failed to take into account crucial evidence that it ought to have considered and/or considered matters and/or issues that were irrelevant to the dispute it hand and thereby arrived at a fundamentally wrong decision.

f. The Judgment was otherwise irregular for failing to outline all the issues arising from the complaint and giving reasons for the conclusions arrived at.”

9. Mr Mwallo asks this court to allow appeal and set aside the judgment and decree of the PPDT. He also seeks a declaration that he is the validly nominated ODM candidate for the position of Member of County Assembly, Kajulu Ward, Kisumu County.

10. After listening to the parties representations and considering the documents availed before me, the crux of the appeal seems to me to be:

Whether the Tribunal adequately considered the evidence availed to it by the appellant, and if not, what remedy should be granted.

Analysis and Determination

11. My analysis requires that, amongst other things, I consider the record and judgment of the PPDT to determine what matters were considered in enabling it reach its decision.

12. The first matter I note is that the ODM Party, although enjoined as a party to the complaint, did not enter appearance at all. Nor did they enter appearance in the appeal. I also note that the complainant, Mr Samo, was granted leave to amend the pleadings to remove, *inter alia*, the ODM National Elections Board from the proceedings, although there is no evidence that the pleadings were amended.

13. In paragraph 6 of the judgment, the PPDT determined the main issue to be: whether the ODM Party and the ODM National Elections Board “*were justified in denying the Claimant the final nomination certificate and instead issuing the same to the Interested Party (Mr Mwallo).*”

14. Having identified that issue, the Tribunal then discussed **Article 38** of the Constitution (para 7); **Article 91(1)(d)** of the Constitution (para 8); **Section 9 Political Parties Act** (para 9); **Rule 18.8(iv)** of the **Party Nomination Rules** on timelines for issuance of a final nomination certificate (para 10). They discussed the Claimant’s legitimate expectation (para 11); and finally, the Tribunal concluded that the Party went against its own rules in not issuing Mr Samo the final nomination certificate, but instead issuing it to Mr Mwallo (para12).

15. There is no doubt in my mind that the Tribunal did not capture the gravamen and essence of the dispute before them which clearly was to answer the following question:

As between the certificate issued to Mr Mwallo and that issued to Mr Samo, and given the evidence filed before the Tribunal, which was the legitimate nomination certificate?

The Tribunal was fully aware that there were two certificates, and in fact did note so at paragraph 12 of the judgment. Yet it did not address that as a discrepancy which needed investigation based on the evidence available.

16. Further, there appears to have been a critical disconnection between the understanding of the Tribunal as to what was submitted to it and the actual documentation submitted. In the judgment at paragraph 2, the Tribunal states:

“However, to date the Claimant has not been issued with the final nomination certificate as required by Rule 18.8(iv) of the [Party’s] Elections and Nominations Rules”

Yet, as earlier noted, the Tribunal noted the existence of two nomination certificates in paragraph 12, but states:

“...In other words we find no justification in the actions of the 1st Respondent [ODM Party] denying the claimant the final nomination certificate and instead issuing the same to the Interested Party [Mr Mr Mwallo] herein.” (emphasis supplied).

17. In fact, on that point, what was deposed by Mr Samo in his Supporting Affidavit before the Tribunal was at paragraph 7, namely:

“THAT I did await to be issued with the Final Nomination certificate as per the 1st Respondent’s Constitution and was issued with one on 29th April, 2017.” (emphasis supplied).

Mr Samo then annexed both his final nomination certificate (exhibit “ROS 3” and that of Mr Mwallo (“ROS 4”), which he was complaining about.

Clearly, the PPDT wholly misapprehended the evidence available before it, or wholly failed to appreciate the thrust of the parties’ cases as made out by the evidence.

18. There were detailed arguments before me on a host of matters. Key among these were: whether or not the Party Nomination Rules contain the office of a Ward Returning officer, or prescribe for a document known as a provisional nomination certificate; or whether the officers whose returns were exhibited were authentic in light of the requirements of the Nomination Rules, and so forth. I have laid no weight on those submissions as the Party was not present to offer its position and clear what are really factual practical issues as to who was a returning officer and what forms were being used in the nominations.

19. There was also an application by the appellant seeking to introduce fresh evidence through affidavits of certain Party operatives to bolster the appellant’s case on the issuance of the results and nomination certificates. I decline to admit the same. Firstly, because the ODM Party was a party in the Complaint but chose not to enter appearance (in fact the Tribunal granted leave for the Party’s National Elections Board to be dis-enjoined) ; and secondly, because the matters deposed to therein had not gone before the Tribunal and would be new evidence to which the respondent would have no opportunity to contest. It is not the role of this court to determine the winner of a disputed nomination at the stage of appeal, particularly when the Party has mechanisms to resolve such disputes internally, but chooses to close its eyes to avoid being involved.

20. This court appreciates that it has the power to hear an appeal as if at first instance and make determination on the facts. In this case, however, I do not consider it appropriate where the documentary evidence is wholly contradictory and contested, for the court to proceed on a determination upon such evidence at appeal level unless the ODM Party is called to give clarification on the documents stated as

emanating from various of its officers and offices. The nominations were for the Party, and it cannot shirk its responsibility to provide resolution for its disputes.

21. I am also concerned that the Tribunal did not consider the fact that two different officers of the Party were claiming to be the bona fide returning officers for Kajulu Ward. Nothing is said in the judgment concerning this curiosity, which in fact led to the miasma the parties found themselves in.

Conclusion

22. For all the above reasons, I am persuaded to agree with the appellant that the Tribunal did not properly consider the competing sides of the parties' stories on the basis of the evidence available. On this basis, I am persuaded to set aside the judgment of the Tribunal.

23. However, I am not persuaded to grant the prayer sought by the appellant that this court should declare the appellant as the validly nominated ODM candidate for the position of Member of County Assembly for Kajulu Ward. The obvious reason is that given the evidence available before this court, it cannot make that determination.

Disposition

24. The appeal is allowed and the judgment of the PPDT is hereby set aside.

25. The ODM Party is hereby ordered to use its internal dispute resolution mechanism to resolve the dispute between the parties within 24 hours from the date hereof, failing which the ODM Party shall hold and complete fresh nominations for MCA for Kajulu Ward no later than Monday, 22nd May, 2017.

26. No order as to costs is made as the matter has an element of public interest.

27. **Orders Accordingly**

Dated and Delivered at Nairobi this 19th Day of May, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

Mr Faraji h/b for Mr Awele for the Appellant/Applicant

Mr Mwale h/b for Mr Muga for the 1st Respondent

N/R for the 2nd Respondent

N/R for the 3rd Respondent

Court Clerk Jeff Omuse