



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NUMBER 46 OF 2017**

**EMMANUEL O ACHAYO.....APPELLANT**

**VERSUS**

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

**COUNTY APPEALS TRIBUNAL (ODM).....2<sup>ND</sup> RESPONDENT**

**ABIGAIEL PERPETUA AWINO.....3<sup>RD</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**REGISTRAR OF POLITICAL PARTIES.....2<sup>ND</sup> INTERESTED PARTY**

*(An Appeal from the Decision of the Political Parties Dispute Tribunal in Case No. 98 of 2017 delivered on 13<sup>th</sup> May, 2017 by M. Lwanga, D. Nungo, P. Ngotho and Dr. A Mbithi)*

**REPUBLIC OF KENYA**

**IN THE POLITICAL PARTIES DISPUTE TRIBUNAL**

**CASE NUMBER 98 OF 2017**

**ISSUE IN DISPUTE: UNLAWFUL AND IRREGULAR NOMINATION IN SIAYA COUNTY (GEM CENTRAL WARD) MCA NOMINATIONS**

**EMMANUEL O ACHAYO.....COMPLAINANT**

**VERSUS**

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

**COUNTY APPEALS TRIBUNAL (ODM).....2<sup>ND</sup> RESPONDENT**

**ABIGAIEL PERPETUA AWINO.....3<sup>RD</sup> RESPONDENT**

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

The Appellant Emmanuel O Achayo is a life member of the Orange Democratic Movement Party and was along with it eleven (11) other aspirants including the 3<sup>rd</sup> Respondent Abigail Perpetua Awino participated in the party primaries for nomination of the member of County Assembly (MCA) for Gem Centre Ward Siaya County. The primaries were conducted by the ODM National Elections Board which is an organ of the ODM Party; the nomination exercise was to be undertaken by the party members in Gem Central Ward. There were 11 polling stations at the ward, and the Tallying Centre was to be at Wagai District Officer's Centre. Each of the 11 polling stations were headed by a presiding officer and the ward Presiding Officer was one Poka.

The nomination primaries were held on 25<sup>th</sup> April, 2017. The Appellant was not satisfied that the same was free and fair as the ODM Party Register of Members, was not used and it allowed non-members to participate in the primaries; there were late arrival of ballot boxes and papers, when the ballot boxes and ballot were delivered to Kaliwo for tallying they had no lids, which led to ballot stuffing, the 3<sup>rd</sup> Respondents using named vehicles, ran away with ballot boxes; there was double voting; that when the ballot papers were exhausted the clerks used exercise books, that there was bribery of voters and that the son of the 3<sup>rd</sup> Respondent took charge of the voting process in some stations. Finally Appellant contends that no tallying of the ward votes was done as chaos erupted at the ward Tallying Centre. He was, however able to tabulate from his agents that he received 1160 votes and the 3<sup>rd</sup> Respondent 958 votes and the others obtained lesser votes.

The Appellants, due to the above malpractices formed opinion that the nomination exercise was not free and fair and were not conducted in accordance to the party's nomination rules. The Appellant contends that despite the fact that no tallying was done, the 3<sup>rd</sup> Respondent Abigail was declared a winner and issued with the nomination certificate. Aggrieved with the manner the nomination exercise was conducted, he lodged a petition to Siaya County ODM elections Board, which is the party's Internal Dispute Resolution Organ which rendered its decision on 6<sup>th</sup> May, 2017 dismissing the Appellants claim stating that the 3<sup>rd</sup> Respondent was duly nominated as MCA Gem Central Ward. Dissatisfied with the decision, the Appellant appealed to the Political Parties Dispute Tribunal against the dismissal of its complaint. By judgment delivered on 10<sup>th</sup> May, 2017, the Political Parties Dispute Tribunal dismissed his claim, the Appellant by application dated 12<sup>th</sup> May, 2017 applied to the PPDT seeking review of their decision dated 10<sup>th</sup> May, 2017 on grounds that by a letter dated 11<sup>th</sup> May, 2017, the Office of the Registrar of Political Parties (ORPP) had notified the ODM Party that as at 10<sup>th</sup> May, 2017 Abigail Perpetua Awino, the 3<sup>rd</sup> Respondent was not a member of ODM but a member of the Democratic congress and was therefore, precluded from being nominated by ODM Party.

By decisions tendered on 13<sup>th</sup> May, 2017 the Tribunal dismissed the application for review. The Appellant being dissatisfied with the judgment and ruling appealed to this court under the provisions of Section 41(2) of the Political Parties Act which provides: -

***“An Appeal shall lie from the decision of the tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”***

By order dated 18<sup>th</sup> May, 2017 this court directed that the both appeals against the judgment and ruling be consolidated and heard together. The appellant filed 4 main grounds of appeal: -

- 1. That the Honourable Tribunal erred in law and fact by dismissing the Complainants Claim and upholding the Decision of the County Appeals Tribunal.***
- 2. The Honourable Tribunal erred in law and fact by failing to consider that the official results were never announced since there was no tallying of votes cast.***
- 3. The Honourable Tribunal erred both in law and fact by failing to consider the appellant's evidence and instead summarily holding that there was no evidence showing substantial irregularities in the entire electoral process in the entire Gem Central Ward.***
- 4. That the Honourable tribunal erred in law and fact by failing to appreciate that there were cases of voter bribery by the 3<sup>rd</sup> Respondents agents, double voting, voter importation using two motor vehicles of registration number KCJ 487W and KCD 671Z.***
- 5. That the Honourable Tribunal erred in law and fact by failing to appreciate that there was stuffing of ballot boxes since the said boxes had no lids enhancing easy stuffing of ballot papers.***
- 6. That the Honourable Tribunal erred in law and fact by failing to find that there was the evidence on record which was uncontroverted by the Respondents to overturn the 1<sup>st</sup> Respondents County Appeals Tribunal decision.***

His prayers to this court are that: -

- 1. The Appeal be allowed and the Decision of the Political parties Disputed Tribunal to be set aside.***
- 2. The Nomination Certificate issued to Abigil Perpetua Awino be nullified.***
- 3. The Orange Democratic Party be ordered to nominate Emmanuel O. Achayo as its nominee to vie for member of Country Assembly for Gem Central Ward, Siaya County.***
- 4. IN THE ALTERNATIVE, a mandatory order be issued against Orange Democratic Movement party to conduct fresh nominations for Member of County Assembly, Gem Central Ward, Siaya County.***
- 5. The 1<sup>st</sup> Interested party do accept and re-issued nomination certificate of the Orange Democratic Movement Party for Member of County Assembly, Gem Central Ward, Siaya County and process it appropriately.***
- 6. Costs of the suit in the Superior Court and in this Appeal be to the Appellant.***

This is a first appeal. The duties of the first appellate court are now well settled. In **Abok James Odera T/a Odera & Co. Advocates Vs John Patrick Machira – AC 161/1999** the Court of Appeal stated: -

***“The duty of the first appellant court is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusion reached by the trial judge are to stand or not and give reasons either way.***

In the case of **Kenya Ports Authority Vs Kuston Kenya Ltd (2009) 2 EA** wherein the Court of Appeal held inter alia: -

***“On a first appeal from the High Court the Court of Appeal should reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. Secondly, the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”***

This court is therefore, enjoined to re-evaluate, reassess and re-analyze the evidence before the tribunal. What was the affidavit evidence before the Siaya County ODM Election Board and the PPDT? The Appellant’s complaint and evidence are contained in his affidavit sworn on 6<sup>th</sup> May, 2017. He deponed that the party primaries were marred by irregularities which included failure to use party register, late arrival of ballot materials at polling station, ballot stuffing, bribery, double voting, use of paper form exercise books as ballot papers and failure to undertake vote tallying. He deponed that he witnessed most of the irregularities. The Appellant also filed an affidavit sworn by Jacob Mathew Oludhe Ondik ***‘The Chief Agent’*** sworn on 8<sup>th</sup> May, 2017 in which he deponed that the ballot materials arrived late’ which disenfranchised a lot of people, that he saw an agent of the 3<sup>rd</sup> Respondent run away with ballot boxes to unknown destination, there was use of exercise books papers as ballot papers, that he compiled results from his agents which showed the Appellant won; and that he was not issued with tallying forms. The Appellant also annexed affidavit of Pauline Akinyi Achayo who deponed on similar terms. The Appellant availed the affidavit of Isaac Poka a Presiding officer sworn on 8<sup>th</sup> May, 2017 who deponed as follows.

- a) ***That, I was the Presiding Officer for Gem Central Ward, Siaya County Nominations.***
- b) ***That my work as a returning officer was to ensure counting was done at various polling stations and officially declare the results of the Gem Central Ward, Siaya County Nominations.***
- c) ***That voting in the various polling stations stated at round 3 p.m. in the afternoon upto 10 p.m. in the evening. Any person who was in the queue was allowed to vote.***
- d) ***That the voting was smooth despite some few challenges in some stations and each candidate had one or two agents in the various stations.***
- e) ***That some of the challenges were that some ballot boxes did not have lids on them and also voting materials ended and we had to use exercise books specifically in the MCA Nominations.***
- f) ***That the voting was done and results were declared in the various stations, the agents of the various candidates knew the results of their candidates.***
- g) ***That originally after the results were declared in the various polling stations, the tallying was to be done at Karariwo where all the ballot boxes were to be brought.***
- h) ***That the returning officer had earlier informed us that especially for the MCA Nominations were a winner has been declared, provisional nomination certified was to be issued, and unfortunately that was not done.***
- i) ***That, I am aware that when we were counting MCA Nominations there was a blackout***
- j) ***That in the morning of 26<sup>th</sup> April, 2017, I together with other presiding officers took our ballot boxes to the returning officer at Wagai.***
- k) ***That at Wagai was where the tallying was supposed to be done for the MCA Nominations but this was not done for reasons that there were some rowdy youths at the gate, we were informed that we put everything in the ballot boxes and left.***
- l) ***That as far I am concerned there was no declaration of a winner at Gem Central Ward, Siaya County, MCA Nominations and therefore no issuance of a provisional certificate.***

The 3<sup>rd</sup> Respondent too filed a response by Kopot & Co. Advocates dated 9<sup>th</sup> May, 2017 in which the 3<sup>rd</sup> Respondent denies the allegation and inviting the Appellant to prove the same and admitting that minor challenges experienced affected all the candidates and the Appellant alone did not suffer prejudice.

This was the affidavit evidence before the Siaya County Elections Board and at the Political Parties Dispute Tribunal. The Political Parties Dispute Tribunal by judgment delivered on 10<sup>th</sup> may, 2017 rendered its decision stating.

***“The Claimant has prayed that the IDRM decision be set aside and the nomination certificate issued to him. The allegation of***

*non-declaration of results, on the basis of which the Claimant lodged this complaint, was he read and determined by the Siaya County Appeals Tribunal. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not appear at the hearing of the matter, neither did they file a response to the allegations of non-declaration of results, so we could not establish whether a certificate of return was issued in respect of the said election. Nevertheless, the burden of proof rests with the Claimant to satisfy this Tribunal that the decision of the County Special Appeals Tribunal was flawed. We find that he did not.”*

In his submission Mr. Kanjama for the appellant faulted the decision on three main grounds

(a) **That the tribunal erred in law and in fact by dismissing the Appellants Claim Summarily.** He submitted that the Appellant herein filed his complaint raising substantial irregularities’ that marred the 1<sup>st</sup> Respondent’s nominations. There is also on record affidavit evidence and annexed documents detailing the said irregularities ranging from voter bribery to ballot stuffing. Further, even the 2<sup>nd</sup> Respondent made a finding that the son to the 3<sup>rd</sup> Respondent was involved as the clerk and acted as the presiding officer in the said nominations.

There was no response from the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. On the part of 3<sup>rd</sup> Respondent, filed a Response to the Complaint which was nothing more than mere denial. In effect, there was no affidavit evidence controverting the bundle of evidence presented by the appellant. There was no attempt by the Tribunal to analyze this evidence. Instead, it dismissed the Appellant’s complaint summarily.

He referred the court to the decisions of **Manson Onyango Nyamweya Vs James Amingo Magara & 2 Others** and **George Onyango Oloo Vs ODM (2017)**

b) **That the Tribunal erred in law and in fact by dismissing the Complainants application for Review in light of the new material evidence on record.**

He submitted that the Appellant got wind of the fact that the 3<sup>rd</sup> Respondent had resigned from the 1<sup>st</sup> Respondent Party. On further inquiry for the 1<sup>st</sup> Respondent which was conducting verifications, he was informed that the 2<sup>nd</sup> Respondent had confirmed that the 3<sup>rd</sup> Respondent was indeed a member of another Party, Amani Democratic Congress from 28<sup>th</sup> November, 2010. Under the law a candidate is precluded from being a member of more than two political parties.

c) **That the Appellant is entitled to the reliefs sought as no official results were declared by the Returning Officer.**

Counsel submitted that the Returning officer swore an affidavit to the effect that neither tallying nor declaration of official results was done in respect of the nominations. There was no basis for the 3<sup>rd</sup> Respondent being declared the winner. According to the results by the presiding officer in the various polling stations and signed by the agents of the various candidates, the chief agent to the Appellant swore an affidavit, confirming that the Appellant emerged victorious in the nomination exercise.

Mr. Kopot for the 3<sup>rd</sup> Respondent submitted that the allegations made by the Appellant at both the Siaya County Elections Board and the PPDT were not proved. The allegations that no party list was used is not supported even by Mr. Poka who was a Presiding Officer, that the late arrival of ballot materials cut across all the Polling Stations and that Mr. Poka admitted that Counting was done at the polling stations but the tallying was to be done at the constituency level by Constituency Returning Officer. There is no evidence that the same was not done as Mr. Poka was not the Returning Officer and that the issue that no tallying was done is not true and an afterthought. On the issue that the 3<sup>rd</sup> Respondent is not a member of Orange Democratic Movement as per the letter from the Office of the Registrar of Political Parties, he submits that the letter was not certified and was not produced by the maker and therefore, is and was inadmissible in evidence.

Mr. Kamero for 1<sup>st</sup> Respondent associated himself with submissions by Mr. Kopot and submitted that the Appellants evidence before the tribunal was weak and that both tribunals were right in dismissing his claim.

It is 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.

The party nomination or primaries are part of the elective management cycle. In election petitions or nominations disputes the burden of proof rests with the party making the allegations at challenging the outcome or alleging, misconduct on the other. The standard of proof in election cycle cases has been held to be higher than the proof on balance of probability but lower than the standard proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral malpractice like for instance bribery require higher proof. It seems clear to this court, therefore, that a petition as compared to other matters of a ‘civil nature’, has to be proved on a much higher standard of proof. Such higher standard was expressed by the High Court in **John Kiarie Waweru Vs Beth Wambui Mugo & 2 others** at page 5 as follows: -

*“As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than applicable in ordinary civil cases i.e. that proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral practices, like for instance bribery, require higher proof.”*

In **Raila Odinga Vs the Independent Electoral and Boundaries Commission** the Supreme Court of Kenya stated thus at page 75: -

*“But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents*

***are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt-save that this would not affect the normal standards where criminal charges linked to an election, are in question.***

I have in this judgment re-stated the affidavit evidence adduced by the Appellant before the tribunals. The affidavit contain in my view allegations of malpractices the appellant stated occurred during the nomination exercise; allegation of bribery without stating who was bribed and by who; ballot stuffing without disclosing the polling stations and by who, double voting, without giving instances, use of exercise book papers without disclosing where, non-tallying of ward votes when all he says that Mr. Poka left the tallying Centre when there were alleged chaos. All these allegations had no supportive evidence. The burden of proof in civil cases is on a balance of probability. Denning J. in **Miller Vs Minister of Pensions (1947)** discussing the burden of proof had this to say: -

***“That degree is well settled. It must carry a reasonable degree of probability, but no so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable that not’, the burden is discharged, but, if the probabilities are equal, it is not.***

***Thus, proof on a balance of preponderance of probabilities means a win, however, narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

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 second ground of appeal by the Respondent is that the Political Parties Disputes Tribunal erred in its refusal to review their decision when there was a letter from Office of the Registrar of Political Parties indicating that the 3<sup>rd</sup> Respondent was a member of Democratic Congress. In response to the letter, the 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn on 13<sup>th</sup> May, 2017 denying that she had ever joined the Democratic Congress as alleged in the Registrar’s letter dated 11<sup>th</sup> May, 2017. She annexed her ODM party Life Membership Certificate No. 002621 and Official Receipt No. 25146 dated 22<sup>nd</sup> march, 2016 for payment of Ksh.20,000/- membership fee. The Respondent annexed the Kenya Gazette Notice No. 3796 of 13<sup>th</sup> April, 2017 where the IEBC published names of Persons scheduled to participate in primaries where the name of the 3<sup>rd</sup> Respondent is listed alongside the appellant as persons cleared for the primaries for Central Gem Ward. The 3<sup>rd</sup> Respondent also annexed a letter to the Office of Registrar of Political Parties dated 13<sup>th</sup> May, 2017 protesting that she had never applied for or been a member of Democratic Congress Party and that she was a member of ODM Party and advising them to amend their records accordingly.

The Political Parties Disputes Tribunal rejected to admit the letter from the Office of the Registrar of Political Parties stating: -

***”We note that the alleged letter from the Office of Registrar of Political Parties on member status was not produced tendered before us as they were neither provided by the ORPP or the 2<sup>nd</sup> Respondent as Secretary General of the 1<sup>st</sup> Respondent to whom it was addressed.”***

The letter tendered by the Appellant was not certified by the Office of the Registrar of Political Parties as per the requirement of Section 80 of the Evidence Act; it was not produced or annexed to affidavit of Office of the Registrars Political Parties or by the person it was addressed to. It was on that basis that the review was declined. Even if it were to be admitted, in view of the documents produced by the 3<sup>rd</sup> Respondent, there would have been a doubt in the mind of the tribunal as to whether the 3<sup>rd</sup> Respondent was not a member of ODM Party, which issue would have been resolved had the Appellant called the maker of the letter from the Office of the Registrar of Political Parties to conclusively confirm that despite the documents produced by the 3<sup>rd</sup> Respondent she was a member of Amani Democratic Congress. In my view, therefore, the tribunal declining the application for review cannot be faulted.

In the result, I find no merit in this appeal which is hereby dismissed. I uphold the decision of the Political Parties Dispute Tribunal dated 10<sup>th</sup> May, 2017 affirming the Nomination of the 3<sup>rd</sup> Respondent Abigail Perpetua Awino as the 1<sup>st</sup> Respondent, Orange Democratic Movement Party Nominee for Member of County Assembly Gem County Ward. I make no orders as to costs.

Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of May, 2017.

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**S N RIECHI**

**JUDGE**