



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**ELECTION PETITION APPEAL NO. 30 OF 2017**

**PERPUTUA MPONJIWA .....APPLICANT**

**VERSUS**

**ELIUS OKUMU OTIENO.....1ST RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT (ODM)**

**SPECIAL COUNTY APPEAL TRIBUNAL..... 2ND RESPONDENT**

**MARY VICTORIA .....3RD RESPONDENT**

**THE RETURNING OFFICER KILELESHWA WARD .....4TH RESPONDENT**

**JUDGMENT**

In the Orange Democratic Movement (ODM) party nomination held on 30th April, 2017 for the Kileleshwa Ward of Dagoreti North Constituency, the following were the results announced after the conclusion of the nomination exercise;

<b>1. Elias Otieno</b>	<b>1,096 votes</b>
<b>2. Mary Victoria</b>	<b>319 votes</b>
<b>3. Essay Oduor</b>	<b>1,28 votes</b>
<b>4. Perpetua Mponjiwa</b>	<b>109 votes</b>
<b>5. Eric Holi</b>	<b>85 votes</b>

Elias Otieno (the 1st Respondent) was declared the winner of the nomination. He was issued with a provisional certificate entitling him to offer his candidature for the Member of the County Assembly of Kileleshwa Ward on an ODM ticket. Perpetua Mponjiwa, (the Appellant) who came 4th in the nominations, was not satisfied that the nominations were carried out in free and fair manner. She lodged an appeal to the ODM's Internal Dispute Resolution Mechanism (IDRM). She alleged, *inter alia*, that the 1st Respondent's victory was fraudulently secured after the 1st Respondent's agents had stuffed ballot boxes with votes marked in his favour; that there was intimidation of voters; that some polling stations

were opened late and that some of the polling officials were allies of the 1st Respondent and therefore could not be expected to carry out a free and fair nomination devoid of malpractices committed to favour the 1st Respondent.

In its decision rendered on 6th May, 2017, the IDRМ allowed the Appellant's appeal. It proceeded to order that the provisional certificate issued to the 1st Respondent by the ODM party be withdrawn and instead the National Election Board issues a nomination certificate to the Appellant.

The 1st Respondent was aggrieved by this decision and duly filed an appeal before the Political Parties Disputes Tribunal (PPDT). After considering the appeal the PPDT favour in found of the 1st Respondent and made the following orders:

***“(a) The purported cancellation of the nomination certificate issue (d) to the Complainant Pursuant to the nomination for candidate for Member of County Assembly for Kileleshwa Ward conducted on 30th April, 2017 by the 1st Respondent’s special County Appeals Board is null and void.***

***(b) The issuance of the nomination certificate to the Complainant Pursuant to the nomination exercise for the position of MCA Kileleshwa Ward is proper.***

***(c) The claim dated 9th May, 2017 is upheld and the 1st Respondent is hereby ordered to forthwith issue a certificate to the Complainant for nominations as candidate for Member of the County Assembly for Kileleshwa Ward is upheld.***

***(d) The notification be sent to the Independent Elections and Boundaries Commission.***

***(e) No orders as to costs.”***

The Appellant was dissatisfied with the Judgment of the PPDT. She has filed an appeal to this court. The Appellant raised several grounds of appeal challenging the decision of the PPDT. The grounds essentially faulted the PPDT for not properly taking into consideration the entire circumstances of the nomination exercise before arriving at its decision setting aside the verdict of the ODM party's IDRМ. In particular, the Appellant was aggrieved with the manner in which the PPDT conducted the hearing of the appeal, and further, failed to accord due consideration to alleged instances of electoral malpractices that the Appellant had pointed out both before the IDRМ and before the PPDT. The Appellant is of the view that if the PPDT had properly evaluated the facts of the case, it would have reached a different determination. It is in that regard that the Appellant urges this court to allow the appeal, set aside the Judgment of the PPDT and confirm the decision of the ODM party's IDRМ which determined that she was the nominee for the ODM party for the Kileleshwa Member of the County Assembly seat in the forthcoming 8th August, 2017 general elections.

During the hearing of the appeal, this court heard oral submission made by Mr. Faraji for the Appellant and Mr. Muthomi for the 1st Respondent. The 2nd, 3rd & 4th Respondents were served but did not attend court in person or through counsel on the day appointed for the hearing of the appeal. From the re-evaluation of the facts of the appeal and the arguments made on this appeal, it was clear to the court that the **ONLY** issue for the determination is whether the nomination was conducted in a free and fair manner, and secondly, whether there were malpractices evident during the said nomination exercise. From the decision rendered by the IDRМ, it was apparent that the IDRМ was persuaded that there were malpractices in the nomination exercise that resulted in the declaration of the 1st Respondent as the winner. The Appellant alleged that there were malpractices evident in the nomination exercise including, *inter-alia*, ballot stuffing, late opening of the polling stations and the appointment of associates of the 1st Respondent as polling officials. On perusal of the record, it was clear to this court that the Appellant presented no cogent or credible evidence to support her claim that indeed such malpractices occurred. For instance, when the Appellant alleges that there was ballot stuffing, what evidence did she present to the IDRМ to support this assertion? This court noted that the total number of members of the ODM party who voted during the nomination exercise in Kileleshwa Ward in the three seats that were being contested

were as follows:

<b>(i) Member of County Assembly</b>	<b>1,737</b>
<b>(ii) Member of Parliament</b>	<b>1,711</b>
<b>(iii) Woman Representative</b>	<b>1,656</b>

This total tally excludes spoiled ballots. The Appellant obtained 109 votes. The 1st Respondent got 1,096 votes. The 1st Respondent received 63% of the total votes cast. The Appellant got 10% of the votes that the 1st Respondent obtained. The question that this court asked itself is what percentage, if any, of the total tally did the 1st Respondent obtain as a result of ballot stuffing as alleged by the Appellant? If the total votes cast in Kileleshwa Ward for the Member of Parliament was to be deducted from the votes cast for Member of County Assembly the difference is 36 votes. Is this the votes that the Appellant claims was as a result of ballot stuffing? Clearly, any reasonable tribunal applying its mind to the facts of the case will reach no other conclusion than that the 1st Respondent won fair and square the nomination exercise. If there was ballot stuffing as alleged by the Appellant, then the Parliamentary and the Women Representative nominations were or would be similarly tainted.

As to the allegation made by the Appellant to the effect that the nomination were vitiated by the fact of late opening of some polling stations, on re-evaluation of the evidence presented before the party's IDRDM and the PPDT, it was apparent to this court that the late opening of the polling stations affected the outcome of the nomination for all the candidates for the seats of the Member of County Assembly, Member of Parliament and Women Representative. The Appellant did not adduce any evidence to establish that she was especially affected by the late opening of the polling stations. She was not saying that some polling stations which were located in her "strongholds" were opened late while the ones located in her opponents "strongholds" were opened early. In this court's considered opinion, this allegation was not established to the required standard of proof.

The court was not convinced by the argument advanced by the Appellant that the polling stations were manned by associates of the 1st Respondent. No credible evidence was placed before this court to support such claim. The fact that some polling officials may have been changed before the conduct of nominations was not sufficient reason or ground for the Appellant to allege that those who conducted the nominations would be biased against her. In any event, not one, but three nominations were simultaneously conducted on that day. The candidates who participated in the other two nominations did not complain of any malpractice. Even if, for argument sake, this court were to find that there were electoral malpractices during the nomination exercise, its determination would be that fresh nominations be conducted to ascertain the will of the people of Kileleshwa Ward.

The IDRDM erred when it arrogated itself powers that clearly it did not have of substituting the election by the ODM party members of Kileleshwa Ward with its own appointee. What basis did the IDRDM take into consideration when appointing the Appellant in place of the 1st Respondent? The ODM's IDRDM had no powers to nominate or give directions on who should be issued with a nomination certificate by the party. If there were malpractices in the nomination process, the IDRDM should have directed for fresh nomination to be held.

It is clear from the foregoing that the PPDT did not err when it set aside the decision of the ODM party's IDRDM in respect of the nomination of Kileleshwa Ward nominee for the ODM party. The 1st Respondent is the rightful nominee having been popularly nominated by the members of the party registered in Kileleshwa Ward of the Nairobi County. The appeal is for dismissal. It was dismissed on 15th May, 2017. These are the reasons for dismissal. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED THIS 16TH DAY OF MAY 2017.**

**L. KIMARU**

**JUDGE**