



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION NOMINATION APPEAL NO. 28 OF 2017**  
**IN THE MATTER OF COUNTY ASSEMBLY-HOMABAY COUNTY**  
**BETWEEN**  
**TOM OKIKI NDEGE.....APPELLANT**  
**VERSUS**  
**ORANGE DEMOCRATIC MOVEMENT.....RESPONDENT**  
**JUDGMENT**

This is an appeal from the judgment and decree of the Political Parties Dispute Tribunal, PPDT, dated 28<sup>th</sup> July 2017. By that judgement, PPDT dismissed the complaint by Tom Okiki Ndege, the appellant, which had challenged the Orange Democratic Movement Party, ODM's party top up list. Being dissatisfied with that decision, the appellant filed a Memorandum of Appeal dated 3<sup>rd</sup> August 2017 and raised three grounds as follows;

- 1. The learned tribunal erred in law and fact in holding that the respondent did not err in coming up with the party list.***
- 2. The learned tribunal erred in law and in fact by failing to satisfy itself on the status and competence of the respondent's body that represents persons living with disability, to wit, Orange Democratic Movement Disability League.***
- 3. The learned tribunal erred in fact and law in coming to the conclusion and or making a wrongful assumption that the respondent adhered to the process leading to the forwarding of the party list rather than the material presented before it considering the claim before it was contested.***

Based on those grounds, the appellant urged this Court to allow the appeal, set aside the judgment of the PPDT and order the respondent to reconstitute the party list for persons living with disability in Homa bay county and direct the respondent to include the name of the appellant in the party list as a first priority to represent persons living with disability from Homa bay county.

During the hearing of this appeal, **Mr. Dome** appeared for the appellant while **Mr. Oduor** represented the respondent. **Mr. Dome** reiterated the grounds set out in the Memorandum of Appeal and argued that the appellant, a person with disability, deserved to be placed in the priority position in the party list due to the nature of his disability. Counsel further argued that PPDT did not satisfy itself on the competence of the respondent's organ representing people with disability in the party's ODM Disability League. He

contended that PPDT erred in assuming that the respondent followed the process in preparing and processing the party list rather than consider the materials placed before it, including the letter from the ODM Disability League.

Counsel contended that the PPDT decided against the appellant without considering the relevant material placed before it. He therefore prayed that the appeal be allowed as prayed.

**Mr. Oduor**, learned counsel for the respondent opposed the appeal and submitted that although the respondent did not file a response before the PPDT, the Tribunal was legally bound to decide the complaint on the basis of evidence before it. Learned counsel submitted that it was the duty of the appellant to prove his case before the tribunal which he failed to do. And in that regard, counsel argued, the decision of the PPDT is clear that the appellant did not prove his case as required by the law.

**Mr. Oduor** in particular contended that there was no evidence before the PPDT that ODM's persons with Disability League had mandate to recommend persons to be nominated. Counsel contended that the list prepared by the respondent had persons with disabilities and, therefore, there was nothing special about the appellant. He prayed that the appeal be dismissed.

In a short reply, **Mr. Dome** contended that the appellant's disability as a deaf person is unique and should have been given priority over and above others in the party list. Counsel argued that no person with that kind of disability has ever been nominated from Homa bay County hence the appellant deserved to be in the list.

I have considered this appeal and submissions by counsel. I have also perused the record and the impugned judgment of PPDT.

According to the card issued by National Council for Persons with Disabilities on 20<sup>th</sup> January 2010, Serial No. 0001354, the appellant is registered as No. P/1794 and the nature of his disability is **deaf**. The other fact discernible from the record the appellant is a life member of the respondent. This is according to the membership certificate in the record of appeal.

The petitioner's complaint before PPDT just like in this appeal, was that he was omitted from the party list despite the fact that he had applied as a person with disability and had a letter from the Party's Persons with Disability League which he had placed before PPDT. The appellant had argued before the PPDT that being a person with disability and having been recommended by the party's organ representing persons with disability, he deserved to be in the party list.

After considering the appellant's complaint, PPDT stated at page 3 of its judgment-

***“The claimant is aggrieved by his omission from the party list when he considers himself to have been qualified, a position confirmed by the Disability League. However, the claimant has not demonstrated that the respondent's rules mandate the said League to determine who would be included in the list submitted to IEBC. Without any anchoring in the rules, the proposal to include the claimant's name appears to have been subject to the decision of other organs of the respondent. In our view, the recommendation by the Respondent's Disability League was intended to guide the process, but it was not prescriptive. Indeed, the wording of the letter marked “TON2” from the Disability League to the Secretary General of the Respondent in respect of the party list for persons with disability indicates that the list was for considerations.”***

From the above statement, the PPDT was not satisfied by the appellant's complaint and dismissed it triggering this appeal.

Party lists are governed by the Constitution, the County Government Act and Elections Act, 2011 as well as regulations made thereunder. The petitioner's counsel did not point out which constitutional or statutory provisions were violated by the respondent in the process of generating the party list. All the appellant says is that he applied and had been recommended by the party's persons with Disability

League.

There is no dispute that the appellant is a member of the respondent. There is also no dispute that the appellant is a person with disability. What I get to be the gravamen of the appellant's appeal is that he deserved to be in the party list than probably others on that list. That would then mean the appellant was to prove before the PPDT and before this Court, that the other persons on the party list did not meet the criteria for being in the party list or that he was more deserving than them.

This being a first appeal, the Court determines the appeal on both facts and the law. The appellant has not demonstrated that the respondent breached the law which would enable the Court address itself on the provisions alleged to have been breached.

Regarding the question of fact, the appellant was required to put forward facts to support his claim. I have gone through the record of appeal but the same does not contain vital documents. Order 42 Rule 13(4) of the Civil Procedure Rules, 2010, provides what a record of appeal should contain. There must be a memorandum of appeal, pleadings, proceedings or notes of the trial Court and judgment and decree appealed against. The record of appeal does not contain pleadings filed before the PPDT and proceedings. This Court cannot therefore tell what the appellant's claim before PPDT was except what is stated in the PPDT's judgment.

The appellant contends that PPDT did not consider materials placed before it. Those materials are not before this Court. However, from the judgment of PPDT, those materials included the letter said have been written by the persons with Disability League of the Party and the appellant's application for nomination. These documents are not on record before this Court. Not even the party list that he sought to challenge before PPDT. Those are relevant materials that would have enabled this Court interrogate the appellant's claim that PPDT failed to consider evidence before it.

This court would also have had an opportunity to consider whether the appellant deserved to be in the party list more than those representing people with disability. In the absence of these vital materials, the appellant's appeal is hollow. Moreover the appeal is incompetent for failure to contain important documents.

From what I have stated above and having considered the judgment of PPDT, I am unable to fault PPDT on the decision it arrived at. The appellant has not demonstrated that his appeal has merit to warrant this Court interfering with the judgment of the PPDT. For the above reasons the appeal dated 3<sup>rd</sup> August 2017 is declined and dismissed with no order as to costs.

Date Signed and Delivered at Nairobi this 22<sup>nd</sup> Day of August 2017

**E C MWITA**

**JUDGE**