REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 25 OF 2017

HAROLD KIMUGE KIPCHUMBA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

GERTRUDE MUSURUVE INIMAH.....2ND RESPONDENT

JUDGMENT

After the general elections held on 8th August 2017, the ODM Party and the Jubilee Party qualified to nominate two candidates each under **Article 90(1)** and **(3)** of the Constitution to occupy special seats created under **Article 98(1) (d)** of the Constitution. The Petitioner and the 2nd Respondent, both members of the ODM Party, successfully applied to be nominated to the Senate to represent persons with disabilities. Two other candidates were also successfully nominated from the Jubilee Party. The nominees of both the Jubilee and the ODM parties were ranked in priority by their respective party as follows:

Jubilee Party	**ODM Party**
Isaack Mwaura (Male)	Harold Kimuge Kipchumba (Male)
Joyce Amasong (female)	Gertrude Musuruve Inimah (Female)

Both party lists were submitted to the 1st Respondent and accepted as having met the legal qualifying requirements. The 1st Respondent, guided by some formula, decided to pick the Jubilee Party's nominee, Isaack Mwaura (male) first. The 1st Respondent picked the second nominee from the ODM Party, Gertrude Musuruve Inimah (female) second in what the 1st Respondent claims was aimed at meeting the requirements of **Article 98(1) (d)** of the Constitution that requires election of two persons, a man and a woman, to represent the persons with disabilities in the Senate. The 1st Respondent gazetted the two nominees vide *Gazette Notice* No.8379 dated 25th August 2017 thereby declaring them as duly elected to the Senate to represent persons with disabilities.

The seats contemplated under **Articles 90(1)** and **98(1) (d)** of the Constitution are special seats to be filled through nominations by way of party lists on the basis of proportional representation. This method of elections is what is referred to as "*election through nomination*" as opposed to "*election by registered voters*" (see ***Moses Mwicigi & 14 others v. Independent Electoral & Boundaries Commission & 5 others [2016] eKLR).***

In his Petition and the Supporting Affidavit filed on 13th September 2017 the Petitioner claims that the 1st

Respondent violated the Constitution, the Elections Act and the Regulations made thereunder in declaring the 2nd Respondent who was ranked second in the ODM party list as the duly elected candidate to represent persons with disabilities in the Senate. In particular, the Petitioner claims that the 1st Respondent usurped the collective will of the people by attempting to share in powers that it neither possessed nor provided for in the Constitution, the electoral laws and the regulations made thereunder. He states that after the General Elections of 8th August 2017, ODM was entitled to one seat in the Senate representation of persons with disabilities under the principle of proportionate representation. He states that the 1st Respondent contravened the legitimate expectation created under **Article 90(2)(b)** of the Constitution and **Section 36(2)** of the Elections Act and declared the 2nd Respondent as the duly nominated representative of persons with disabilities; that by altering the ODM party list in favour of the 2nd Respondent and declaring her as the duly elected representative to the Senate of persons with disabilities to the Senate, the 1st Respondent acted ultra vires **Article 90(2)** of the Constitution and **Section 26(5)** of the Elections Act.

The Petitioner further claims that by acting as it did and nominating the 2nd Respondent with total disregard of the Petitioner who was ranked first on the ODM party list, the 1st Respondent violated the principles that form the fabric of the electoral laws including the freedom of the citizens to exercise their political rights, fair representation of persons with disabilities and free and fair elections; that the 1st Respondent interfered with the electoral process by dis-entitling a candidate who was lawfully elected in the 8th August General Elections; that the 1st Respondent usurped the sovereign power of the people entrenched under **Articles 1(1)** and **1(2)** of the Constitution and the constitutional mandate exclusively vested in political parties under **Article 90** of the Constitution and that by nominating the 2nd Respondent alongside the first candidate on the Jubilee Party list, the 1st Respondent contravened the National Values and Principles of governance which includes transparency, the rule of law, non-discrimination and accountability contrary to **Articles 10, 20** and **27** of the Constitution; further that by gazetting the 2nd Respondent as well as the first Jubilee Party nominee the 1st Respondent denied the Petitioner his right to a fair administrative action which is efficient, reasonable and procedurally fair contrary to **Articles 47** and **54** of the Constitution and by nominating, declaring and gazetting the 2nd Respondent, the 1st Respondent violated **Section 34(8)** of the Elections Act which provides that the party list shall remain closed for the entire life of Parliament.

The Petitioner seeks the following reliefs:

a. The honourable court be pleased to issue a declaration that the Petitioner is the duly elected candidate to the Senate as representative of persons with disabilities as provided under Articles 90 and 98(1)(d) of the Constitution;

b. The honourable court be pleased to issue a declaration that the election of the 2nd Respondent to the Senate as representative of persons with disabilities under Article 98(1)(d) of the Constitution was unlawful and should be declared void due to grounds aforementioned and those stated in the affidavit in support of the Petition;

c. The honourable court be pleased to issue a declaration that the 1st Respondent's acts ***have violated the Petitioner's fundamental rights and freedoms contrary to Articles 27, 47 and 54 of the Constitution;***

d. The honourable court be pleased to issue a declaration that the 1st Respondent has contravened the provisions of Articles 90(2)(a)(b)(c), 98(1)(d) of the Constitution together with Sections 34(5)(6)(8) and 36(2) of the Elections Act by selecting the 2nd Respondent to the Senate;

e. That the honourable court be pleased to nullify the election of the 2nd Respondent as the representative of persons with disabilities in the Senate;

f. Costs be borne by the 1st Respondent; and

g. Any other reliefs that the honourable court shall deem fit and just to grant.

The 1st Respondent has opposed the Petition in its Response to the Petition and Replying Affidavit dated 18th September 2017 and filed on 21st September 2017. The 1st Respondent states that under **Article 98(1) (d)** of the Constitution, for the Senate to be properly constituted there must be two members nominated to represent persons with disabilities and these must be a man and a woman based on proportional representation. The 1st Respondent states that after the general elections held on 8th August 2017 only ODM and Jubilee Party qualified for nominations and that the two political parties submitted their respective part lists for persons with disabilities with ODM submitting the Petitioner and the 2nd Respondent ranked in priority in that order and Jubilee submitting Isaack Mwaura (male) and Joyce Amasong (female) in priority in that order.

The 1st Respondent states that the two party lists had a male candidates proposed and ranked first in priority with the second ranked candidates being female in each list. It states that both lists complied with **Article 90(2) (b)** of the Constitution and **Section 36(2)** of the Elections Act and that **Article 98(1) (d)** of the Constitution would be violated if both qualifying candidates placed number one (1) on each party list were picked since both are of the same gender (male). The 1st Respondent states that it had to make a decision on which party list to consider first and that decided to consider the Jubilee Party list first because the Jubilee Party had garnered majority elective seats in the Senate (24 seats out of 47) and that the decision to start considering the Jubilee party list is in line with **Article 90** of the Constitution. The 1st Respondent states that the decision to consider the Jubilee Party list first is also in line with international best practices. Having picked the first candidate from the Jubilee Party and that candidate being male, a female candidate had to be picked from the ODM.

The 1st Respondent states that the Petition is misconceived as it is based on a wrong notion that being first in the party list leads to automatic nomination; that no legitimate expectation can be derived from a process that would lead to unconstitutional results; that it did not violate the legitimate expectation of the Petitioner in any way and neither did it violate **Article 90(2) (b)** of the Constitution and **Section 36(2)** of the Elections Act; that it never altered the list submitted by the ODM as it picked the second qualifying nominee under **Article 98(1) (d)** from the persons contained in the party list submitted; that it did not subvert the will of the people nor the constitutional provision requiring that the two nominees representing persons with disabilities be a male and a female; that it would have been unconstitutional and illegal to allocate and gazette the first ODM nominee and the first Jubilee Party nominee because both nominees were of male gender and that it acted reasonably, legally and within the law.

The 1st Respondent states that its role is not merely to declare the candidate appearing on the party list even where such a declaration would lead to having two persons of the same gender being declared without ensuring that the provisions of **Article 98 (1) (d)** of the Constitution are complied with. The 1st Respondent prays that the Petition be dismissed; that the 2nd Respondent be declared as validly nominated to the Senate and costs of the Petition be awarded to the 1st Respondent.

The 2nd Respondent in her Response to the Petition and the Replying Affidavit dated 10th October 2017 and filed with the leave of the court on 10th November 2017 opposes the Petition. She pleads that she is a life member of the ODM and a person with disability registered as a member of the National Council for Persons with Disabilities. She pleads that she applied to be nominated by her party to represent special interests; that on 24th June 2017 she came across a nomination list on the 1st Respondent's website where she appeared in number one (1) for the Senate position and the Petitioner was listed number two (2); that on 30th June 2017 she came across the 1st Respondent's nomination list published in the newspaper where her name appeared in position one (1) for the slot of Senator; that on 23rd July 2017 she came across the 1st Respondent's nomination list published in the Nation newspaper, she was shocked to learn that her name was removed from position one (1) to position two (2) and the Petitioner had been moved to

position one (1); that she wrote to ODM inquiring into the circumstances revolving around the change in position but received no response; that she filed *Complaint No.495 of 2017, Gertrude Inima Nusuruve v. Orange Democratic Movement Party* at the Political Parties Disputes Tribunal (PPDT) and that the PPDT ordered ODM to reinstate her name in position one (1).

She states that she was rightfully nominated and gazetted to the Senate as representative of persons with disabilities and prays that this Petition be dismissed with costs.

The following issues were flagged out by the parties and agreed upon:

> ***1. Whether representatives of Special Interests groups under Article 98(1) (d) of the Constitution of Kenya, 2010, are elected by the people or chosen by the IEBC;***
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> ***2. Whether when conducting elections to those special seats under Article 98(1) (d) of the Constitution of Kenya, 2010, the IEBC is required to act only in accordance with the law;***
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> ***3. Whether there is a law that enjoins the IEBC to allocate the seats to a party who has won the highest numbers and thereafter allocate to a party with minority seats;***
>
> ***4. Whether it is the Petitioner or the 2nd Respondent who was elected to one of the seats created under Article 98(1) (d) of the Constitution on the ODM party list;***
>
> ***5. Whether the 1st Respondent is bound to declare the 1st person in the list submitted by a party pursuant to Article 90 (1) of the Constitution of Kenya as duly elected even if such a declaration would lead to two persons of the same gender being representatives of persons with disabilities in violation of Article 98 (1) (d) of the Constitution.***

This Petition, with consent of all parties was argued by way of written submissions and oral highlighting in court.

The Petitioner through his legal counsel Mr. Arwa, submitted that the Petitioner was nominated by ODM to one of the special seats created under **Article 98(1) (d)** of the Constitution and ranked number one (1) in priority to the 2nd Respondent; that both the ODM and Jubilee parties qualified for one of the seats created under Article **98 (1) (d)** each; that both the nominees for ODM and Jubilee were male; that the 1st Respondent decided to use a formula according to which they would allocate a seat to the political party with the largest number of seats in the Senate first before allocating a seat to the party with second largest number of seats; that the Jubilee Party has garnered the largest number of seats in the Senate and therefore according to the formula used, Jubilee Party was allocated the one special seat to the Senate first; that the Petitioner being also a male nominee for ODM could not be picked and that this resulted in the Petitioner being skipped and the 2nd Respondent, who is a woman, being declared elected.

Mr. Arwa submitted that the 1st Respondent in so acting reasoned that it would lead to unconstitutional outcome to declare two nominees of the same gender to special seats created under **Article 98(1) (d)** of the Constitution; that there is nothing unconstitutional for two men or two women to hold the special seats created under **Article 98(1) (d)** of the Constitution as long as those seats will have been shared equally between men and women within three parliamentary terms; that there is no conflict between the value of democracy and that of gender equity and that even if there was conflict between the two values, the value of democracy overrides that of gender equality as in ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate –Advisory Opinion of the Supreme Court [2012] KLR-SCK.***

Mr. Arwa submitted that the 1st Respondent's mandate enjoins it to declare the outcome of an election and that the question as to the effect of implication of that outcome on the composition of Parliament is outside its mandate and therefore the 1st Respondent cannot refuse to declare who has won an election because it believes that to do so would lead to unconstitutional result. It was submitted that the 2nd

Respondent has admitted that the Petitioner was ranked first in the ODM party list but that she had obtained a judgment from the PPDT ordering ODM to place her name first; that the said judgment was not brought to the attention of ODM; that the final ODM party list was submitted to the 1st Respondent on 19th July 2017 and was published by the 1st Respondent in the daily newspapers on 23rd July 2017 and therefore the same could not be amended to change the order of priority with the result that the judgment and the decree of the PPDT was completely ineffectual.

It is the submission of the 1st Respondent, through Mr. Githumbi, that the Petitioner and the 2nd Respondent participated in the general elections held on 8th August 2017 through party lists submitted by the ODM Party; that after the elections ODM Party and Jubilee Party qualified for one candidate each to fill the special seats created under **Article 98(1) (d)** of the Constitution; that only two candidates, a man and a woman, can be declared as duly elected to represent persons with disabilities pursuant to **Article 90(1)** of the Constitution; that the formula for allocation of these seats is provided for under Regulation 56 of the Elections (General) Regulations 2012; that Jubilee Party won the majority of seats in the Senate being 24 seats out of 47 while ODM garnered 13 seats; that both parties submitted party lists of two persons ranked in priority; that candidates ranked in position one (1) in each party was a man; that the 1st Respondent was faced with two qualifying party lists where preferred candidates were both male; that it is common sense that the 1st Respondent must consider one list first before considering the second list; that in deciding which party to consider first the 1st Respondent took into account the party with more seats in the Senate and that a man was picked first from the Jubilee Party and a woman from the ODM Party to ensure compliance with **Article 98(1) (d**) of the Constitution that requires two candidates, one a man and the other a woman to represent persons with disabilities in the Senate. It was submitted that to declare the Petitioner as the elected candidate would have led to two male representatives in the Senate contrary to **Article 98(1) (d)** of the Constitution.

The 2nd Respondent through Ms Pekke her legal representative submitted that she expressed her interest to be nominated to the Senate to represent persons with disabilities at the Senate and that on 15th June 2017 she was identified as a nominee to the Senate while the Petitioner was nominated to the National Assembly. It is submitted that she came across a nomination list in the 1st Respondent website on 24th June 2017 where she was listed in position one (1) and on 30th June 2017 she saw a nomination list published in the newspapers where she was placed in position one (1) in the ODM party list; that on 23rd July 2017 she was shocked to learn that she was removed from the first position and placed at number two (2) in the ODM list; that she wrote to ODM to resolve the issue and reinstate her in position one (1) but ODM did not response to her request; that she filed a Complaint with the PPDT who ruled in her favour and ordered ODM to reinstate her name to position one (1) in the party list but ODM did not do so. It is submitted that the 2nd Respondent was rightfully nominated to the Senate.

The parties made submissions in respect of the specific issues flagged out as follows:

Whether representatives of Special Interests groups under Article 98(1) (d) of the Constitution of Kenya, 2010, are elected by the people or chosen by the IEBC

Under this issue, Mr. Arwa submitted that **Article 1(2)** of the Constitution is clear that no one can occupy a seat in parliament without being democratically elected by the people and that under **Article 90(1)** of the Constitution holders of special seats created by **Article 98(1) (d)** of the Constitution must be elected by the people through the use of party lists. He submitted that the use of the Hare Formula in the manner suggested by the 1st Respondent is inconsistent with **Article 90(2)** which denies the 1st Respondent liberty to choose or appoint candidates to hold those seats. Mr. Arwa submitted that in the ***Linet Kemunto Nyakeriga & another v. Ben Njoroge & 2 others [2014] eKLR***, the Court of Appeal rejected the notion that IEBC can randomly choose or appoint qualifying candidates from the party list submitted by political parties in order to facilitate compliance with constitutional provisions.

Mr. Githumbi for the 1st Respondent submitted that there are two modes of electoral system in Kenya for parliamentary and county assemblies: election through registered voters and election by use of

proportional representation by way of party lists; that these two modes of elections were recognized by the Court of Appeal in ***Lydia Mathhia v. Naisula Lessuda & another in Civil Appeal No. 287 of 2013 (UR);*** that the Court of Appeal found that the representatives under **Article 98(1) (d)** of the Constitution are elected by the people through party lists and therefore the election in respect of this matter were conducted on 8th August 2017 and the results declared through *Gazette Notice* No. 4987 dated 25th August 2017.

Ms Pekke for the 2nd Respondent submitted that the 2nd Respondent exercised her right under **Article 38** of the Constitution by participating in the activities of her political party where she applied for nomination for special seats provided for under **Article 98(1) (d)** of the Constitution in accordance with **Article 90** of the Constitution and that according to ***National Gender and Equality Commission v. Independent Electoral & Boundaries Commission [2013] eKLR***, the term "elected" in **Article 90** does not refer to internal party elections for positions on the party list; that not all persons nominated by political parties are deemed elected under that article and that it is the allocation of the seats that results in an election of the party members based on the lists submitted by the political party to the 1st Respondent.

Whether when conducting elections to those special seats under Article 98(1) (d) of the Constitution of Kenya, 2010, the IEBC is required to act only in accordance with the law

Mr. Arwa submitted that IEBC is required under **Article 88(5)** of the Constitution exercise its powers and perform its functions in accordance with the constitution and national legislation and therefore everything IEBC does, and all decisions it makes must not only be expressly authorized but also commanded either by the Constitution or any other written law. He submitted that there is absolutely no room for application of any unwritten law, or any rule of reason or logic. Counsel cited the ***Linet Kemunto case*** (supra) where the Court of Appeal agreed with the High Court that everything that IEBC does, even in pursuit of the principles and values of the Constitution must be commanded and directed by express provisions of the constitution itself or of any other written law.

Mr. Githumbi for the 1st Respondent submitted that the 1st Respondent is a public body and is enjoined to follow the law in conducting the elections under **Article 98(1) (d)** of the Constitution. He submitted that allegations of violations of various articles of the Constitution have been made without providing particulars of how these provisions were violated. It was submitted that a party alleging violations of provisions of the constitution must give precise particulars of the same (see **Mumo Matemu v. Trusted Society of Human Rights Alliance & others [2013] eKLR**). It was submitted that the Petitioner has raised issues of violations of **Articles 1, 2, 3, 10, 20, 27, 38, 81, 90** and **259** of the Constitution but in his Petition he had pleaded only **Article 27** and that the Petitioner has used Supplementary Affidavit to expand his Petition without leave of this court and therefore this cannot be allowed by the court as it will amount to denying the Respondents a fair hearing. It was further submitted that the 1st Respondent did not violate any of the provisions cited by the Petitioner in the Petition and the Supplementary Affidavit; that the declaration of the 2nd Respondent as duly elected was pursuant to the party list that was submitted by ODM Party and therefore the 1st Respondent never usurped the role of the people to vote for their leaders; that the people voted for the party list and the 1st Respondent never went outside the party list submitted; that the 1st Respondent did not violate any national values and principles of governance as alleged; that the 1st Respondent did not discriminate against the Petitioner but acted in accordance with the Constitution and that it has not been demonstrated how the cited provisions of the Constitution were violated.

Ms Pekke for the 2nd Respondent submitted that the 1st Respondent is required under **Article 88(1)** of the Constitution to exercise its powers and perform its functions in accordance with the constitutional and the written law; that constitutional provisions are to be interpreted in relation to other provisions of the constitution so as to render the interpretation that is consistent with other provisions and the overall spirit of the constitution; that under **Article 259** of the Constitution the constitution should be interpreted in a manner that promotes its purposes, values and principles and that advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to

good governance.

Reference was made to **Article 27** of the African Charter on Human and Peoples' Rights and the Convention on the Elimination of all forms of Discrimination against Women in respect to equality and freedom from discrimination and affirmative action to remedy the historical wrongs of discrimination and marginalization. It was submitted that the 1st Respondent has a mandate to act in accordance with the Constitution, the Elections Act and the Regulations made thereunder in relation to affirmative action in respect of women.

Whether there is a law that enjoins the IEBC to allocate the seats to a party who has won the highest numbers and thereafter allocate to a party with minority seats

With regard to this issue Mr. Arwa submitted that the 1st Respondent explained the reason why it skipped the Petitioner and picked the 2nd Respondent was because the seats under **Article 98(1) (d)** of the Constitution had to be held by a man and a woman. It was submitted that the 1st Respondent applied a formula that is not provided for in any written law nor published as required by **Regulation 56(1)** of the Elections (General) Regulations 2012; that this formula cannot apply in Kenya since the party list system is a closed one unlike countries with an open list system and that this formula violates **Article 90(2)** of the Constitution which enjoins the IEBC to declare number one of the ODM party list as duly elected and that denies IEBC the liberty to choose or appoint candidates on the party list.

Mr. Githumbi submitted that the law **Regulation 56** of the Elections (General) Regulations 2012 gives a formula to be used in allocating seats to the qualifying political parties; that the 1st Respondent applied this formula with the result that only two political parties, Jubilee and ODM qualified to have one candidate each to the Senate to represent persons with disabilities; that the lists of the two parties had male candidates ranked first on the list and had both been picked this would have been contrary to **Article 98(1) (d)** of the Constitution and that the party with the majority seats in the Senate and the National Assembly must be considered first and that this court must adopt a purposive interpretation of the Constitution. The case of ***Dileep Manibhai Patel & 3 others v. Municipal Council of Nakuru & another [2014] eKLR*** was cited to support the submission on purposive interpretation of the Constitution. It was submitted that a purposive interpretation of **Article 90(1)** of the Constitution would mean that a party with a higher proportion of seats gets the larger number of the seats in the party list and that such a party gets priority; that even assuming that **Article 90(1)** does not require priority to be given to the party with majority seats in the Senate, that would be the most objective and practical way of dealing with the situation where two candidates in the party list from two qualifying parties are of the same gender and that where there is no rule and/or statute that guides how a certain thing ought to be done, the same cannot be left undone but the 1st Respondent would be under a constitutional duty to be innovative within the rules of common sense and interpretation of the constitution to prevent an unconstitutional outcome. It was further submitted that the 1st Respondent has no powers to reject a list on the grounds that the two dominant political parties' lists have persons of the same gender appearing first.

Ms Pekke submitted that **Regulation 56** of the Elections (General) Regulations 2012 provides the formula to be followed in allocating special seats and through that formula the Jubilee Party and ODM were allocated one seat each and that the 1st Respondent allocated a man from the Jubilee Party and the 2nd Respondent from the ODM pursuant to **Article 98(1) (d)** of the Constitution.

Whether it is the Petitioner or the 2nd Respondent who was elected to one of the seats created under Article 98(1) (d) of the Constitution on the ODM party list

Relying on the ***Linet Kemunto case*** (supra) Mr. Arwa submitted that the Court of Appeal in that decision reduced the law governing the mandate of the IEBC under **Article 90(2)** of the Constitution to two propositions, namely that party lists are not only sacred but belong absolutely to the political parties, who alone, can nominate candidates thereon and, determine, change, or in any other way, deal with the order of priority of candidates thereon and secondly that where a party is entitled to only one seat, then the person who was on top of the final list published under **Regulation 54(8)** of the Elections (General)

Regulations, 2012 must be declared elected. It was further submitted that the 2nd Respondent's argument that the PPDT had directed that her name be placed as number one on the ODM list should be ignored by this court because neither the 1st Respondent nor any other tribunal or court can direct political parties with regard to the order of priority on their party lists; that by the time the said judgment and decree was issued ODM's final list had been published and was no longer capable of being amended and therefore the said judgment was incapable of being enforced and that at the time the 1st Respondent was allocating seats on 25th August 2017 the Petitioner was number one on the ODM list and the 1st Respondent was bound to declare him as duly elected.

Submissions by Mr. Githumbi on this issue are that ODM Party presented two party lists with the first list on 28th June 2017 ranking the 2nd Respondent as number one in the list and the second party list submitted on 19th July 2017 had the Petitioner ranked in position one (1); that the 2nd Respondent filed a Complaint at the PPDT who ruled in her favour and ordered ODM to reinstate the 2nd Respondent to position one (1) but ODM did not comply and that the 1st Respondent could not change the list submitted by the ODM on 19th July 2017; that Tony Muturi who has sworn the affidavit attached to the Petitioner's Supplementary Affidavit is lying to the court in his depositions that the 2nd Respondent was never placed number one (1) in the ODM party list and that ODM was not aware of the Complaint filed by the 2nd Respondent at the PPDT and therefore this court should not believe him.

On this issue Ms Pekke submitted that the 2nd Respondent had been placed at position one in the ODM party list but this was changed to place her at number two (2); that she contested this at the PPDT and she was successful; that ODM was ordered to reinstate her to position one (1); that by electing the 2nd Respondent who is a woman with physical disability and a male candidate from the Jubilee Party the 1st Respondent complied with **Article 90(2) (c)** of the Constitution and that it would have been a violation of **Article 98(1) (d)** of the Constitution if the 1st Respondent had elected two males to the Senate.

Whether the 1st Respondent is bound to declare the 1st person in the list submitted by a party pursuant to Article 90 (1) of the Constitution of Kenya as duly elected even if such a declaration would lead to two persons of the same gender being representatives of persons with disabilities in violation of Article 98 (1) (d) of the Constitution

Mr. Arwa submitted that the 1st Respondent was constitutionally bound to declare the Petitioner as duly elected even if that would result in the two seats under Article 98(1) (d) of the Constitution being held by men. The reasons for the above submission are that election outcomes must be upheld at all times irrespective of any view held by the 1st Respondent, election courts or any other person because elections are a manifestation of the collective will of the people; that the mandate of the 1st Respondent under **Article 249** of the Constitution to promote constitutionalism, while protecting the sovereignty of the people enjoins it to respect, zealously defend and safeguard the choices made by the people at the ballot.

Mr. Githumbi submitted that it is not in dispute that only two political parties qualified to have one of their candidates under **Article 98(1) (d)** of the Constitution to be declared as elected and these two political parties had both male candidates ranked in the first position; that there was no way that both of them would be declared as elected as that would lead to having two male persons representing persons with disabilities and therefore it was the mandate of the 1st Respondent to determine how to solve this issue; that the candidate, a man, ranked first in the Jubilee Party list, being the party with the majority seats in the Senate, was picked first and the candidate ranked number two (2), a woman, in the ODM list, being the party with the second largest number of seats in the Senate, was picked second in order to comply with **Article 98(1) (d)** of the Constitution and that **Section 36(4)** of the Elections Act requires the 1st Respondent to designate, from each qualifying list, the party representatives on the basis of proportional representation within 30 days after the declaration of the elections results.

It was further submitted that the Court of Appeal in ***Lydia Mathia case*** (supra) interpreted **Section 36(4)** of the Elections Act and that IEBC has powers to designate the representatives from the list provided and

not necessarily in the order of priority; that the Court found that the 1st Respondent could actually alter the priority list where it might lead to unconstitutional effect and that if the priority declared under **Article 90(2) (b)** of the Constitution means that the candidate appearing first in the list must be declared, then the effects of **Article 90(2) (b)** would lead to conflict with **Article 98(1) (d)** of the Constitution and that the court must adopt an interpretation that avoids the conflict and brings harmony between the two provisions. The case of ***Mugambi Imanyara & another v. Attorney General & 5 others [2017] eKLR*** was cited to support the submission.

Ms Pekke submitted that the 1st Respondent is mandated to be responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament and in particular to regulate the process through which parties nominate candidates for elections; that the responsibility of the 1st Respondent under the law is very clear and definite and the 1st Respondent must comply with the law in performing its functions and that it is constitutional for the 1st Respondent to declare two persons of the same gender as duly elected to represent the persons with disabilities at the Senate.

Petitioner's Reply

In reply to the 1st Respondent's submissions, the Petitioner submits that the 1st Respondent has admitted that the candidates who hold special seats are elected by the people and secondly that in exercising its mandate under **Article 98(1) (d)** of the Constitution in conducting and supervising elections for special seats, the 1st Respondent must strictly be guided by the Constitution and the law. It was submitted that by making the above admissions, the 1st Respondent is deemed to have admitted that it has no role whatsoever to play in the distribution of the special seats between political parties or even as between genders or in configuring or structuring the composition of Parliament to align it with what is perceived to be the intention of the constitutional makers. It was submitted that the role of the 1st Respondent is confined solely to declaring the will of the people and leaving it to other agencies to determine the question whether the will of the people complies strictly with the Constitution and that where the people have elected two men or two women instead of a man and a woman under **Article 98(1) (d),** then the 1st Respondent cannot refuse to declare the two winning male or female candidates as duly elected. It was submitted that the fact that the 1st Respondent has admitted that all its decisions must be guided by the law means that there is no room for application of common sense or logic and that any decision taken which is not anchored on any law are null and void.

It was submitted that the 1st Respondent has focused on literal meaning of **Article 98(1) (d)** without taking into account the other provisions of the Constitution to give it a broad interpretation and that the 1st Respondent has distorted the decision of the Court of Appeal in ***Lydia Mathia case*** (supra) by attributing to that authority the proposition that the order of priority on a party list can be overlooked even when the party list strictly complies with the Constitution and the law.

It was further submitted that a constitution cannot be said to have been violated when all the procedures that it provides have been meticulously followed; that the Constitution did not just create two seats for a man and a woman under **Article 98(1) (d);** that the Constitution went ahead and elaborately defined the procedure which must be followed in filling those seats; that if such procedure is carefully, diligently and faithfully followed but the process yields two men or two women instead of one man and one woman then the Constitution cannot be said to have been violated; that the 1st Respondent has not stated who violated the Constitution; that it is the 1st Respondent who is violating the constitutional rights of the people to choose their leaders under **Article 1(2)**, the right of ODM to have their most preferred candidate in the Senate and the right of the Petitioner to represent the interest of persons with disabilities, by refusing to declare the Petitioner as duly elected to one of the seats created under Article 98(1) (d) of the Constitution.

The Petitioner submitted that in the ***Advisory Opinion No. 2 of 2012 in the Supreme Court in the Matter of Gender Representation in the National Assembly and the Senate*** the Court held that the statement in

Article 81(b) of the Constitution to the effect that *"not more than two-thirds of the members of elective public bodies shall be of the same gender"* does not mean that the Constitution is violated, even when the composition of the Senate or the National Assembly comprises 99% of any gender. It was submitted that in the advisory opinion cited above and also in the ***Criminal Application No. 39 of 2000, Chrispus Karanja Njogu v. The Attorney General*** which cited with approval *Njoya & others v. The Attorney General & others [2004] 1EA 194*, the Supreme Court and the High Court respectively stated that the constitution should be given a broad interpretation and that if this approach is applied to the meaning of **Article 98(1) (d)** then it will be clear that the Constitution does not prohibit or exclude the possibility of the two seats created under **Article 98(1) (d)** being held by two men or two women.

It was submitted that in the ***Lydia Mathia case*** (supra) the court was dealing with a complex issue where the party list had a problem which the political party failed to remedy and that where there is no problem with the political party and where all the provisions of the constitution and electoral laws have been followed then it follows that the jurisprudence developed in the ***Linet Kemunto Nyakeriga case*** (supra) must be followed. It was submitted that there is absolutely no law in respect of the question of the order of allocation of seats to political parties and that **Article 90(3)** of the Constitution read with **Section 36(6)** of the Elections Act and **Regulation 56(2)** of the Elections (General) Regulations 2012 only deal with a formula for allocation of seats to political parties not the order of allocation.

Determination of the issues

All the parties framed and agreed on the issues for determination as shown elsewhere in this judgment. It is the duty of this court to determine these issues. To inform my determination of the issues before me I have read and considered all the pleadings, the written submissions, the oral submissions and the cited authorities. In my view all the five issues are interconnected and it is on this basis that they will be addressed. The central issues in the Petitioner's case are firstly that the 1st Respondent violated the Constitution, the Elections Act and the Regulations made thereunder in declaring the 2nd Respondent as duly elected to the Senate instead of the Petitioner to represent persons with disabilities and secondly that the seats created under **Article 98(1) (d)** of the Constitution can be occupied by two men or two women.

All the parties to this dispute are unanimous in respect of the first issue that representatives of Special Interests groups under **Article 98(1) (d)** of the Constitution of Kenya, 2010, are elected by the people and not chosen by the IEBC. The parties are also unanimous in respect to the second issue that when conducting elections to those special seats under **Article 98(1) (d)** of the Constitution of Kenya, 2010, the IEBC is required to act only in accordance with the law.

I agree with the parties to this Petition on the position of the law on the two issues that all representatives, whether elected directly by registered voters or through nominations, are elected by the people of Kenya.

The Constitution is specific in its provisions under **Article 1** that all sovereign power belongs to the people of Kenya who exercise that power only in accordance with the law. The people of Kenya are empowered by the Constitution to exercise that power directly or through their democratically elected representatives. Parliament is one of the State organs which exercise delegated power. Parliament in Kenya is made up of two chambers: the National Assembly and the Senate. Membership of the Senate under **Article 98** of the Constitution is composed of elected members: those elected directly by the registered voters and those elected through nominations. The latter category includes two persons, a man and a woman to represent persons with disabilities as provided under **Article 98(1) (d)** of the Constitution. These two members, among others specified under **Article 98(1) (b) and (c),** are elected through party lists on the basis of proportional representation in accordance with **Article 90** of the Constitution.

Article 90 of the Constitution provides that:

> ***(1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98(1)(b), (c) and (d), and for the members of the county assemblies under article 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.***

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that-

(a) Each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) Except in the case of the seats provided in Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c) Except in the case of a county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election (emphasis added).

A plain reading of **Article 90** clearly shows that special seats created under **Article 98(1) (d)** are to be filled by persons elected to represent persons with disabilities. The election envisaged under **Article 90 (1**) is the election through nominations.

Articles 90, 97 and 98 of the Constitution, **Sections 34, 35, 36 and 37 of the Elections** Act, **Regulations 20** and **21 of the Elections (Party Primaries and Party Lists) Regulations 2017** and **Regulations 54, 55, and 56 of the Elections (General) Regulations 2012,** as amended, all provide the electoral regime dealing with election through nominations by way of party lists. There is also ample jurisprudence of election through nomination including ***Linet Kemunto Nyakeriga case*** (supra), ***National Gender and Equality Commission case*** (supra), ***Lydia Mathia case*** (supra) and ***Moses Mwicigi & 14 others case*** (supra). All these authorities recognize this mode of elections. The role of the 1st Respondent is recognized in these authorities as that of a regulator of the process by which parties nominate their candidates and also ensuring compliance with the law in respect to qualification of candidates, the procedure of nomination including submission of party lists, issues of alternates between male and female candidates and regional as well as ethnic balance. The 1st Respondent's role in the elections of the candidates through party lists entails preparing the guidelines to the political parties to guide them in the process of compiling party lists, receiving party lists and reviewing them to ensure compliance, publishing the party lists in the newspapers and gazetting them and designating the elected candidates to the special seats they are elected to occupy.

Further, I hold the same view as all the parties to this dispute that in performing its functions, which include regulating the process of elections for special seats created under **Article 98(1) (d)** of the Constitution, the 1st Respondent is required to act in accordance with the law. This is an imperative of the Constitution under **Article 88(5)** which in specific terms states that: ***The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.***

Parties however did not agree on the remaining three issues; namely whether there is a law that enjoins the IEBC to allocate the seats to a party who has won the highest numbers and thereafter allocate to a party with minority seats; whether it is the Petitioner or the 2nd Respondent who was elected to one of the seats created under **Article 98(1) (d)** of the Constitution on the ODM party list and whether the 1st Respondent is bound to declare the 1st person in the list submitted by a party pursuant to **Article 90 (1)** of the Constitution of Kenya as duly elected even if such a declaration would lead to two persons of the same gender being representatives of persons with disabilities in violation of **Article 98 (1) (d)** of the Constitution.

On whether there is a law that enjoins the IEBC to allocate the seats to a party who has won the highest numbers and thereafter allocate to a party with minority seats, the Petitioner takes the view that there is no

such law while the respondents state that a liberal and broad interpretation of the Constitution means that since the party with the majority seats gets allocated more seats in the Senate, then it is in order to use the logic that the same party takes priority in having its candidate picked first before the next candidate is picked from the second party.

The Petitioner maintains that he was ranked number one (1) in the ODM party list and ought to have been declared duly elected even if this would have led to two men being elected to occupy seats meant for a man and a woman and that declaring the 2nd Respondent as the duly elected representative of the persons with disability is a violation of the Constitution. He submitted that the 1st Respondent applied a formula that is not provided for in any written law nor published as required by **Regulation 56(1)** of the Elections (General) Regulations 2012; that this formula cannot apply in Kenya since the party list system is a closed list unlike countries with an open list system and that this formula violates **Article 90(2)** of the Constitution which enjoins the IEBC to declare number one of the ODM party list as duly elected and that denies IEBC the liberty to choose or appoint candidates on the party list. The 1st and the 2nd Respondent submitted a contrary view that the 2nd Respondent was validly elected to the Senate to represent persons with disabilities; that 1st Respondent was guided by the formula provided under **Regulation 56** of the Elections (General) Regulations 2012 and therefore acted within the law and that both ODM and Jubilee parties submitted party lists with a man ranked number one (1) and that it would have led to unconstitutional result had the 1st Respondent picked both men and declared them as duly elected to the Senate and that the Jubilee party list had to be considered first because Jubilee garnered majority of elective posts in the Senate.

The situation facing this court is not similar to the one facing the court in ***Lydia Mathia case***. In this case, there is no dispute that the party lists submitted to the 1st Respondent by both ODM and Jubilee were compliant. The 1st Respondent did not require the two parties or any of them to amend or rectify any anomalies in the respective party lists nor did it reject the party lists or any of them for non-compliance with the law. Each list has ranked a male nominee in position one (1) in priority to the female nominee. The 1st Respondent was faced with a challenge probably hitherto unforeseen. To my knowledge there is no specific provision either in the Constitution or the Elections Act as well as in the Regulations made under the Elections Act that prescribes to the 1st Respondent the method of handling a challenge like this one where both nominees ranked in first position are of the same gender. The law without a doubt is clear that the party list must be prepared in alternates of a man and a woman in the order of priority preferred by the political party. In cases where the number of seats allocated to each qualifying party is more than one, there probably would be no problem in my view. In this case, each qualifying party, ODM and Jubilee, was entitled to one seat. Picking the first nominee in each list would lead to automatic two men being picked. To circumvent this challenge the 1st Respondent picked the male nominee ranked in position one (1) from Jubilee Party first then omitted the male nominee ranked in position one (1) from the ODM party who is the Petitioner, and picked a female nominee who was ranked number two in priority. In so doing, the 1st Respondent held the view, as submitted, that it was acting in compliance with **Article 98(1) (d)** of the Constitution which requires "***two members, being one man and one woman, representing persons with disabilities***" among other members elected to the Senate. This action by the 1st Respondent is at the center of this Petition. The question is simply this: can the 1st Respondent act as it did and still be within the law? The Petitioner thinks not, the respondents think the opposite.

Under **Article 88(4)** of the Constitution the 1st Respondent is mandated, *inter alia*, to conduct or supervise referenda and elections to any elective body or office established under the Constitution and in particular to regulate the process by which parties nominate candidates for elections and to facilitate the observation, monitoring and evaluation of elections. Under **Article 90(2)** of the Constitution, the 1st Respondent is under an obligation to conduct and supervise elections for seats provided for under **Articles 97(1) (c), 98(1) (b), (c)** and **(d)** and **177(1) (b)** and **(c)** of the Constitution. In doing so the 1st Respondent is obligated to ensure that-

(a) each political party participating in a general election nominates and submits a list of all the

persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) except in the case of the seats provided for under **Article 98(1) (b),** each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c) except in the case of county assembly seats, each party lists reflects the regional and ethnic diversity of the people of Kenya.

Sections **34, 35, 36** and **37** of Elections Act provide details on nomination of candidates in the party lists, submission of the party lists to the 1st Respondent and allocation of special seats. Under **Section 36(4)** of the Elections Act, the 1st Respondent is obligated to ***designate***, from each qualifying list, the party representatives on the basis of proportional representation within 30 days after the declaration of the election results (emphasis added).

The Court of Appeal in **Linet Kemunto Nyakeriga** case had this to say about "***designate***":

> **"The "*designation*" of a candidate after the declaration of election results under Section 36(4) aforesaid must therefore be read in the context of the broad constitutional role of the IEBC. In that context, it is our view the meaning to be attached to the word "*designate*" is not to "*choose*" or "*appoint*" because the action of designation comes after the elections are complete, but as an act of giving a title or, a name. "*Designatio personae*" in Latin according to Black's Law Dictionary Ninth Edition, 2009, is the "*designation of the person by class or category rather than by name*". Here the IEBC was required to formally declare the 1st and 2nd respondents members of the Senate, henceforth to be referred to as Senators."**

The Supreme Court held the view that to "*designate"* or "*draw from*" entails the act of selecting from the list provided by the political party (see ***Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR***).

The act of "*designating*" the party representatives from each qualifying list on the basis of proportional representation, in my view, is simply the act of picking representatives from the party list in which they are nominated and declaring them duly elected representatives of special seats as the case may be to the National Assembly, the Senate or the County Assembly. The law, as can be seen from the Constitution, the Elections Act and the Regulations as well as jurisprudence, dictates that the party lists belong to the political parties and that only the political parties can decide the priority in which their nominees should appear.

But what happens where the party lists are compliant but the ranking in priority has placed two male nominees or two female nominees in position one, as is the case in this Petition? What should IEBC do to comply with the law? In this case the 1st Respondent decided to pick a man who was in position one (1) from Jubilee and a woman who was in position two (2) from ODM to comply, in their view, with the constitutional requirement of a man and a woman to represent persons with disabilities in the Senate. The Petitioner says this cannot happen as it is outright violation of the Constitution and the written law that dictates that the person in priority to another must be considered first.

The Petitioner has relied heavily on the **Linet Kemunto Nyakeriga case** to submit that the position of the law is that the 1st Respondent has no mandate to interfere with the party list that meets the requirements. The High Court and the Court of Appeal were of the same mind that the IEBC did not have any basis for interference with the party lists because the constitutional consideration was disability, not categories of disability and, and to that extent, the IEBC's intervention was not only untenable but it also lacked basis in law. In the **Lydia Mathia case**, the Court of Appeal upheld the High Court's decision in replacing the 3rd nominee (Lydia Mathia) with the 5th nominee (Naisula Lesuuda) to reflect the regional and ethnic diversity of the people of Kenya. The Petitioner distinguished this case with that of **Lydia Mathia case**

on the basis that in the **Lydia Mathia case**, the party list was not compliant and the TNA party, being the nominating political party, had been directed by IEBC to rectify the anomaly but the TNA had failed to do so. The Petitioner states that in this case the party lists for Jubilee and ODM were compliant.

The 1st Respondent told the court that it had to make a decision and going by the formula of proportional representation they decided to give the Jubilee Party priority over the ODM Party because Jubilee had the majority seats in the Senate. I appreciate the challenge facing the 1st Respondent in the absence of a clear guideline as to what to do in such circumstances.

This court has been urged to adopt a liberal and broad approach to interpreting the Constitution. Several authorities have been cited to buttress the submissions that a broad and purposive interpretation of the Constitution should be adopted. In the **Njoya case** (supra) the court held by a majority that:

> ***"Quite unlike an Act of Parliament which is subordinate, the Constitution should be given a broad liberal and purposive interpretation to give effect to its fundamental values and principles."***

In **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate (Advisory Opinion No. 2 of 2012)** the Supreme Court stated as follows in respect to constitutional interpretation:

> ***"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."***

The Court of Appeal in ***Lydia Mathia v Naisula Lesuuda & another*** was of the view that an approach of constitutional interpretation that seeks to foster national unity, inclusivity and protection and participation of minorities and marginalized groups is consistent with **Article 259** of the Constitution. This article prefers the interpretation of the Constitution in a manner that promotes its purpose, values and principles; advances the rule of law, human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance. Some of the values and principles anchored under **Article 10** of the Constitution are equity, inclusiveness, equality, non-discrimination and protection of the marginalized.

This court was told by the Petitioner to interpret the constitution taking into account that the value of democracy overrides the value of gender equity and where there is a conflict between the value of democracy and the value of gender equity, the value of democracy must always prevail. The above submission is similar submissions before the Court of Appeal in ***Lydia Mathia case*** where the Court of Appeal expressed itself thus:

> ***"The invitation extended to us by the appellant to hold that the requirements of regional and ethnic inclusivity cannot override democracy is no more than an invitation to interpret the Constitution as though Article 90(2) (c) does not exist or as though the nominated women Senators are to be elected through the First Past the Post system. Otherwise how would one perceive the appellant's bold submission that no constitutional value can override democracy and that democracy cannot be sacrificed at the altar of regional or ethnic balance?"***

It is true that this case is distinguishable with the **Lydia Mathia case** in that in this case the party lists

were compliant while in the **Lydia Mathia case** the party list from TNA was not compliant and the TNA had been told by the IEBC to amend it and bring it within the law but TNA had failed to do so.

I have considered this matter. I want to start by considering what is the purpose of **Article 98(1) (d)** of the Constitution? In my view the purpose is to give both men and women who have disabilities of some form or another, a chance and equal opportunity to represent other Kenyans who may suffer from some form of disability or another in the Senate. The starting point being that both men and women who suffer from some form of disability or another do not stand on the same footing with other Kenyans who do not have any challenges in this area. The political arena is not level between Kenyans with disabilities be they men or women and able Kenyans. To me this is what **Article 98(1) (d)** of the Constitution is meant to address. The article seeks to give equal opportunity to men and women to represent persons with disabilities in the Senate. In my view to interpret **Article 98(1) (d)** of the Constitution in a manner above is to, *inter alia*, promote its purposes, values and principles; in a manner that advances the rule of law and it that permits the development of the law.

The common thread running through **Articles 90(1), 97(1) (c), 98(1) (b), (c)** and **(d)** and **177(1) (b)** and **(c)** of the Constitution; **Sections 34, 35, 36** and **37** of the Elections Act is that the political party with the majority elected persons to any House gets the highest number of nominated candidates for special seats and gender-top-up lists. The formula to be used to determine the number of seats to allocate the parties is the one provided by **Regulation 56** of the Elections (General) Regulations. It is simply the number of seats won by a political party, divided by the total number of seats, multiplied by the available seats for allocation in the respective House. I appreciate that this formula is for purposes of determining the number of slots to be allocated to each qualifying political party but I am also alive to the fact that almost always, the political party with the majority seats gets the highest number of special seats or gender top-up seats.

The 1st Respondent submitted that a purposive interpretation of **Article 90(1)** of the Constitution would mean that a party with a higher proportion of seats gets the larger number of the seats in the party list and that such a party gets priority; that even assuming that **Article 90(1)** does not require priority to be given to the party with majority seats in the Senate, to do so would be the most objective and practical way of dealing with the situation where two candidates in the party list from two qualifying parties are of the same gender and that where there is no rule and/or statute to guide how a certain thing ought to be done, the same cannot be left undone but the 1st Respondent would be under a constitutional duty to be innovative within the rules of common sense and interpretation of the constitution to prevent an unconstitutional outcome.

I have taken into account the fact that the 1st Respondent did not have any basis to reject the two party lists which were compliant with the law. Had the 1st Respondent returned the second party list submitted to it and required the particular political party to amend it and place a female nominee on position one (1), this would have been prejudicial to that party and the 1st Respondent would have acted against the law given that the process of compiling party lists and the order of priority are the prerogative of the political parties and where the party list complies with the law the 1st Respondent is obligated to accept it.

I take the view that the 1st Respondent had a duty to take a decision in this matter. It was faced with two party lists that were valid and which listed a man in position one. It had to make a decision to start designating the one nominee from one party list and to start with the party list with majority seats was not irrational but was guided by belief that the party with majority seats takes priority over the other(s) given the formula in **Regulation 56**. To my mind the decision by the 1st Respondent to pick the first male candidate from the Jubilee party list and the second candidate, a female, from the ODM party list, is logical, practical and objective in the absence of any law that guides the manner of dealing with this type of situation.

In my considered view, the method used by the 1st Respondent led to the designation of one man and one woman to represent persons with disabilities in the Senate. I fail to see how else the provisions of **Article 98(1) (d)** of the Constitution would have been complied with if a different decision, for instance of

designating two men, had been taken. The two persons elected under Article 98(1) (d) must fulfill the "*alternate*" criteria commonly referred to as "*zebra*" of one man and one woman. Further, once a man is picked first, it follows automatically that the next person to be picked must be a woman.

It is true that the party list system in Kenya is a "closed list" and that once such a list is subjected to elections it cannot be amended as it was held by the Court of Appeal in ***Linet Kemunto & another case.*** The decision by the 1st Respondent to pick the 2nd Respondent and declare her as duly elected to the Senate to represent persons with disabilities alongside the Jubilee nominee was, in my view, born of necessity to comply with **Article 98(1) (d**) of the Constitution as explained above.

I do not think that it is the intention of the law to leave the body that is mandated to regulate and oversee elections without a solution when faced with a difficult situation like this one. To my mind it is given latitude in *designating* nominees to do so in a way that complies with the Constitution, the electoral laws and the regulations made thereunder. I think a distinction needs to be made between elections by registered voters and elections through nominations. In the former the IEBC will have no mandate to refuse to declare a candidate who has won the elections by the majority as duly elected, but in the latter, to take the list as it is and designate nominees as listed may in some cases lead to two men or two women being declared elected to occupy seats under **Article 98(1) (d)** in violation of the Constitution, the Elections Act and the Regulations.

The 1st Respondent did not bring to the attention of this court any regulations, other than referring to **Regulation 56** of the Elections (General) Regulations, which guides it in handling situations like the one that faced them in respect of this matter. I may be wrong but if I am not then it would serve the 1st Respondent and the political parties well if such guidelines are developed and published in the same manner in which guidelines in respect of party lists or handling of electoral disputes are published.

On the fourth issue: whether it is the Petitioner or the 2nd Respondent who was elected to one of the seats created under **Article 98(1) (d)** of the Constitution on the ODM party list, it is my view, given the analysis I have given above, that it is the 2nd Respondent who was elected to one of the seats created under Article 98(1) (d) of the Constitution.

On the last issue: whether the 1st Respondent is bound to declare the 1st person in the list submitted by a party pursuant to **Article 90 (1)** of the Constitution of Kenya as duly elected even if such a declaration would lead to two persons of the same gender being representatives of persons with disabilities in violation of **Article 98 (1) (d)** of the Constitution, it is my view that declaring the Petitioner as duly elected would have led to two men occupying seats intended by **Article 98(1) (d)** of the Constitution to be occupied by a man and a woman and this would have violated the Constitution.

I have considered the submissions to the effect that it is not unconstitutional to have two men or two women occupy the seats created under **Article 98(1) (d)** of the Constitution as long as these seats are shared equally between men and women within three parliamentary terms. This court was not told the basis of this submission. In my view the Constitution under **Article 98(1) (d)** is specific that the seats created thereunder are intended for a man and a woman to represent persons with disabilities. The provision has no ambiguity and in my view it is clearly understood mean what it says. With respect, to argue that there is nothing unconstitutional to have two men or two women holding special seats under Article 98(1) (d) is a misapprehension of that provision.

The actions of the 1st Respondent in declaring the 2nd Respondent to be duly elected to the Senate to represent persons with disabilities alongside a male nominee from Jubilee Party, taken in the context of Article 98(1) (d) of the Constitution that requires two persons, a man and a woman, to be elected to occupy these seats, and further, in view of the principle that in elections through nominations people elect party lists and not individual candidates, leads me to conclude that the 1st Respondent:

(i) Did not usurp the collective will of the people to elect their representatives in contravention of Article 1(1) and (2) of the Constitution;

(ii) Did not contravene the legitimate expectation of the Petitioner or the National Values and Principles under Article 10 of the Constitution ;

(iii) Is not ultra vires Article 90(2) of the Constitution;

(iv) Did not deny the Petitioner fair administrative action in contravention of Articles 47 and 54 of the Constitution

(v) Did not alter the ODM party list but designated one of the nominees from the party list to fulfill a constitutional requirement of one man and one woman elected to the Senate.

In my conclusion of this matter, having read and considered all the pleadings and submissions, the applicable law and the cited authorities, I am persuaded that this Petition lacks merit. The 1st Respondent acted as it did to comply with **Article 98(1) (d)** of the Constitution as explained in this judgment. As a result the prayers sought by the Petitioner in the Petition cannot issue and as a consequence, this Petition stands dismissed. The 2nd Respondent is declared duly elected to occupy one of the seats created under Article 98(1) (d) of the Constitution to represent persons with disabilities in the Senate.

In respect to the issue of costs of this Petition, **Section 85** of the Elections Act provides that ***"An election court shall award the costs of and incidental to a petition and such costs shall follow the cause."*** **Rule 30** of the Elections (Parliamentary and County Elections) Petition Rules also empower this court to make an order specifying the total amount of costs payable; the maximum amount of costs payable; the person who shall pay the costs and to whom shall the costs be payable. **Sub-rule 2** of **Rule 30** gives this court discretion to disallow any prayer for costs or to impose a burden to pay costs on any party as specified in that sub-rule. I have considered this issue and order that each party bear its own costs. Orders shall issue accordingly.

Delivered, dated and signed this 20th day of December 2017

S.N. Mutuku

Judge