



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO 344 OF 2013

ONG'ONG'A
COLETA AYOMBA

a.k.a COLLETA AYOMBA
**PETITIONER**

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
**1st RESPONDENT**

CHARLES JOHN OTETE
 **2ND RESPONDENT**

JUDGMENT

1. This petition relates to the nominations for the special interests (Persons with Disability (PWD)) seat in Busia County. The petitioner’s case is that she was in the list of nominees for the PWD seat in Busia County, but was removed following the complaint of a third party, one Florence Mwikali Mutua, the women representative for Busia County, and replaced with the 2nd respondent. The said complainant is the applicant in **High Court JR. Miscellaneous Application No. 208 of 2013-Florence Mwikali Mutua –vs-IEBC and Another.**
2. The petitioner claims that she was not a party to complaint No IEBC/ NDRC/PL/275/2013 which resulted in her removal; that though she was not a party and was not heard, she was made the centre of the complaint; that the IEBC ruled that evidence had been produced that showed she was not a person with a disability and consequently removed her and replaced her with the 2nd respondent, Charles John Otete.
3. The 1st respondent confirms that a complaint was made by the said Florence Mwikali Mutua; that the petitioner was at No 14 in the gender top up list; that there was also a marginalized list in which the petitioner was not included. It avers that both lists were rejected as they did not comply with the Zebra requirement of alternating male and female. According to the respondent, in the second list submitted by the party, the applicant was serialised as number 2401 while the 2nd respondent was number 2394.

4. The 1st respondent submits that in its decision of 4th May 2013, the petitioner replaced one Rosemary Awino on the marginalized list, leading to complaint No. IEBC/ NDRC/PL/275/2013; that at the hearing of that complaint, the 1st respondent found that sufficient evidence had been adduced to the effect that the petitioner was not a person with a disability. It asserts that possession of a certificate of membership to the Kenya Union of the Blind, which the petitioner claims to possess, is not proof that one is a person with a disability.
5. The 2nd respondent supported the position taken by the IEBC.

Determination

6. The crux of the petitioner's complaint is that a decision was made by the 1st respondent without affording her a hearing. We have read the decision of the 1st respondent in complaint No. IEBC/DRC/PL/275/2013, in which the complaint before the IEBC was that the original nominees had been replaced by others. In its decision on this complaint, the 1st respondent removed the petitioner on the basis that it had been proved that she was not a person with disabilities. It replaced her with the 2nd respondent, John Charles Otete.
7. As a party who was going to be adversely affected by the decision of the 1st respondent in IEBC/NDRC/PL/275/2013, the petitioner was entitled to be heard. However, the record of the decision by the 1st respondent at page 128 of the decision of 7th June 2013 does not indicate that she was given an opportunity to be heard and provide evidence that she was a person with a disability, yet the decision of the IEBC to revoke her nomination was on the basis that it had been proved with sufficient evidence that she was not a person with a disability. It is a cardinal principle of natural justice that a person is entitled to be heard before a decision is made that is adverse to him or her. To make a decision in her absence and without hearing her was not only a violation of her right to a hearing but was also in breach of the rules of natural justice.
8. In the circumstances, the petitioner has succeeded in establishing that the 1st respondent was in breach of the rules of natural justice in revoking her nomination and replacing her with the 2nd respondent.
9. The remedy that commends itself to us in this matter is to remit the matter to the 1st respondent to re-consider, on the basis of the law, and to give all parties a hearing before making its decision.
10. The respondent shall render its decision upon reconsideration of this matter within 14 days of today and thereafter gazette the nominee.
11. As we have held in **High Court JR. Miscellaneous Application No. 208 of 2013-Florence Mwikali Mutua –vs- IEBC and Another**, these two matters are related as they pertain to nominations in Busia County. However, for the avoidance of doubt, our remitting of the matter pertaining to the petitioner in this case does not imply a re-opening of all other matters pertaining to Busia County, which shall remain as determined by the 1st respondent in the decisions of 7th June 2013.
12. Each party shall bear its own cost of the petition.

Dated, Delivered and Signed at Nairobi this 12th day of July 2013

MUMBI NGUGI

D. S. MAJANJA

WELDON KORIR

JUDGE

JUDGE

JUDGE

