



**Munasya v Mitalo & another; Orange Democratic Movement (Interested Party) (Election
Petition Appeal E001 of 2023) [2023] KEHC 20065 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20065 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
ELECTION PETITION APPEAL E001 OF 2023**

PJO OTIENO, J

JULY 7, 2023

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES
90,177(1)(C) AND 177(2) OF THE CONSTITUTION**

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

AND

IN THE MATTER OF THE ELECTION (GENERAL) REGULATIONS

AND

**IN THE MATTER OF THE ELECTIONS (PARTY
PRIMARIES AND PARTY LISTS) REGULATIONS 2017**

AND

**IN THE MATTER OF NOMINATED MEMBERS
TO THE COUNTY ASSEMBLY OF KAKAMEGA**

BETWEEN

AMOS LIYAYI MUNASYA APPLICANT

AND

GEOFFREY MUHONGO MITALO 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

AND

ORANGE DEMOCRATIC MOVEMENT INTERESTED PARTY



(Being an appeal from the Judgment and Decree of Hon. Dolphina Alego (SPM) in Kakamega CM's Election Petition No. E006 of 2022)

Review of the list of nominees to special seats in a county assembly is within the right and prerogative of the political party provided that nobody had been declared elected

The appeal challenged the determination by the trial court of an election petition initiated by the 1st respondent who was aggrieved for not having been nominated to the County Assembly of Kakamega to represent the marginalised. The court held that the review of the list was within the right and prerogative of the political party to reconstitute its list provided that nobody had been declared elected. The court reiterated that the publication in the gazette that was not subject to review, for the entire life of the Assembly, was that which published the persons elected after the seats were allocated by the 2nd respondent. The court further held that not every violation of any rights must lead to nullification of the election but that some violations may be remedied by an award of damages in an appropriately instituted claim.

Reported by Kakai Toili

Electoral Law - elections – allocation of special seats - declaration of election for special seats - how was the declaration of election for special seats done - what was the effect of a political party sending a reviewed list of nominees of special seats in a county assembly to the Independent Electoral and Boundaries Commission (IEBC)- whether a gazetted list of persons elected after allocation of special seats by the IEBC was immune from amendment - whether every violation of any rights regarding party lists must lead to nullification of elections.

Brief facts

In the election petition at the trial court, the 1st respondent contended that the Orange Democratic Movement (the interested party) submitted a list of eight persons to the 2nd respondent as nominees for the marginalized group for nomination into Kakamega County Assembly (the Assembly). The 1st respondent was listed as number two and the preferred nominee for the marginalized while the appellant was listed as number six and a nominee for the youth.

The 2nd respondent eventually allocated two seats for the marginalized in the Assembly and listed the appellant and the person who appeared first on the list as the nominated members. The 1st respondent argued that the list of nominees was published in the order of priority and since he was number two on the list he had a legitimate expectation that he would be nominated together with the person who appeared first on the list.

The appellant contended that the initial list sent by the interested party was amended by the interested party, following the general elections and its performance which earned it two slots in the Assembly for nomination, in which list the appellant was ranked first in preference to represent the youth with the 1st respondent being ranked 3rd to represent ethnicity. The trial court held that the 1st respondent was rightfully nominated and elected as a member of the Assembly. Aggrieved, the appellant lodged the instant appeal.

Issues

- i. What was the effect of a political party sending a reviewed list of nominees of special seats in a county assembly to the Independent Electoral and Boundaries Commission?
- ii. How was the declaration of election for special seats done?
- iii. Whether a gazetted list of persons elected after allocation of special seats by the Independent Electoral and Boundaries Commission was immune from amendment.
- iv. Whether every violation of any rights regarding party lists had to lead to nullification of elections.

Held

1. Being a first appeal, the mandate of the court even on an election dispute like the instant one remained that the court must proceed by way of retrial and the principles upon which the court acted in such an appeal were well settled. Briefly put, they were that the court must reconsider the evidence, evaluate



- it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowances in that respect. That re-evaluation and re-examination of the entire record must reveal that the trier of fact committed an error of principle by considering an irrelevant matter or ignoring to consider a relevant matter or that it just misapprehended the law and the evidence adduced.
2. The law was that the onus was upon he who alleged and he who would fail if no evidence at all was led, to prove what was alleged in the pleadings. The dispute before the trial court was brought by the 1st respondent hence it was his duty to prove that he was unfairly excluded in the Gazette Notice No 10712 dated September 9, 2022.
 3. The trial court was never satisfied that the allegations had been proved, and was in fact complaining about failure by the political party (the interested party) to avail the evidence to shed light. That state of affairs and evidence asserted that even the evidentiary burden was yet to shift. Before it was shifted, the appellant and in deed every other party to the petition, had no obligation to lead any evidence, unless it was for purposes only of hoping to fill in the gaps left by the 1st respondent's case.
 4. There were indeed three lists that the interested party sent to the 2nd respondent as its list for nomination. The first was rejected by the 2nd respondent on account of non-compliance with the law. The last was sent under the cover of a letter by the interested party dated September 5, 2022. The list was from the interested party just as it was never alleged nor proved that the list was phantom or a fraud. If there was to be time and if the 1st respondent was to be aggrieved with the review by the party, it was a good ground for a complaint to the party. However, as there was no time and the appellant stood elected, the route the 1st respondent took was the only route and he was under a duty to prove his allegations. Having taken that route, the law obligated him to prove his case by cogent evidence before he could expect to succeed.
 5. In forwarding the reviewed list, the interested party told the 2nd respondent and indeed whoever was interested in the list that the appeal in respect of the Kakamega marginalized list was allowed by the Appeals Tribunal. The review of the list was within the right and prerogative of the political party to reconstitute its list provided that nobody had been declared elected. The declaration of election for special seats was by publication in the gazette.
 6. The court's understanding of *Jaldesa Tuke Deballo v IEBC and Another* (2015) eKLR was that the publication in the gazette that was not subject to review, for the entire life of the Assembly, was that which published the persons elected after the seats were allocated by the 2nd respondent and not the publication done before the general elections were conducted. With that understanding, it was the list published in the gazette on September 9, 2022 that stood immune from any amendment, unless by an order of the court, during the term of the Assembly.
 7. It was the court's understanding of the appurtenant law around party lists, that it was a constitutional process that when concluded must be respected by all and not every violation of any rights must lead to nullification of the election but may be remedied by an award of damages in an appropriately instituted claim. The allegations in the petition were never proved and the trial court was in error when it allowed the same and nullified the appellant's election.

Appeal allowed.

Orders

- i. *The decision nullifying the election was set aside and, in its place, substituted and order dismissing the petition.*
- ii. *The costs of the petition were awarded to the appellant and the 2nd respondent, as the respondents before the trial court. By the same token, the costs of the appeal shall be paid to the appellant by the 1st respondent.*
- iii. *Pursuant to the stipulations of regulation 30, the Elections (Parliamentary and County Elections) Petitions Rules, 2017, the costs of the petition were capped at Kshs 300,000 to be paid by the petitioner 1st*



respondent and shared equally between the two respondents at the trial court while the costs of the appeal were capped at Kshs 100,000 and payable by the 1st respondent to the appellant.

Citations

Cases

Kenya

1. *Aden, Noor Ali v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 12 of 2017; [2018] KECA 3 (KLR) - (Applied)
2. *Dabelo, Jaldesa Tuke v Independent Electoral & Boundaries Commission & another* Civil Appeal 37 of 2014; [2015] KECA 1005 (KLR) - (Applied)
3. *Imanyara, Gitobu & 2 others v Attorney General* Civil Appeal 98 of 2014; [2016] eKLR - (Applied)
4. *Karan v David Ouma Ochieng & 2 others* Election Petition 13 of 2018; [2018] KECA 367 (KLR) - (Applied)
5. *Kigia, Hellen Ndiko & 2 others v Independent Electoral and Boundaries Commission & another* Election Petition 1 of 2017; [2017] KEMC 23 (KLR) - (Applied)
6. *Miano, Antony v Attorney General & others* Petition E343 of 2020; [2021] eKLR - (Applied)
7. *Mponjiwa, Perpetia v Independent Electoral & Boundaries Commission & 3 others* Election Appeal 4 of 2017; [2018] KEHC 4489 (KLR) - (Applied)
8. *Nyakeriga, Linet Kemunto & another v Ben Njoroge & 2 others* Civil Appeal 266 of 2013; [2013] KECA 60 (KLR) - (Applied)
9. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Presidential Election Petition 1 of 2017; [2017] KESC 33 (KLR) - (Applied)
10. *Odongo, Victor Robert v Independent Electoral and Boundaries Commission* Election Petition 1 of 2017; [2018] KEMC 35 (KLR) - (Mentioned)

Statutes

Kenya

Constitution of Kenya, 2010 articles 90,100 - (Interpreted)

Election (General) Regulations 2012 (cap 7 Sub Leg) regulations 54-56 - (Interpreted)

Election (Party Primaries and Party Lists) Regulations 2017 (cap 7D Sub Leg) regulations 20, 21, 27 - (Interpreted)

Elections (Parliamentary and County Elections) Petitions Rules, 2017 (cap 7 Sub Leg) regulation 30 - (Interpreted)

Elections Act (cap 7) sections 34(4); 35; 36(1)(f); 37 - (Interpreted)

Political Parties Act (cap 7D) section 40(20) - (Interpreted)

Advocates

Mr. Abok for the Applicant

Mr. Mokaya holding brief for Magina and Kabue for the Respondents

JUDGMENT

Background of the Appeal

1. This appeal challenges the determination by the trial court of an election petition initiated by the 1st respondent. In that petition, 1st respondent, as the petitioner, contended that the interested party submitted a list of eight persons to the 2nd respondent as nominees for the marginalized group for nomination into Kakamega County Assembly. The list was published by the 2nd respondent in their website with the 1st respondent being listed as number two and the preferred nominee for the



marginalized while the appellant was listed as number six and a nominee for the youth. The 2nd respondent eventually allocated two seats for the marginalized in the County Assembly of Kakamega and listed Rosemary Katibi and the appellant as the nominated members. It is this action that gave rise to the election petition in which the 1st respondent argued that the list of nominees was published in the order of priority and since he was number two on the list he had a legitimate expectation that he would be nominated together with Rosemary Katibi who appeared first on the list.

2. As the person whose election was impugned, the appellant filed a response to the petition, dated 29.9.2022 as well as a replying affidavit sworn on the same date and contended that the initial list sent by the interested party was amended by the interested party, following the general elections and the performance of the political party which earned it two slots in the Assembly for nomination, in which list the appellant was ranked first in preference to represent the youth with the 1st respondent being ranked 3rd to represent ethnicity. Pursuant to that subsequent list, the 2nd respondent, on the 09.09.2022, published the appellant's name and that of Rose Kabiti Okoyi, as the ODM member of the Assembly. In his view, the 2nd respondent had no part to play in the constitution of the party list, which entirely is the mandate of the party. In addition, it was stressed that, the 1st respondent, as the petitioner at trial, did not qualify for nomination to represent the special groups because is an Isukha Luhya from Shinyalu Constituency, and not from any of the minority or marginalized communities. For good measure, the appellant cited the provisions of the *Constitution*, the *Elections Act* and the regulations stipulating the process of nomination and contended that he was lawfully and properly nominated and thus elected upon being gazetted. He thus prayed that his election be upheld as having been validly conducted.
3. In response and opposition to the petition, the 2nd respondent argued that marginalized groups within the reading of article 100 of the *Constitution* constitutes; a) Women; b) persons with disabilities; c) Youth; d) Ethnic and other minorities and e) marginalized communities, and that the 1st respondent was not eligible to be elected to represent the special interests of any marginalized communities as he does not belong to either of them. The 2nd respondent further contended that the interested party submitted an amended list of nominees, following the general elections and its performance in the said elections, which list ranked him first to represent the youth while the 1st respondent was ranked number three whose nature of interest was ethnicity.
4. In a judgment delivered by the election court on 10/1/2023, it was a determination of the court that since no appeal had been lodged challenging the 1st gazette notice, the 2nd gazette notice was illegal and this meant that the instant 1st respondent, as the petitioner before the trial court, was rightfully nominated and elected as a member of the County Assembly.
5. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 16/1/2023 and set out the following grounds of appeal: -
 - a. That the learned trial magistrate erred in law and fact by failing to find that the appellant was duly and properly nominated as Member of County Assembly for Kakamega County.
 - b. That the learned trial magistrate erred in law and fact by failing to find that it was a prerogative of the interested party to prepare and submit a party list that complied with the provisions of the law.
 - c. That the learned trial magistrate erred in law and fact by failing to find that the party list was reconstituted and resubmitted in compliance with the law.



- d. That the learned trial magistrate erred in law and fact by failing to find that the 1st respondent failed to discharge the burden of proof by demonstrating that the appellant's nomination was illegal.
6. The appellant therefore prays that this appeal be allowed with costs to the appellant and that the judgment of the trial court be set aside.
7. The appeal has been canvassed by way of written submissions and i appreciate the industry and diligence exhibited by the counsel. In brief, the appellant identifies only two issues for submission with the first being; whether the trial magistrate erred in law and fact by failing to find that it was a prerogative of the interested party to prepare and submit a party list that complied with the provisions of the law. On that point, the appellant argues that in compliance with article 90 of *the Constitution of Kenya, 2010* and sections 34(4) and 36(1)(f) of the *Elections Act* which deals with party lists and their compilation, the interested party submitted an initial party list to the 2nd respondent as shown on page 26 of the record of appeal which contained the below listed names;
- a. Roselyne Katibi Akoyi-PWD
 - b. Geoffrey Muhongo Mitalo-Marginaliized
 - c. Witney Okelo Ouma-Youth
 - d. Hebel Okelo Ouma-PWD
 - e. Maxine Khasiha Ombima-PWD
 - f. Amos Liyayi Munasia-Youth
 - g. Susan A Omondi-Community
 - h. Asina Dafra Amboko-Youth
8. It is then contended that by its letter dated July 15, 2022, captured on page 67 of the record of appeal, the 2nd respondent communicated to political parties including the interested party, informing them that all the party lists submitted had been rejected for various reasons communicated to each respective party and that the interested party was advised to review its party list within seven (7) days and resubmit the reviewed list on or before the 22nd day of July, 2022.
9. It was then submitted and underscored that compilation of party lists is a preserve of the interested party as was noted by the court of appeal in the case of *Aden Noor Ali v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR where the court held;
- “...It is the responsibility of the political party to submit a compliant party list, and the choice of nominees in the list is the sole prerogative of the political party.”
10. *Vide* a letter dated September 5, 2022, is captured on page 72 of the record of appeal, the appellant submits that the interested party notified the 2nd respondent of the fact that all aggrieved parties had referred their complaints to the interested party's Appeal Tribunal, Political Parties Dispute Tribunal and the High Court, as each case required, and resubmitted a party list in line with the different decisions reached. It is therefore reiterated that the reviewed list was submitted to the 2nd respondent on the September 5, 2022 and published in the gazette on the September 9, 2022 and so he stood elected on that date of publication.



11. The appellant further claims that IEBC correctly directed political parties to review the party lists to ensure compliance with the law and since no complaint was lodged by the 1st respondent as noted during his cross examination as PW1, to challenge the party list as captured on page 157 of the record of appeal, the reviewed party list ought to stand. Reliance was then placed on the case of *Hellen Ndiko Kigia & 2 others v Independent Electoral and Boundaries Commission & another* [2017] eKLR where the court held as follows: -

“...The petitioners in this petition did not present before this court any material credible and cogent evidence as proof that they filed complaints with IEBC or the political parties disputes tribunal established under section 39(1) of the political parties act...”

12. The second issue identified by the appellant is whether the learned trial magistrate erred in law and fact by failing to find that the party list was reconstituted and resubmitted in compliance with the law to which they submit that the interested party reviewed its party list as per communication from the 2nd respondent and since no complaint was lodged by neither the appellant nor the 1st respondent, how the interested party reconstituted the party list was its prerogative. The decision in *Perpetia Mponjiwa v Independent Electoral & Boundaries Commission & 3 other* [2018] eKLR was cited for the proposition that electoral disputes are a mode of scrutiny when the court said: -

“...It is the court’s finding that the disputes are one method of scrutiny and thus the commission acted within its mandate under the law to return the list to the party once it was satisfied that there were genuine reasons (raised in the disputes) that touched on qualification, eligibility of the persons named in the list and compliance with the law by the party.”

“How the party reconstituted the list after it was returned to it for reconstitution concerns the party alone and Independent Electoral & Boundaries Commission has no say in it except to discharge its mandate in confirming that the reconstituted list complied with the law.”

13. The appellant equally cited the decisions in *Aden Noor Ali’s* case for the finding that where a party reconstitutes its party list which is approved by the Commission as legally compliant, any aggrieved party may contest same by a complaint using the Internal Dispute Resolution Mechanisms. *Anthony Miano v AG* [2021] eKLR and several other decisions were cited for the law that a party needs to exhaust avenues of dispute resolution provided outside the court before approaching the court and that the court is bound by the doctrine of constitutional avoidance and exhaustion principle.

14. The 1st respondent, while appreciating that it remains the prerogative of the political party to constitute the party list, also isolate two issues, which in reality is a single issue for determination by the court to be; which party list was used to gazette the appellant as the second nominee member of the Kakamega County Assembly; and, if that list was legal. The party then delves into the chronology of the events setting out three lists as having been submitted with the first list being rejected by the Commission, the second list being reviewed by the party and contending that the reviewed list was the list used to gazette the appellant as the second nominee to represent the marginalized groups. It is then contended that the 2nd respondent allowed itself to be swayed by the letter dated 05.09.2022 without any order from the court, Internal Party Dispute Resolution. That position is very firmly held by the 1st respondent but no effort was made to cite to court any provision of the law; in the *Constitution*, statute, regulations or stare decisis to support the position.

15. The 1st respondent then submits that having succeeded before the election court and having been delayed and kept away from the fruits of the litigation, he developed the legitimate expectation to



- receive the accrued salaries which should be awarded as compensation and cites the decision in *Odongo Victor Robert v IEBC* [2018] eKLR for the submission that costs be capped at Kshs 250,00 for him.
16. For the 2nd respondent, it was submitted that on 25/6/2022 being 45 days to the general elections they received party lists from 81 political parties, including the interested party herein, pursuant to article 90 of *the Constitution*, sections 34,35,36 and 37 of the *Elections Act, 2012*, regulations 4,55, and 56 of the *Election (General) Regulations 2012* and regulations 20 and 21 of the *Election (Party Primaries and Party Lists) Regulations 2017*. On reviewing the list, they found that the interested party was non-compliant and they wrote to them on July 15, 2022 highlighting the areas of non-compliance.
 17. On 27/7/2022, the interested party wrote to the 2nd respondent informing it that the party would resolve its own disputes arising from party lists in line with section 40(2) of the *Political Parties Act* No 11 of 2011 and regulation 27 of the *Elections (Party Primaries and Party Lists) Regulation, 2017* and thereafter communicate the party's position.
 18. They claim that the present matter was referred to ODM Appeals Tribunal culminating in the interested party reviewing its party list for Kakamega County Assembly touching on the marginalized group as depicted in a letter dated 5/9/2022 captured on page 72 of the record appeal and consequently the following names were forwarded to the 2nd respondent by the interested party: -
 - a. Amos Liyayi Munasia-Youth
 - b. Roselyne Katibi Akoyi-Persons with disability (pwd)
 - c. Geoffrey Muhongo Mitalo-Ethnicity
 - d. Whitney Mwenje-Youth
 - e. Hebel Okelo Ouma-Persons with disability(pwd)
 - f. Maxine Khasosha-Youth
 - g. Asina Dafra Amboko-Youth
 - h. Susan A. Omondi-Ethnicity
 19. Based on the performance of the interested party in the elective seats of the Members of the County Assembly of Kakamega, the party was allotted two seats and the review of the party list affected the nomination of the petitioner herein. It is then submitted that the 2nd respondent was under a legal obligation to effect the changes forwarded to it by the interested party and that it is the responsibility of parties to choose their preferred candidate and relied on the decision in *Linet Kemunto Nyakeriga & another v Ben Njoroge & 20 others* where the court held: -

“It follows that it is the responsibility of parties to choose their preferred candidate and rank them in order of priority of preference. The seats won by each party are filled by candidate in the order they appear on the parties’ respective list. The definition of “party list” under section 2 of the *Elections Act* suggests ownership of the list by the political party that has prepared it. The practice, indeed the law, in jurisdictions with a closed list system is that the power over who gets the reserved seats resides with the parties themselves and no other authority.”
 20. Asserting the appreciation of its legal and constitutional mandate and boundaries in constitution and implementation of the party lists, the 2nd respondent assert that its only duty in the matter is to review the list to ensure compliance with the law otherwise the list belongs and is a preserved prerogative of the



political party with the right to adjust same in accordance with the provisions of section 40, Political Parties as read with regulation 27 of the *Elections (Party Primary and Party Lists) Regulations, 2017*.

21. Being a first appeal, the mandate of the court even on an election dispute like this remains that the court must proceed by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.¹ That re-evaluation and re-examination of the entire record must reveal that the trier of fact committed an error of principle by considering an irrelevant matter or ignoring to consider a relevant matter or that it just misapprehended the law and the evidence adduced.
22. In coming to its determination which allowed the petition and nullified the appellant's election the court did remark as follows: -

“ ...This court reiterates that if no one ever sought an appeal to the original published list then there would have been an issue to determine it in this court.

Secondly, failure by the interested party to put in their papers albeit being duly served would have shed more light as to authenticate their stand on the party list published.

Unfortunately, they did not participate in this matter and as such were never heard by this court.

The petitioner has said he was never aware of any changes. The first respondent equally has averred that he never put in an appeal nor complaint and the second respondent acted with the mandate of the original letter to gazette.

And simply put, this court cannot go fishing for evidence which is not before court. Legally put the court cannot move itself suo moto to answer this question...

...This court had no mandate to nullify the said gazette notice as it had no chance to see the lists presented to IEBC nor does it process any powers by law to do so without prove that indeed the gazetted members were not the ones that were presented for nomination.

The petitioner and the first respondent would want to know how they ended up being where they are today. The petitioner was very confident that he had been gazetted. And surprisingly the first respondent does not understand how he ended up being the current MCA yet he did not file a complaint in the internal dispute resolution within ODM...

....Who then replaced this list. The second respondent has equally testified that what they get submitted to them is what they publish and this is their mandate.

The quagmire here would have been easily resolved had ODM referred to herein defended this suit as apparently the answers beckon on them how they ended up nominating the 1st respondent, yet gazette the petitioner in the first instance.

Both the parties herein cannot answer the question as they have no answer...” (Emphasis added)

23. It is clear that the court was clear in its mind that how the last list was constituted before the appellant was gazetted by the 2nd respondent as the elected nominee was not clear from the evidence led before it. That position should have eased the court's duty when regard is had on the incidence and burden of

¹ 1. *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR,



proof and the indubitable position of the law of evidence that a fact that is neither proved nor disproved remain unproved². The law remains that the onus remains upon he who alleges³ and he who would fail if no evidence at all was led⁴, to prove what is alleged in the pleadings. The dispute before the election court was brought by the 1st respondent hence it was his duty to prove that he was unfairly excluded in the gazette Notice No10712 dated the September 9, 2022.

24. The Supreme Court in *Raila Odinga & anor v IEBC & 2 Others* [2017] eKLR, held, at para 132 and 133 that: -

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout a trial with the plaintiff. However, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting” and “its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.” (emphasis added)

25. From the excerpt from the judgment of the election court produced above, the court was never satisfied that the allegations had been proved, and was in fact complaining about failure by the political party (ODM) to avail the evidence to shed light. That state of affairs and evidence assert that even the evidentiary burden was yet to shift. Before it was shifted, the appellant, and in deed every other party to the petition, had no obligation to lead any evidence, unless it was for purposes only of hoping to fill in the gaps left by the 1st respondent’s case.
26. Further, the substratum of the 1st respondents case was that he was nominated to represent the marginalized but no iota of evidence was availed to court in proof of such allegation. Nothing was said on his qualification to represent the marginalized. The trial court appears not to have addressed its mind in that direction at all yet it was the center and fulcrum of the dispute. Without that proof, it is difficult to uphold the trial court’s decision.
27. That the court additionally bemoaned the failure by the interested party to attend and clear the position just as the appellant equally failed to lead evidence, only add to the fact that the 1st respondent failed on his burden to prove the case presented. It was therefore a failure to make a proper exposition of the law when the court without being satisfied on the standard of proof, to conclude that the petition had succeeded. It is the finding by this court, that on full reappraisal of the evidence, the petition was not proved and further that allowing same was against the weight of evidence led.
28. The evidence converges at the position that there were indeed three lists that the interested party sent to the 2nd respondent as its list for nomination. the first was rejected by the 2nd respondent on account

² Section 3, *Evidence Act*

³ Section 109, *Evidence Act*

⁴ ² Section 108, *Evidence Act*



- of non-compliance with the law. The last was sent under the cover of a letter by the interested party dated September 5, 2022. It is not disputed that the list was from the interested party just as it was never alleged nor proved that the list was phantom or a fraud. If there was to be time, and if the 1st respondent was to be aggrieved with the review by the party, it was a good ground for a complaint to the party. However, now that there was no time and the appellant stood elected, the route the 1st respondent took was the only route and he was under a duty to prove his allegations. Having taken that route, the law obligated him to prove his case by cogent evidence before he could expect to succeed.
29. In forwarding the reviewed list, the Interested party did tell the 2nd respondent and indeed whoever was interested in the list that “the appeal in respect of the Kakamega marginalized list was allowed by the Appeals Tribunal... The court views the review of the list to be within the right and prerogative of the political party to reconstitute its list provided that nobody has been declared elected. The declaration of election for special seats is by publication in the gazette.
 30. A point has been argued that by the publication of the second party list, the 1st respondent was poised to stand elected in terms of the jurisprudence in *Jaldesa Tuke Deballo v IEBC and Another* [2015] eKLR. This court’s understanding of that decision is that the publication in the gazette that is not subject to review, for the entire life of the Assembly, is that which published the persons elected after the seats are allocated by the Commission and not the publication done before the General Elections are conducted. With that understanding, it is the list published in the gazette on the 9.9.2022 that stands immune from any amendment, unless by an order of the court, during the term of the Assembly.
 31. It is the court’s understanding of the appurtenant law around party lists, that it is a constitutional process that when concluded must be respected by all and not every violation of any rights must lead to nullification of the election but may be remedied by an award of damages in an appropriately instituted claim. See *Christopher Odhiambo Karan v David Ouma Ochieng & 2 others* [2018] eKLR para 105-107.
 32. In conclusion, after full reappraisal of the record of the material presented before the trier of facts, it is the finding by the court that the appeal is wholly merited in that the allegations in the petition were never proved and the trial court was in error when it allowed the same and nullified the appellant’s election. For that error the decision nullifying the election is set aside and in its place substituted and order dismissing the petition.
 33. In terms of the law that costs do follow events, unless for special reasons to be recorded, and there being no special reasons discerned in this litigation, the costs of the petition are awarded to the appellant and the 2nd respondent, as the respondents before the election court. By the same token, the costs of this appeal shall be paid to the appellant by the 1st respondent.
 34. Pursuant to the stipulations of regulation 30, the *Elections (Parliamentary and County Elections) Petitions Rules, 2017*, the costs of the petition are capped at Kshs 300,000 to be paid by the petitioner 1st respondent and shared equally between the two respondents at the election court while the costs of the appeal are capped at Kshs 100,000 and payable by the 1st respondent to the appellant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF JULY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Mr. Abok for the Applicant



Mr. Mokaya holding brief for Magina and Kabue for the Respondents

Court Assistant: Polycap

