



**Mogeni v Independent Electoral and Boundaries Commission & 2 others (Election
Petition Appeal E004 of 2023) [2023] KEHC 19692 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION APPEAL E004 OF 2023**

HK CHEMITEI, J

JULY 6, 2023

BETWEEN

DENNIS MATUNDURA MOGENI APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

ORANGE DEMOCRATIC MOVEMENT PARTY 2ND RESPONDENT

DICKSON MACHUNGO MOGAKA 3RD RESPONDENT

*(Being an appeal from the whole Judgment and Decree of Principal Magistrate
at Keroka Hon. B.M Kimtai, issued on the 26th January 2023 in the Keroka
Principal Magistrate's Court in Election Petition No. E005 of 2022))*

JUDGMENT

1. This appeal arises from the Judgment rendered by Hon. B.M Kimtai(PM) on 26th January 2023 whereby the court found that the petitioner failed to proof his case as was required by law. In his Judgment the learned trial magistrate proceeded to dismiss the petition with costs to the 1st and 3rd respondents capping the same at Kshs. 300,000/=.
2. The appellant was aggrieved by the said judgment and filed the appeal herein. The grounds of the appeal are as follows:
 - a. The learned magistrate misapprehended the law in summarily dismissing the appellant's application dated 22nd November 2022 seeking an order compelling the Directorate of Criminal Investigation (DCI) to investigate the 3rd respondent two identity cards produced before court.



- b. The learned magistrate misapprehended the law by finding that the 3rd respondent's age was legally proved to be 34 years old and not 35 years old as indicated in the 2nd Respondent's party list and in Gazette Notice No. 10712 dated 9th September 2022.
 - c. The learned magistrate misapprehended the law by considering evidence in form of a Birth Certificate and an Identity card showing the age of the 3rd respondent as being 34 years old, that was not available to the Independent Electoral and Boundaries Commission (IEBC) or the Orange Democratic Movement (ODM) Party, during the nomination stage.
 - d. The learned magistrate misapprehended the law by holding that the 3rd respondent tendered documents in the nature of a birth certificate to the 1st and 2.4 Respondents in proof that he was aged 34 years old as at the time of the nomination and thus qualified for nomination to the youth category.
 - e. The learned magistrate misapprehended the law by placing reliance on a document that was not produced by the 1st respondent, but that which was belatedly produced by the 3rd respondent to sanitize an otherwise voidable election.
 - f. The honorable court misapprehended the law by upholding the nomination of the 3rd respondent as the Member of the County Assembly of Nyamira County representing the youth category, despite being 35 years old thus an unqualified person.
 - g. The honorable court misapprehended the law by upholding the gazettement of the 3rd respondent as the nominated member of Nyamira County Assembly under the category of special seats (Youth) *vide* Gazette Notice No. 10712 dated 9th September 2022, despite the gazette Notice indicating the true age of the 3rd respondent as 35 years, thus unqualified to be nominated.
 - h. The learned magistrate misapprehended the law in awarding the respondents Kshs. 300,000.00 being costs of the suit.
3. The Appellant sought several orders in his memorandum of appeal and urged the Court to set aside the said judgment and the Certificate of validity of election issued to the 3rd respondent by the trial magistrate. He also prayed for costs of the Appeal.
 4. Parties were directed to canvass the appeal by way of written submissions which they have complied save for the 1st and 2nd Respondent.

Appellant's Written Submissions

5. The appellant in his submission identified four issues for determination and also adopted his submissions filed in the trial court found at page 98-258 of the record of appeal.
6. The first issue was, whether the 3rd respondent was qualified to be nominated under category of Marginalized (Youth) representing the 2nd respondent in Nyamira County Assembly. He submitted that by the mere fact that the national identification card presented to the 2nd respondent by the 3rd respondent for consideration of nomination as a youth had his age showed 35 years, was an affirmation that the 3rd respondent was not qualified to be nominated as a youth. Nominating the 3rd respondent therefore went against the provisions of Article 177(C) of the Constitution relating to the youth and the will of the people of Nyamira County.



7. Further, that an introduction of a new identity card by the 3rd respondent did not bear any evidential value as that was not the document that was considered when nominating him. He placed reliance on the case of *Lydia Nyaguthi Githendu v IEBC & 17 Others* [2015] eKLR.
8. The second issue was whether the process that led to the gazettelement of the 3rd Respondent as a nominee in Gazette Notice No. 10712 under category of Marginalized (Youth) representing the 2nd respondent in Nyamira County Assembly was irregular and illegal. The appellant submitted that the 1st respondent had to this end not produced the certificate of compliance to confirm whether the party lists containing the name of the 3rd respondent was compliant as stipulated under section 34(6A) of the *Election Act* 2011.
9. Further, that the 1st respondent failed to produce any declaration to the effect that the 2nd respondent had complied with the provisions of Regulation 55(4) of the *Elections (General) Regulations* of 2012. Based on the said arguments the appellant submitted that the gazettelement of the 3rd respondent as a nominee under the category of Marginalized (Youth) representing the 2nd respondent in Nyamira County was irregular and illegal.
10. The third issue was whether the 1st and 2nd respondent violated the law in nominating the 3rd respondent under the category of Marginalized (Youth) representing the 2nd respondent in Nyamira County Assembly. The appellant submitted that the said respondents having engaged on the illegal nomination and eventually gazettelement of the 3rd respondent was outright violation of the rule of law.
11. The court's attention was drawn to several cases among them being *Muslims for Human Rights (MUHURI) & Another v Inspector General of Police & 5 Others* [2015] eKLR, *Commissioner for the Implementation of the Constitution v Attorney General & 2 Others* [2013] eKLR and *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR which cited with approval the case of *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others*.
12. Lastly, on the issue of who should bear the costs the appellant submitted that it was an accepted principle that cost should follow events and that based on the foregoing the 3rd respondent ought to bear the costs. He urged the court to grant the orders sought in his appeal.

3rd Respondent's Written Submissions

13. The 3rd respondent in his submissions submitted on the grounds raised in the memorandum of appeal. In respect to ground 1, the 3rd respondent submitted that contrary to the allegation by the appellant, it was evident from the record that the application dated 22nd November 2022 which the appellant had instituted was never dismissed summarily. The said application was dismissed following a well-reasoned ruling by the learned trial magistrate exhibited at pages 730-739 of the record of appeal.
14. In respect to grounds 2, 3, 4, 5, 6 and 7, the 3rd respondent submitted that in his affidavit in support to his response to the petition, he gave a detailed explanation to controvert the appellant's allegations that he was 35 years of age and not 34 years of age at the time of the nomination process. That the said affidavit was at pages 412 – 425 of the record of appeal. Further, that the trial magistrate in his decision observed Regulation 15(3) of the *Election (Party Primaries and Party Lists, 2017)*.
15. He submitted that under the said provisions of the law, one was only required to proof by way of documents that he was above 18 years and that he had not attained the age of 35 years at the time of applying for nomination. He placed reliance on the cases cited by the trial magistrate in his judgment, High Court Constitutional Petition No. E313 OF 2022; *Losikany James v IEBC* and *Linet Kemunto Nyakerigo & Another v Ban Njoroge & 2 Others* C.A 266/2013.



16. In respect to ground 8, the 3rd respondent submitted that it could not be gainsaid that costs followed the event. That the learned trial magistrate rightly held that under section 85 of the *Election Act*, a court sitting as an election court was enjoined to award costs of and incidental to the petition. Further, that failure by the appellant to adduce evidence in support of his petition, the trial magistrate rightly exercised his discretion by awarding costs. He urged the court to dismiss the appeal with costs in his favour.
17. The matter came in court on 12th April 2023 for highlighting of submissions by the parties herein. The advocates for the parties highlighted several issues raised for determination in their written submission and cited sets of authorities which the court has had advantage of perusing.

Analysis and Determination

18. Being an appeal, this court is expected to reevaluate the evidence afresh and in particular matters of law and ensure that the trial court acted judicially and correctly applied the law and ultimately come up with an independent and fresh finding.
19. At the time of highlighting of submissions, it was plainly evident that the main issue for determination in this appeal was whether the 3rd respondent was eligible to be nominated as a youth in line with Article 177 of the *Constitution* as well as Regulations 15 (3) of the *Elections (Party Primaries and Party Lists) 2017*.
20. Article 260 of the *Constitution* provides as follows;
 - “(1) A county assembly consists of—
 - (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
 - (b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
 - (c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and” (underlining mine)
21. Regulation 15(3) of the *Elections (Party Primaries and Party Lists) 2017* provides as hereunder;
 - “a person who wishes to be nominated by a political party to represent the youth shall be a person who has attained the age of eighteen years but has not attained the age of thirty-five years and such person shall provide documentary proof of his or her age.”
22. It therefore means that any person calling himself a youth ought to be between age 18 and 34. It is the responsibility of the political party when carrying out the primary elections to examine and satisfy itself that the candidates fronting themselves for the said positions are qualified as provided above.
23. In the context of the matter at hand it was the duty of the Orange Democratic Movement (ODM), the 2nd respondent to ensure that the eventual party list that is submitted to the 1st respondent complied with the legal requirements cited above.



24. From the evidence gleaned from the record it is apparent that the third respondent herein had issues with his national identity card number 25566490 which indicated that he was born on 1st January 1987 and thus it meant that at the time of carrying out the election primaries he had attained the age of 35 years and he was therefore non eligible as he was no longer a youth.
25. The 3rd respondent instead of presenting to the 2nd respondent the said identity card during the nomination exercise presented instead his certificate of birth No.557768 which indicated that he was born on 12th December 1987 and thus he was 34 years and therefore was still in the bracket of youth.
26. The 1st respondent in the affidavit sworn by Chrispine Owiye its legal officer at the trial court confirmed that by virtue of the said certificate of birth they permitted the 3rd respondent to contest the said seat.
27. There are therefore two sets of competing documents namely the certificate of birth and the national identity cards. It was the appellants case that the presentation of certificate of birth as a primary document to the 2nd respondent during nomination was legally wrong as it was not one of the documents prescribed.
28. At the same time the issue of obtaining a second identity card was illegal as it was obtained way after the nominations had been conducted and more so after the elections had been conducted.
29. The first issue to determine is whether the 3rd respondent's nomination was done procedurally based on the contested identification documents. The court has perused the record and in particular the nomination form No. 18B contained in the affidavit of the appellant in support of the petition.
30. Under part D, "Supporting Documents;" it goes on to indicate;
 - " Please attach the following documents to your application.
 - (a) Evidence of payment of the application fee applicable to the position sought.
 - (b) A detailed curriculum vitae
 - (c) Certified copies of your educational qualifications
 - (d) A certified copy of the national identification card."
31. Although the above documents were presented by the appellant, there was no doubt that the 3rd respondent must have presented similar ones when he sought his nominations since they were from the same party.
32. I have critically perused the said requirements and clearly a certificate of birth is not one of the documents for presentation. It means therefore that what the 3rd respondent presented was his national identity card which indicated that he was born on 1st January 1987 since by then he had not done the rectification so as to be given the new identity card which indicated that he was born on 12th December 1987.
33. What then was the consequences of presenting what I may call his first identity card? It simply meant that he was not a youth anymore and in any case and as found above the certificate of birth was not one of the documents the 2nd respondent expected.
34. The 3rd respondent thereafter proceeded to seek the error amended in the identity card so as to tally with the certificate of birth. He stated that he wrote to the registrar of births and deaths to carry out the rectification. The said rectification as stated above came way after the nomination primaries as well as the general elections.



35. The 1st respondent admitted that it instead used the certificate of birth in allowing the 3rd respondent to participate in the said general election as it was one of the legal documents it is relied upon when one is applying for the identity card. This in my view presents a problem because in the first instance it is the 2nd respondent which is supposed to vet and thereafter present to the 1st respondent people it deemed legible and or qualified to contest.
36. I think at that juncture it was not for the 1st respondent to usurp the role and responsibility of the 2nd respondent. At any rate the 1st respondent is not the Registrar of Birth and Deaths to declare a certificate of birth a valid document. Whatever it is worth, it is only the said Registrar who is mandated to issue the national identity card.
37. The reliance by the 1st and 2nd respondents on certificate of birth to clear the 3rd respondent went against the law as it was not a legal document to be presented in both the primaries(nominations) and general election exercises however genuine it may have been.
38. The court has perused the gazette notice no 6378 at paragraph (d) issued by the 1st respondent and it clearly states that "... copies of the person's national identity card or valid passport (the documents used by the nominee to register as a voter." as one of the requirements.
39. I doubt whether the 3rd respondent used his certificate of birth to register as a voter. It left him with one option, namely the original identity card which in this case was the one with alleged errors.
40. It would therefore follow conclusively that the certificate of birth was not one of the documents gazetted by the 1st respondent and if it intended so then it ought to have indicated.
41. It is also very difficult for this court to agree that the certificate of birth is a document to be admitted and be used in such a serious contest like elections since the practice generally is the use of national identity card. I can easily draw analogy with the above 2nd respondent's primary elections which required an identity card as one of the documents. How then can a whole national electoral body require a certificate of birth.?
42. Even for argument sake, it meant that the 3rd respondent must have had two sets of certificates of birth, one indicating that he was born on 1st January 1987 and the other one indicating his date of birth as 12th December 1987. Otherwise what did the Registrar of Births and Death use in issuing another identity card to the 3rd respondent.?
43. This court finds that the corrections by the 3rd respondent were only done on 14th October 2022 way after nominations and one is left to wonder what he had been doing since 5th of September 2007. Surely this was a monumental error in his legal documents which it is difficult to ignore. The 3rd respondent is obviously a learned man and he must have used it in his various endeavors and he cannot chance to rectify the error only during the elections.
44. Consequently, and for the reasons stated above this court is satisfied that at the time of presentation of the nomination for primaries the 3rd respondent was aged 35 years and therefore not a Youth as per his identity card number 25566490. The effort to sanitize the same whether procedural or not came after the nomination and in my humble view not consequential.
45. I further do not think that the 3rd respondent should benefit from High court Constitutional Petition Number E313 of 2022 *Losikany James v. IEBC* and the interim orders flowing therefrom. This court for the reasons found above cannot agree with the above persuasive authority as the 3rd respondent cannot benefit from an illegality. As a matter of fact and as admitted by the parties the said petition was later dismissed.



46. It perhaps would have been different if the 3rd respondent had been in the first place legible for the position he was yearning to contest. In other words, if he felt below the age between 18 and 34 years then this court would have taken some time to consider whether the advanced reasons for correcting the error or relying on the certificate of birth were plausible.
47. For the above reasons this court finds that the 1st and 2nd respondent violated both the *Constitution* and the Election Act in allowing a non-Youth to contest the said election both at the primary level as well as the general elections. The trial court felt therefore in error.
48. The other issues raised in the grounds of appeal for the reasons stated above are for now moot and engaging in them is purely academic. In other words, the issue of the age factor discussed above squarely settled this matter.
49. The only issue is on costs. It is agreed that the provisions of Section 27 of the *Civil Procedure Act* applied in all fours. In the premises I find the holding by the trial court on the issue of costs capping the same at kshs 300,000 at the trial court was and is reasonable considering the labour the parties have been into.
50. For this appeal I find that the appellant is entitled to costs. The labour involved of course is still enormous taking into consideration the preparation for the appeal. However, the same as is the practice now ought to be definite and not speculative punitive or leaving it for taxation.
51. Taking all the factors herein into consideration the appellant shall have the costs capped at kshs 200,000.
52. The costs of kshs 300,000 awarded to the respondents at the trial court is set aside and the same instead shall be payable to the appellant herein.
53. In summary the appellant shall have both costs at the lower court and in this appeal totaling kshs 500,000. The same shall be paid by the 1st and 3rd respondent at kshs 250,000 each.

Conclusion.

54. In conclusion this are the orders of the court;
 - (a) The appeal is hereby allowed and the trial courts judgement and all the consequential orders are set aside.
 - (b) The certificate of validity of elections issued by the trial court dated 26th January 2023 is set aside.
 - (c) The process that led to the gazetment of the 3rd respondent as a nominee in gazette notice number 10712 under the category of Marginalized (Youth) representing the 2nd respondent in Nyamira county assembly was irregular illegal, null and void.
 - (d) The 3rd respondent is unqualified to be nominated as a nominee under the category of Marginalized (Youth) representing the 2nd respondent in Nyamira county assembly.
 - (e) The 3rd respondent Dickson Machungo Mogaka is hereby revoked as the ODM nominee in the category of Marginalized (Youth) in Nyamira county assembly.
 - (f) The 1st respondent is hereby ordered to via a gazette notice revoke the 3rd respondent as the nominee nominated in the category of Marginalized (youth) in Nyamira county assembly.
 - (g) The 1st and 2nd respondents to conduct fresh nominations and election for the position of Marginalized (Youth) in Nyamira county assembly.



- (h) The appellant shall have both costs at the trial court and this court capped at kshs 500,000 in total to be paid by both the 1st and 3rd respondent to the appellant in equal portions, that is kshs250,000 each respectively.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 6TH DAY OF JULY, 2023.

H. K. CHEMITEI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

