



REPUBLIC OF KENYA



KENYA LAW
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**Shambi v Rodgers & another (Election Petition Appeal
E002 of 2023) [2023] KEHC 20513 (KLR) (17 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
ELECTION PETITION APPEAL E002 OF 2023**

GMA DULU, J

JULY 17, 2023

BETWEEN

JOSEPHAT PETER SHAMBI APPELLANT

AND

DOREEN TAABU RODGERS 1ST RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION

(IEBC) 2ND RESPONDENT

*(From the judgment and decree in Taveta Principal Magistrate's Court Election Petition
No. MCEP E001 of 2022 delivered on 28th March 2023 by Hon. P. Ndungi (PM))*

JUDGMENT

1. In a judgment delivered on March 28, 2023 the Magistrate's court concluded as follows:-

“In the final analysis, and after considering the pleadings, the evidence, the submissions filed and the law, I hereby allow the petition filed on September 30, 2022. I make the following orders:-

- a. A declaration is hereby made that the Taita tribe is not an ethnic minority in Taita Taveta County within the meaning of Article 177(1) (c), Article 199 (2)(b) of the Constitution and Section 7(2) of the County Government Act.
- b. A declaration is hereby made that the said Josephat Peter Shambi who is the 1st respondent herein being a Taita was not validly elected or nominated as a Member of County Assembly of Taita Taveta County to represent ethnic minority in the said County Assembly.



- c. A declaration is hereby made that the Pare tribe is an ethnic minority group in Taita Taveta County for purposes of Article 177(1)(c), Article 197(2)(b) of the Constitution and Section 7(2) of the County Government Act.
- d. The Kenya Gazette Notice No 10712 Vol CXXIV – No 186 dated September 9, 2022 which declared the 1st respondent as a nominated Member of County Assembly of Taita Taveta County is hereby annulled and quashed.
- e. The Wiper Democratic Movement to prepare and submit another Party Nomination List to the Independent Electoral and Boundaries Commission (2nd respondent) in conformity and compliance with Article 177(1)(c), Article 197(2)(b) of the Constitution and Section 7(2) of the County Government Act.
- f. Costs of the petition are awarded to the petitioner to be borne by the respondents jointly and severally.

The respondents will pay the costs of the petition jointly and severally since they are both to blame for the nomination irregularities. The 1st respondent applied for nomination knowing very well that he comes from the majority Taita tribe and he is not qualified to be nominated to represent ethnic minority in the County Assembly of Taita Taveta. The 2nd respondent failed to properly exercise its responsibility under Article 90(2) of the Constitution and Section 34 of Elections Act to ensure that the nomination list does not contain an unqualified person who cannot represent the ethnic minority in County Assembly of Taita Taveta County.”

2. Aggrieved by the above decision of the trial court, Josephat Peter Shambi, the 1st respondent in the trial court, has come to this court on appeal through counsel Sharia Nyange Njuguna & Company Advocates on the following grounds:-
 1. The learned trial Magistrate erred in law by quashing and nullifying Kenya Gazette Notice No 10712 Vol CXXIV – No 186 dated September 9, 2022, whose legal effect is to nullify the election by way of nomination of all nominated member of the County Assembly of Taita Taveta.
 2. The learned trial Magistrate erred in law by quashing and nullifying Kenya Gazette Notice No 10712 Vol CXXIV – No 186 dated September 9, 2022 thus nullify the election by nomination of all nominated Member of the County Assembly of Taita Taveta without affording an opportunity to be heard.
 3. The learned trial Magistrate erred in law by quashing and nullifying Kenya Gazette Notice No 10712 Vol CXXIV – No 186 dated September 9, 2022 yet no such prayer was pleaded nor sought by the petitioner now 1st respondent herein.
 4. The learned trial Magistrate erred in law by descending into the arena of this dispute by making findings and giving final prayers that were not pleaded nor sought by the petitioner now the 1st respondent.
 5. The learned trial Magistrate erred in law by reaching a finding that the Pare tribe is an ethnic minority group in Taita Taveta which finding was never pleaded nor sought by the petitioner now 1st respondent herein.



6. The learned trial Magistrate erred in law in finding that the petitioner now 1st respondent is a Kenyan citizen contrary to the evidence adduced before court.
7. The learned trial Magistrate erred in law by reaching the finding that the petitioner now 1st respondent herein is a Kenyan while relying on the publication in the national newspaper as caused to be published by the 2nd respondent herein.
8. The learned trial Magistrate erred in law by finding that the petitioner now 1st respondent had proofed her citizenship by way of Kenyan identity card and birth certificate yet none was produced during trial.
9. The learned trial Magistrate erred in law in finding that Biometric data produced by the petitioner now 1st respondent is admissible as evidence of citizenship.
10. The learned trial Magistrate erred in law in reaching a finding that the petitioner now 1st respondent is a Kenyan contrary to the evidence adduced by the petitioner herself now 1st respondent that Pares are non-citizens.
11. The learned trial Magistrate erred in law by failing to interpret and construing the provisions of Article 90(2)(c) of the *Constitution of Kenya* that expressly exempts County Assemblies from the requirement to comply with ethnic minorities in its composition.
12. The learned trial Magistrate erred in law by defining the meaning of ethnic minority narrowly and on the basis of numerical majority alone.
13. The learned trial Magistrate erred in law by failing to interpret the meaning of ethnic minority within the context of Article 27 of the *International Covent on Civil and Political Rights (ICCPR)*.
14. The learned trial Magistrate erred in law by failing to consider the admission of the petitioner now 1st respondent that she was aware of the facts giving rise to the dispute herein well before September 9, 2022.
15. The learned trial Magistrate erred in law by failing to follow the binding decision of the Supreme Court on the subject of pre and post nomination disputes.
16. The learned trial Magistrate erred in law in failing to properly apply the law and circumstances of the case in reaching a finding that the court had jurisdiction to hear and determine the dispute herein.
17. The learned trial Magistrate erred in law by failing to reach a finding that the petitioner now 1st respondent failed to discharge the burden of proof to the set standard required by law.
18. The learned trial Magistrate erred in law by finding that the petitioner now 1st respondent has proofed that she is a registered member of Wiper Democratic Party.
19. The learned Magistrate erred in law by reaching a finding that the petitioner now 1st respondent had proofed that she applied for nomination as a Member of the County Assembly of Taita Taveta as an ethnic minority.
20. The learned trial Magistrate erred in law in making a finding order that alters the party list prepared by Wiper Democratic Party and directing Wiper Democratic Party to prepare and submit another nomination list, yet Wiper Democratic Party was never a party to petition before the trial court.



21. The learned trial Magistrate erred in law by condemning Wiper Democratic Party without affording the party an opportunity to be heard, when in making a finding, order that altered the party list prepared by Wiper Democratic Party and directing Wiper Democratic Party to prepare and submit another nomination list.
 22. The learned trial Magistrate erred in law when reaching a finding that the 2nd respondent has the mandate to alter, rearrange or pick out from the list any other candidate other than the party preferred listed in the top of the list.
 23. The learned trial Magistrate erred in law when he condemned the appellant to pay costs for reasons that he applied to be nominated while knowing he is not qualified yet the decisions whether one is qualified to nominate lies with the political party and 2nd respondent herein.
 24. The learned trial Magistrate erred in law when he failed to consider the appellant's arguments, submission and authorities when arriving at his decision.
3. The 2nd respondent (IEBC) herein, on their part through counsel Kioko, Munyithia & Ngugi Advocates filed a cross-appeal on April 28, 2023 on the following grounds:-
1. The learned Magistrate erred in law by holding that the Petitioner now 1st respondent had properly invoked the jurisdiction of the court without exhausting the available Dispute Resolution Mechanism available to her.
 2. The learned Magistrate erred in law and fact by failing to consider the admission by the petitioner now 1st respondent that she was aware of the facts giving rise to the dispute herein well before September 9, 2022.
 3. The learned Magistrate erred in law in finding that the 2nd respondent could interfere with a party list as submitted by a political party.
 4. The learned Magistrate erred in law in quashing or nullifying Gazette Notice number 10712 Vol CXXIV – No 186 dated September 9, 2022 whose net legal effect was to nullify the election of all nominated Members of County Assembly within the Republic of Kenya nominated in different categories.
 5. The learned Magistrate erred in law in quashing and nullifying Gazette Notice number 10712 Vol CXXIV. No 186 dated September 9, 2022 whose net legal effect was to nullify election of all nominated Member of County Assembly within the Republic of Kenya nominated in different categories without granting them an opportunity to be heard.
 6. The learned Magistrate erred in law by failing to find that party lists can only be submitted once, 45 days to a general election.
 7. The learned Magistrate erred in law by failing to find that the criteria employed in party nominations is that if a candidate number 1 fails to meet the eligibility criteria set down in law, it would mean that the next candidate of the same gender according to the party list would be considered.
 8. The learned Magistrate erred in law by issuing orders against a party not enjoined in the proceedings.
 9. The learned Magistrate erred in law by directing the 2nd respondent to call upon the Wiper Democratic Party to submit another list way after the 45 day period had lapsed and general elections had been conducted.



10. The learned Magistrate erred in law in finding that the petitioner now 1st respondent had discharged her burden of proof and proved that there was non-compliance with the law relating to nomination of persons representing ethnic minority in Taita Taveta County Assembly, and the non-compliance affected the validity of the Election by Nomination.
 11. The learned Magistrate erred in fact and in law by allowing the petition with costs to be borne by the respondents and failing to consider or to sufficiently consider the case advanced by the 2nd respondent in relation to nomination of the 1st respondent to represent the ethnic minority in Taita Taveta County Assembly.
 12. The learned Magistrate erred in law by shifting the burden of proof to the 2nd respondent in relation to alleged malpractices.
 13. The learned Magistrate erred in law in wrongly construing the permitted extent of intervention by a court in political party nominations disputes and in the result arrived at a wrong decision.
 14. The learned Magistrate erred in law in failing to correctly contextualize the duty of the 2nd respondent in the overall conduct of elections and thereby arrived at the erroneous decision that the 2nd respondent had acted in violation of their mandate and the electoral laws regarding nominations.
 15. The learned Magistrate erred in law in disregarding and/or failing to properly interpret and apply the provisions of Section 83 of the *Elections Act, 2011* and in consequence arrived at an erroneous decision in principle and effect.
 16. The learned Magistrate erred in law by improperly predisposing his mind to a position favourable to the petitioner and against the 2nd respondent and thereby failed to accord the 2nd respondent the right to a fair hearing before an impartial tribunal as envisaged by or under the provisions of Article 50 of the Constitution. The decision of the learned Magistrate is unreasonable, wrong in law and unjust in effect.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions and submissions in reply to 1st respondent filed by Sharia Nyange Njuguna & Company the counsel for the appellant, and the submissions filed by Kioko, Munyithia & Ngugi counsel for the 2nd respondent who is a cross-appellant, as well as the submissions filed by Kiarie Mungai & Associates the counsel for the 1st respondent. I have to acknowledge here that each counsel relied on decided court cases.
 5. I note that during trial, the trial court made a number of ruling at a preliminary stage, until on November 30, 2022, when the trial court issued directions that the court would not entertain any further applications and/or objections except in exceptional circumstances. Yet the trial court thereafter on the December 1, 2022 issued orders striking out yet another application, and still thereafter the trial court had to pronounce other rulings, until February 13, 2023 when the court directed that no further interlocutory applications shall be filed in the matter.
 6. Thus it was not until February 14, 2023 that the hearing of the petition commenced. On the side of the 1st respondent herein who was the petitioner, only PW1 Doreen Taabu Rodgers, the petitioner in the trial court testified. On the side of the appellant who was the 1st respondent at the trial, only the appellant herein, Josephat Peter Shambi testified. On the side of IEBC, the 2nd respondent herein who is also a cross-appellant, only Chrispine Owiye the Director of Legal Services testified. All the three witness were cross-examined and re-examined.



7. I have to mention here also that this appeal having been filed on April 17, 2023, on the April 24, 2023 parties counsel filed a written consent dated the same date, to the effect that pending the hearing and determination of the appeal, there be a stay of execution of the judgment and decree herein in *Taveta Principal Magistrate Election Petition No MCEP E001 of 2022 Doreen Taabu Rodgers v Josephat Peter Shambi & IEBC*.
8. Coming now to this appeal, I have considered the petition of appeal, the judgment of the trial court and submissions of all parties counsel, and perused the pleadings and proceedings. In my view, the issues for determination are as follows:-
 - i. Whether the Magistrate’s court had jurisdiction to entertain and hear and determine the petition.
 - ii. Whether the appellant and 1st respondent were qualified to be in the list of recommended persons for appointment as MCA’s to represent special groups in Taita Taveta County.
 - iii. Whether the Magistrate’s court was correct in quashing Gazette Notice No 10712 Vol CXXIV - No 186 dated September 9, 2022.
 - iv. Whether the Magistrate’s court was correct in issuing orders against Wiper Democratic Party, who were not parties to the petition.
 - v. Who should bear the costs.
 - i. Whether the Magistrate’s court had jurisdiction to entertain and determine the petition.
9. With regard to the first issue whether the Magistrate’s court had jurisdiction to entertain the petition, several arguments have been put across by the three parties counsel herein, and several authorities relied upon.
10. There is no dispute that the proceedings before the Magistrate’s court were commenced after the general elections of August 2022. There is also no dispute that the petition proceedings were commenced after nominated MCA’s were gazetted by the IEBC the 2nd respondent herein, in the Gazette Notice No 10712 Vol CXXIV – No 186 dated September 9, 2022.
11. I note that in the case before the Magistrate, the petitioner was not challenging the list prepared by the IEBC following the decision of Wiper Democratic Party, but the gazettment of the appellant as MCA, whom he contends was not from an ethnic minority in the county. This gazettment was after the general elections. Thus in my view the jurisdiction of the pre-election disputes mechanisms enumerated in the case of *Sammy Ndungu Waity v IEBC & 3 Others* (2017) eKLR, had long lapsed, and the matter became an election petition to be determined by the court, and ceased to be a pre-election or nomination dispute.
12. Since the issue before the Magistrate arose after the elections, the Magistrate’s court would have jurisdiction, to deal with and determine the matter.
13. Lastly, the present dispute being on who was elected by nomination through publication in the Kenya Gazette Notice of September 9, 2022, in my view, it was a matter where the Magistrate’s court did have jurisdiction, to hear and determine and I so find.
 - (ii) Whether the appellant and the 1st respondent were qualified to be in the list of the recommended persons for appointed as MCA’s to represent special groups in Taita Taveta County.



14. I now turn to the second issue whether the appellant and 1st respondent were qualified to be on the list of recommended persons for appointment as MCAs to represent special groups in the Taita Taveta County.
15. I have considered the varying arguments by the parties counsel. I note that the definition of special interest groups under Article 177(1) of the Constitution is not a closed one. The Elections Act and County Government Act, and Politics Parties Act, do not close the definition of special or marginalized groups. The discretion to consider those qualified is left with the political party, with the IEBC (2nd respondent) only having an oversight role to ensure compliance with the law depending on information availed to it. This is what has been held in several cases including the case of National Gender & Equality Commission v IEBC & Another (2014) eKLR, wherein the Supreme Court stated that under Section 34(6) of the Elections Act 2011, party nominations were to be done by parties in accordance with their rules.
16. There being no information herein that anybody complained to IEBC in July when the list of proposed nominated MCAs was published in the newspapers, or the Wiper Democratic Movement Party, and the party not having been informed of such complaint, and not being a party herein, it follows that all the people named in the list published in the newspapers by IEBC in July 2022 were qualified to be nominated as MCAs to represent defined interest groups.
17. I am aware that there have been strong arguments herein about the Pare tribe being a minority group, or the Taita group being a minority group. Those arguments in my view, are academic, as the definition of special groups under the Constitution and Elections Act, does not exclude ethnic minorities, and the definition of what in any particular situation constitutes a special or marginalized group is left to the Political Party. If the Wiper Democratic Party decided to go by a description of names of tribes, so be it. If someone wished to contest that description, he or she should have contested it with the political party at the time the list was published in July 2022 in the newspapers. Otherwise, it is my finding from what has been placed before me, that both the appellant and 1st respondent were qualified to be MCAs to represent special groups in Taita Taveta County.
 - (iii) Whether the Magistrate was correct in quashing Gazette Notice No 10712 Vol CXXIV – No 186 dated September 9, 2022
18. I now turn to the issue whether the Magistrate was correct in quashing Gazette Notice No 10712 Vol CXXIV – No 186 dated September 9, 2022.
19. In my view, the Magistrate erred in quashing the Gazette Notice. The first reason is that the petitioner, who is 1st respondent herein did not prove to the required standard that there was any irregularity committed by either IEBC or the appellant herein. Secondly, in the proceedings before the trial court, the 1st respondent did not show or demonstrate that there was any factual or legal error in the contents of the list published in the Gazette Notice. The fact that her name was not contained therein was neither a factual or legal error, because it is very clear from the legal position applicable which was explained in the case of Linet Kemunto Nyakariga & Another v Ben Njoroge & 2 Others (2014) eKLR that IEBC was required to go by the priority of names in the list as made by the party Wiper Democratic Party, and that is what they did.
20. More importantly, the quashing of the Gazette Notice meant that other special interest elected MCAs, who were not parties in the proceedings herein, were all to be disqualified from holding their positions, while they were neither parties, nor were they aware or served with the pleadings herein. Such quashing would contravene the provisions on fair hearing contained in Article 50 of the Constitution of Kenya



in relation to those affected. On that ground, alone, the appeal and cross appeal will succeed, and the quashing of the Gazette Notice set aside.

21. Lastly, though the appellant's counsel has argued that the order of the trial court did not quash the whole Gazette Notice, in my view that is not true. I will thus reinstate the Gazette Notice.
 - (iv) Whether the Magistrate's court was correct in issuing orders against Wiper Democratic Party who were not parties to the petition
22. The fourth issue is whether the Magistrate was correct in issuing orders against Wiper Democratic Party. On this, I will go back again to the constitutional provisions on fair hearing contained in Article 50 of the Constitution.
23. In my view, the learned Magistrate erred in issuing orders meant to be complied with by the Wiper Democratic Party, who was neither a party, nor were they served with the pleadings, in violation of the Article 50 of the Constitution.
 - (v) Who should bear the costs
24. In my view, costs will follow the event. The successful parties will have the costs. I thus award costs of the appeal, as well as the costs of proceedings in the trial court to the appellant and the 2nd respondent (cross-appellant herein), as against the 1st respondent.
25. The final orders of this court are thus as follows: -
 - a. The appeal herein and cross-appeal are hereby allowed and the judgment delivered by the Taveta Magistrate's court on 28th March 2023 is hereby set aside.
 - b. The certificate of validity of election issued by the learned Magistrate on March 28, 2023 be and is hereby set aside.
 - c. The quashing of Kenya Gazette Notice No 10712 Vol CXXIV-No 186 dated September 9, 2022 is hereby set aside, and the Gazette Notice reinstated.
 - d. A declaration is hereby issued that the gazettement of the 1st respondent as nominee MCA in Gazette Notice No 10712 in (c) above, representing the ethnic minority in Taita Taveta County Assembly was regular and legal.
 - e. The costs of this appeal and cross appeal and the costs of proceedings in the trial court are hereby awarded to the appellant, and the 2nd respondent against the 1st respondent.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF JULY 2023 AT VOI IN OPEN COURT VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

For the appellant: Mr. Nyange

For 1st respondent: Mr. Odunga

For 2nd respondent: Mr. Mokaya and Mr. Munyithya

Mr. Otolu court assistant

