



**Macharia v Wangari & 2 others (Election Petition Appeal E003 of 2023)
[2023] KEHC 22276 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22276 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
ELECTION PETITION APPEAL E003 OF 2023
FN MUCHEMI, J
SEPTEMBER 20, 2023**

BETWEEN

AGNES WANJIRU MACHARIA APPELLANT

AND

MAINA VERONICA WANGARI 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

UNITED DEMOCRATIC ALLIANCE PARTY (UDA) 3RD RESPONDENT

*(Being an appeal from the judgement and decree of Hon. M. Okuche (SPM)
delivered on 3rd March 2023 in Nyeri CM Election Petition No. E005 of 2022)*

JUDGMENT

1. This appeal arises from the judgment in Nyeri CM Election Petition No. E005 of 2022 whereby the court issued a declaration that the appellant was not validly elected/nominated through Gazette Notice Number 10712 Vol. CXXIV-No. 186 of 9th September 2022, as a member of County Assembly of Nyeri under the marginalized list representing ethnicity and that the said nomination under the category of ethnicity was illegal, unlawful and void and should be invalidated as the Constitution does not provide for ethnicity in county seats.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing nine (9) grounds summarized as follows:-
 - a. The learned trial magistrate erred in law in finding that the court had jurisdiction to hear and determine the election petition which was a dispute arising from a nomination process of a political party;



- b. The learned trial magistrate erred in law in finding that the appellant was nominated on the basis of ethnicity and therefore her nomination was null and void;
 - c. The learned trial magistrate erred in law by adopting a narrow interpretation of Article 90(2)(c) of *the Constitution* to the extent that it provides for an exception to county assembly to provide as a mandatory imperative for regional and ethnic diversity but does not expressly forbid or restrain them from doing so where possible and appropriate;
 - d. The learned trial magistrate erred in law in making a finding that the 1st respondent had proved her case to the intermediate standard.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the 3rd respondent invited its registered members who meet the qualifications for election as members of County Assembly to apply for nomination of party list as provided for under Article 177(1)(b) of *the Constitution* of Kenya. Being interested in being nominated to the party nomination list, the appellant states that she applied in the manner prescribed by the invitation published. Subsequently after, the 3rd respondent submitted to the 2nd respondent, its party nomination list together with the declaration that the names so submitted were in compliance with *the Constitution* of Kenya and the applicable laws.
5. On 27th July 2022, the 3rd respondent published the names as submitted and the list was revised on the 3rd respondent's orders and directions to make the same compliant with the applicable legal provisions. The revised list was thereafter published afresh by the 2nd respondent on 9th September 2022.
6. The appellant contends that she was nominated under the special category of ethnicity which is a valid category recognized and provided for by the law and therefore if the 1st respondent was aggrieved by that decision, she ought to have challenged the validity of the list with the UDA party and/or with IEBC as provided under Article 88(4) of *the Constitution* as read together with Section 74 of the *Elections Act* 2011.
7. The appellant argues that the court erred by finding that it had the requisite jurisdiction to hear and determine the petition on the basis that she and other nominees of the UDA party had already been gazetted and thus duly elected and therefore they could only be impeached by way of an election petition. The appellant further argues that the 1st respondent was aggrieved by the 3rd respondent in its compilation of the party list for the gender top up and marginalized special seats. She further contends that the 1st respondent questioned her competency to be included in the party list as she was not a registered voter within Nyeri County and thereby sought her removal from the said list by instituting the petition in court. The appellant states that those concerns involve the issue of nomination and composition of a party list which fall in the class of pre-election disputes and therefore they ought to be resolved by the internal dispute resolution mechanism of the party, as stipulated in the cases of *Silverse Lisamula Anami vs IEBC & 2 others* [2018] eKLR and *Republic vs Independent Electoral and Boundaries Commission ex parte Charles Olari Chebet* [2013] eKLR and if not disposed of in that forum, then it ought to have been raised under Article 88(4) of *the Constitution* as read with Section 74 of the *Elections Act*, before the IEBC as stipulated in the case of *National Gender and Equality Commission vs Independent and Electoral Boundaries Commission & Another* [2013] eKLR.
8. The appellant further submits that the trial magistrate misconstrued the interpretation of Article 177 (a) (b) & (c) of *the Constitution* as read together with Article 90 of *the Constitution* and misdirected



himself on the issue of the categories for eligibility for nomination of any person as a member of the County Assembly of Nyeri or any other assembly. According to the appellant, the court misconstrued the meaning of the word ‘marginalized’ and failed to appreciate that it is a general name for all such groups as are disadvantaged within a certain demographic. The appellant further argues that the sub categories as provided by *the constitution* are not exhaustive and many sub categories apply depending on the context including women, youth, persons with disabilities, minority tribes. The appellant further submits that the court interpreted Article 177 of *the Constitution* to the effect that the marginalized groups is a closed group containing only two named categories being persons with disabilities and youth and thus condemned her application on the basis that the said sub category had not been specifically mentioned in *the Constitution*.

9. The appellant further submits that the learned magistrate erred in construing Article 90(2)(c) of *the Constitution* to the effect that county assembly party lists should not give any regard to the regional and ethnic diversity of the people of Kenya. The correct interpretation is that for seats including the national assembly and senate party lists, it is a mandatory requirement of law that the said party list must reflect regional and ethnic diversity of the people of Kenya. The appellant argues that although county assemblies are exempt from this list, the provision does not forbid a party list for county assembly seats from reflecting the regional or ethnic diversity of the people of Kenya or within the particular county in issue. Moreover, the appellant argues that there is no provision of law that expressly provides that a person cannot be nominated on the basis of a marginalized group on the basis of ethnicity.
10. The appellant relies on the case of Raila Odinga & Another vs The Independent Electoral and Boundaries Commission & Others [2017] eKLR and submits that the only reason isolated by the court for impugning the appellant’s nomination and election, being the interpretation of the above two provisions of law, does not satisfy the standard of proof required by law to upset an election. The appellant further submits that the magistrate’s error of interpretation is further exemplified by the fact that she was nominated as a member of the county assembly of Nyeri as published in the Gazette Notice of 9th September 2023 representing a marginalized group in the marginalized list which is expressly provided for in Article 177(c) of *the Constitution* of Kenya. The appellant further submits that ethnicity was not the applicable criteria but rather the nature of special interest represented under the marginalized groups category.
11. The appellant submits that there is no legal requirement that for one to be elected as a member of a county assembly whether by election or through nomination, one must have been registered as a voter in that particular county. The election of a person through nomination is an edict of *the Constitution* pursuant to Article 177(1) & (2) of *the Constitution*. Further Article 193 (1)(a) of *the Constitution* requires one to be a registered voter to be elected as a member of county assembly and therefore the learned magistrate erred by holding that one needed to be a registered voter in the county that he/she seeks an elective post either by way of a direct vote or through nomination. Further, the appellant states that Article 193(1)(a) of *the Constitution* and Section 25(1) & (2) of the *Elections Act*, 2011 set out the qualifications of a person to hold office as a member of county assembly and contends that she met the requirements to hold office as member of county assembly for Nyeri. She states that she is the lawful nominee of the sponsoring political party being the United Democratic Alliance and urges the court to uphold her election by way of nomination as it is the discretion of the party to determine who its candidates and nominees are as stipulated in the case of Moses Mwigigi & 14 Others vs IEBC & 5 Others [2016] eKLR.



The 1st Respondent's Submissions

12. The 1st respondent submits that the appellant was elected by way of nomination through Kenya Gazette Notice No. 10712 Vol CXXIV No. 86 dated 9th September 2022 under the category of marginalised with nature of special interest stated as ethnicity which means that she was elected by way of nomination on the basis of her being of a group of people with a shared culture, language, history and tradition. The 1st respondent further submits that Article 90 (2)(c) of *the Constitution* is clear that in as much as political party lists should reflect the regional and ethnic diversity of the people of Kenya, the county assembly lists are an exception when it comes to reflecting regional and ethnic diversity. The 1st respondent further cites Article 177 (1)(c) of *the Constitution*, the *County Governments Act* No. 17 of 2012 and Article 197 of *the Constitution* of Kenya and submits that the said provisions do not make reference to ethnicity or ethnic diversity as a consideration when it comes to the nomination in the county assembly under Article 90(2)(c) of *the Constitution* as opposed to Articles 97 and 100 of *the Constitution* which explicitly provide for ethnicity in the houses of the national assembly and the senate. The 1st respondent further argues that exemption of ethnicity or ethnic diversity in the county assembly has been addressed in case law in the cases of Commission for Implementation of *the Constitution* vs Attorney General & 2 Others [2013] eKLR and Nyeri Election Petition Appeal No. 1 of 2018 Millicent Cherotich vs Omari Esha Wanjiku & 2 others [2018] eKLR where the courts held that Article 90(2)(c) of *the Constitution* exempt the counties from including the representation of ethnic minority and regional representation in the nomination of a representative of the special interest group into the county assembly.
13. The 1st respondent further submits that the 2nd respondent was cognizant of the import of Article 90(2)(c) of *the Constitution* as the chairperson of the 2nd respondent in the Special Issue Kenya Gazette Notice No. 6378 of 3rd June 2022 Vol CXXIV-No. 101, titled Notice on Requirements for submission of Party Lists, stated that each party list reflects the regional and ethnic diversity of the people of Kenya but the said contention was not applicable in the case of the party list for the county assembly list.
14. The 1st respondent relies on Regulation 54 of the Election General Regulations 2012 and the case of Gender and Equality Commission vs IEBC Petition No. 147 of 2013 and submits that there was a breach in law as the appellant never featured in the marginalized list publicized on 27th July 2022 yet she ended up as the one elected under the said category. Furthermore, the appellant appeared as number 25 in the gender top up list under Article 177(b) in the publicized list dated 27th July 2022 but ended up in the marginalized list under Article 177(c). Relying on the case of Lydia Nyaguthii vs Independent Electoral and Boundaries Commission [2015] eKLR, the 1st respondent submits that the nomination of the appellant was tainted with illegality as the party list was changed moving the appellant from number 25 in the gender top up list Article 177(b) to number 4 in the marginalized list Article 177(c) and urges the court to find that on top of the issue of ethnicity, the alteration of the final publicized list also vitiated in regard to the election/nomination of the appellant.
15. The 1st respondent further relies on Article 177 (b) & (c) of *the Constitution* and the case of Raila Omollo Odinga vs IEBC & 4 Others [2013] eKLR and submits that she discharged the burden of proof that her application her special interest indicated minority groups under Article 177 (c) and was listed as number 6 whereas the appellant herein applied under the gender top up under Article 177(1)(b) but was nominated under Article 177(1)(c) marginalized group. The 1st respondent further contends that the 2nd respondent steered clear on responding to them publishing the appellant under the category of gender top up nor did they unequivocally deny that by virtue of publishing the appellant in the Standard of 27th July 2022 under the gender top up she must have applied for that category to her respective party. Neither did they deny the publication that showed that the appellant was number 25



in the gender top up list. Further, the 3rd respondent denied the allegations which is akin to denying their own list and the appellant merely denied the claim and put the 1st respondent to strict proof. That notwithstanding, the 1st respondent argues that the election by way of nomination of the appellant was vitiated under Section 75 of the Elections Act and Rule 39 (10) of the Elections County and Parliamentary Regulations Rules 2017.

16. The 1st respondent relies on Section 35(5), 36(1)(f), (2) of the Election Act and submits that the court by invalidating the election by way of nomination of the appellant ought to have declared her elected by nomination as she was next in priority under the marginalized list. She further submits that she was the next alternate female on the list and thus pursuant to Section 37 (i) of the Elections Act she was the next female in priority and thus ought to be declared elected.
17. The 1st respondent submits that she was aggrieved when the 2nd respondent published in the Kenya Gazette No. 10712 Vol CXXIV-No. 186 dated 9th September 2022 the list of members nominated to the Nyeri County Assembly when she noted that the appellant had been listed in the marginalized list whereas the appellant had appeared in the list published on 27th July 2023 as number 25 in the gender top up list. Relying on the case of Moses Mwicigi & 14 Others vs IEBC & 5 Others [2016] eKLR the 1st respondent contends that her only cause of action was to file an election petition in court since the marginalized list had already been gazetted which was the nomination/election stage. As such, the 1st respondent submits that the trial court had jurisdiction to hear the petition as it was the right form.

The 2nd Respondent's Submissions

18. The 2nd respondent submits that pursuant to Article 90 (2) of the Constitution and Rule 55(1) of the Elections (General) Regulations, it is mandated to review the submitted county assembly political parties' list to ensure that the list is in accordance with the constitution and statutory provisions. The 2nd respondent further relies on the cases of Civil Appeal No. 12 of 2018 Aden Noor Ali vs Independent Electoral and Boundaries Commission & 2 Others and Moses Mwicigi & 14 Others vs Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR and submits that it only ensures that party lists as tendered, complies with the relevant laws and regulations.
19. The 2nd respondent further relies on Section 34 (10) of the Elections Act and the case of Perpetua Mponjiwa vs Independent Electoral & Boundaries Commission & 3 Others (2018) eKLR and submits that the party list submitted shall not be amended during the term of parliament or the county assembly. Thus the 2nd respondent states that it adhered to and complied with the laid out nomination procedures as stipulated by the law.
20. The 2nd respondent submits that nominative slots offer a window of opportunity for special interests such as persons with disability, youth, ethnic minority and marginalized groups to have their voices heard in the mainstream political process within the country. The rationale for protecting special interests within the country was explained in Rose Wairimu Kamau vs IEBC [2013] eKLR. The 2nd respondent further argues that the geographic positioning of the counties could majorly comprise of a particular ethnic community influenced by the Kenyan history in migration of communities.
21. The 2nd respondent submits that Section 36(1)(f) of the Election Act provides that a party list submitted by a political party under Article 177 (1)(c) of the Constitution shall contain eight candidates at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group. Section 36(3) of the Election Act provides that the party list referred to under sub section (1)(f) shall prioritize a person with disability, the youth and any other candidate representing a marginalized group. Article 177 (1)(c) of the Constitution provides that the county assembly provides that the number of members of marginalized groups, including persons



with disabilities and the youth prescribed by an Act of parliament. Article 260 of *the Constitution* of Kenya provides for the definition of marginalised group as a group of people who because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4) of *the Constitution* of Kenya.

22. The 2nd respondent further submits that one cannot consider Article 90 of *the constitution* alone and conclude that the nomination of the appellant as a member of the county assembly of Nyeri was null and void. The 2nd respondent contends that one needs to consider Articles 100, 177(1)(b) and (c) and 260 of *the Constitution* which all provide for protection of vulnerable groups in the society and the representation of their political interests in the political spheres of government. The 2nd respondent further urges the court to consider Article 159 (2)(e) and 259 of *the Constitution* and the case of Njoya and Others vs Attorney General [2017] eKLR and interpret *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 and in a manner that contributes to good governance. The 2nd respondent further argues that the trial court ought to have put into consideration the interpretation of Article 260 and 27(4) of *the Constitution* before making its decision. The 2nd respondent further relies on the cases of Tinyefunza vs Attorney General, Constitutional Petition 1 of 2006 and Centre for Rights Education and Awareness and Another vs John Harun Mwau & 6 Others, Civil Appeal No. 74 of 2012 and submits that Article 90 of *the Constitution* ought to have been interpreted broadly.

The 3rd Respondent's Submissions

23. The 3rd respondent relies on Article 90(1) and 177(1)(b) & (c) of *the Constitution*, Section 2 of the *Elections Act* and the cases of Lydia Mathia vs Naisula Lesuuda & Another [2013] eKLR and National Gender and Equality Commission vs IEBC & Another [2013] eKLR and submits that the responsibility of preparing the party list and the decision on the nominees to be in the list rests with the political party. The 3rd respondent states that in accordance with the mandates of the law, it undertook its responsibility of choosing their preferred candidates and ranked them in order of priority pursuant to Section 34(5) of the Election Act for purposes of nominating the said party members to the special categories being the marginalized category and the gender top up category. The said list was forwarded to the 2nd respondent and upon it compliant with the law, the list was published in the special issue of the Kenya Gazette No. 10712 Vol. CXXIV-No. 186. Therefore, the 3rd respondent contends that learned magistrate erred in law by nullifying the nomination of the appellant and ordering for a repeat election for her position by way of fresh nomination.
24. The 3rd respondent relies on Article 177 (1)(c) of *the Constitution* and submits that the learned magistrate erred in finding that the appellant had been elected under the ethnic diversity category whereas she had been nominated under the marginalized category, which is a categorization of the law provided in Article 260 and 27(4) of *the Constitution* of Kenya and stipulated in case of Millicent Cherotich vs Omari Esha Wanjiku & 2 Others [2018] eKLR.
25. The 3rd respondent relies on the case of Micah Kigen & 2 Others vs Attorney General and 2 Others Nairobi Petition No. 268 & 398 of 2012 [2012] eKLR and submits that in considering the definition of special interests in the context of Articles 97(1), (b) & (c), 98(1)(b)(c) & (d), 177 (1)(c) and 90 of *the Constitution*, the court observed that special interests ought to have a broad and expended meaning to cover interests identified by political parties and not restricted to the categories of interests or groups identified by *the constitution*. As such, the 3rd respondent argues that the court took a narrow approach of the meaning and import of the construction of Article 177(1)(c) of *the Constitution* in finding that there is no provision for nomination under the category of ethnic diversity within county assemblies.



26. The 3rd respondent relies on Section 84 of the *Elections Act* and submits that costs follow the cause and urge the court to award costs to it.

Issues for determination

27. The main issues for determination in this appeal are as follows:-
- a. Whether the trial court was clothed with jurisdiction to determine the petition;
 - b. Whether the 1st respondent discharged the burden of proof in respect of the allegations in the petition;
 - c. Who should bear the costs.

The Law

28. As the first appellate court, this court derives its jurisdiction from Section 75(4) of the Election Act which provides:-

An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be:-

- a. Filed within thirty days of the decision of the magistrate's court; and
- b. Heard and determined within six months from the date of filing the appeal.

The High Court to which an appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.

29. Thus the court's role is to revisit the entire record but to limit itself to only settling matters of law. What constitutes matters of law in election matters was settled by the Supreme Court in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 7 Others Su. Ct. Petition No. 2B of 2014 (2014) eKLR* as follows:-

Now with specific reference to Section 85A of the *Elections Act*, it emerges that the phrase "matters of law only" means a question or an issue involving:-

- a. The interpretation, or construction of a provision of *the Constitution*, an Act of parliament, subsidiary legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of the County Governor;
- b. The application of a provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine, to a set of facts or evidence on record by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of the County Governor;
- c. The conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence" or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse" or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of evidence.

30. Thus in light of the above, the court must therefore be so vigilant and strictly keep within the above confines.



Whether the trial court was clothed with jurisdiction to determine the petition

31. It is the appellant's case that the trial court did not have jurisdiction to determine the dispute as it emanates from issues of nomination and composition of the party list which falls in the category of pre-election disputes. The appellant contends that such issues ought to be resolved by the internal dispute resolution mechanism of the party or raised under Section 88(4) of *the Constitution* as read with Section 74 of the *Elections Act* before the IEBC which vests IEBC with power to settle electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of results.

32. It is trite law that jurisdiction is only obtained through *the constitution* or legislation as stipulated in the case of Samuel Kamau Macharia vs KCB & 2 Others Civil Application No. 2 of 2011, where the court stated:-

“A court's jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

33. Section 75(1A) of the *Elections Act* provides that:-

A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

34. It is imperative to look at the law that conferred to the magistrate's court jurisdiction to determine disputes relating to nomination of members of county assembly. The foundation is laid under Article 177(2)(b) and (c) of *the Constitution* and expounded under Section 74 of the *Elections Act*. Section 74(1) of the *Elections Act* provides:-

Pursuant to Article 88 (4) (e) of *the Constitution*, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration elections results.

35. The Supreme Court in the case of Moses Mwicigi & 14 Others vs IEBC & 5 Others [2016] eKLR provided as follows:-

At what point in time does the court become clothed with jurisdiction to determine disputes relating to the nomination of members of a county assembly by virtue of Article 177(2)(b) and (c) of *the Constitution*? Is it after issuance of Gazette Notice by the IEBC or the close of elections when the nomination process begins?

It is plain to us that *the Constitution* and Electoral laws envisage the entire process of nomination for the special seat including the act of gazettelement of the nominees' names by the IEBC, as an integral part of the election process.

The Gazette Notice in this case signifies the completion of the election through nomination and finalizes the process of constituting the Assembly in question.

It is therefore clear that publication of the Gazette Notice marks the end of the mandate of the IEBC, regarding the nomination of party representatives and shifts any consequential dispute to the election courts.

The *Elections Act* confers jurisdiction upon magistrates' courts to determine the validity of the election of a Member of a County Assembly.....



36. It is therefore a requirement of the law that once a person has been nominated to a County Assembly and has been gazetted, the nominee is considered to have already been elected and his nomination may only be nullified by the election court as appointed by the Chief Justice, in this case, the magistrates' courts. Upon careful scrutiny of Section 74(1), the IEBC is clothed with power to determine electoral disputes arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. In this appeal, the appellant was elected through nomination by the publishing of the Kenya Gazette Notice No. 10712 Vol. CXXIV – No.186 of 9th September 2022.
37. The Court of Appeal has equally pronounced itself in the case of *Rose Wairimu and 3 Others vs Independent Electoral and Boundaries Commission C.A. No. 169 of 2013* cited in *Rahma Issak vs IEBC & 2 Others [2017] eKLR* as follows:-
- In reaching the conclusion, we are alive to the fact that once nominees to parliament and county assemblies under Article 97(c) and 177(2) respectively have been gazetted....they are deemed elected Members of Parliament and County Assemblies and any challenge to their membership has to be by way of election petitions under Article 105 of *the Constitution* or part VIII of the Election Act as the case may be.
38. Consequently, I am of the considered view that the magistrate's court that heard and determined the petition herein was clothed with the requisite jurisdiction to determine the said petition.

Whether the 1st respondent discharged the burden of proof in respect of the allegations in the petition

39. The 1st respondent's case is that the appellant was not a registered voter within Nyeri County and thus not eligible for nomination to the Nyeri County Assembly. Further the 1st respondent further complained that although the appellant applied for nomination under the Gender top up category, she was nominated under the Marginalized list which is illegal, null and void. Furthermore, the 1st respondent contends that appellant was nominated under the category of Ethnicity which is non-existent in law.
40. The appellant contends that she was not nominated on the basis of ethnicity but under the category of Marginalized groups under the sub category of ethnicity. It is further argued that ethnicity was not the applicable criteria but rather the nature of special interest represented under the Marginalized groups category.
41. It is trite law that the burden of proof in an election petition is on the intermediate standard of proof as stipulated in the case of *Lydia Mathia vs Naisula Lesuda & IEBC [2013] eKLR* where the court held:
- The petitioner is required by law to adduce sufficient facts to support her claims; secondly when that is done the court will have to consider whether it is satisfied that the petitioner adduced sufficient evidence to support the facts and the court must also bear in mind that the election laws can be infringed through incompetence, malpractice or fraud attributable to the responsible electoral body. However it rests on the person who alleges to produce the necessary evidence.
42. In the case of *Raila Odinga & 5 Others vs IEBC & 4 Others [2013] eKLR* the Supreme court held that:-
- The threshold of proof should in principle have been above the balance of probability though not as high as beyond reasonable doubt save that it would not have affected the normal standards where criminal charges limited to an election were in question.
43. The subject of nomination of members to the county assembly and party lists is provided for in Article 177 of *the Constitution* which provides:-



1. A county assembly consists of-
 - a. Members elected by 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 every fifth year;
 - b. The member 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 marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
 - d. The Speaker, who is an ex officio member.
 2. The members contemplated in clause (1) (b) and (c) shall in each case be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.
44. Article 90 of *the Constitution* deals with allocation of party lists seat and provides for party lists in the following manner:-
1. Elections for seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and for the members of county assemblies under 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 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 list reflects the regional and ethnic diversity of the people in Kenya.
 3. The seats mentioned 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.
45. The appellant herein was elected by way of nomination through Kenya Gazette Notice No. 10712 Vol CXXIV-No.86 dated 9th September 2022 under the category of Marginalized with the nature of special interest as ethnicity. According to the appellant the trial court misconstrued the word marginalized as a basis for nomination and failed to appreciate that it is a general name for all such groups as are disadvantaged within a certain demographic and that the sub categories as provided in *the constitution* are not exhaustive. Thus the issue is whether ethnicity is a special interest group for consideration for the nomination of members to the county assembly as envisaged by Article 177 of *the Constitution*.
46. *The Constitution* has defined marginalized groups in Article 260 to mean:-
A group of people who, because of laws or practices before, on, or after the effective date, were/or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).



47. Article 27(4) of *the Constitution* provides that the state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

48. The term marginalized groups was further defined in the case of *Millicent Cherotich vs Omari Esha Wanjiku & 2 Others* [2018] eKLR where the court defined the term as provided for under Article 177 (1)(c) of *the Constitution* under two heads:-

“marginalized community means-

- a. a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- b. a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- c. an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter and gatherer economy; or
- d. pastoral persons and communities whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;

“marginalized group” means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).

49. Further, the court in *Micah Kigen & 2 Others vs Attorney General & 2 Others* [2012] eKLR considered the definition of special interests in the context of the provisions of Articles 97(1)(b) & (c), 98(1) (b) (c) and (d), 177 (1) (c) and 90 and observed as follows:-

Taking all these provisions into account means that “special interests including” must have a broad and expended meaning to cover interests identified by the political parties and not restricted to the categories of interest or groups identified by *the Constitution*....It would be inconsistent with *the Constitution* to limit the right of any special interests identified by political parties to be represented in the National Assembly.

50. The appellant, 2nd & 3rd respondents contend that the court below took a narrow approach of the meaning and import of Article 177 (1) (c) of *the Constitution* in finding that there is no provision for nomination under the category of ethnic diversity within county assemblies. In light of the above definitions of marginalized groups, it is evident that these are groups of people who have been disadvantaged by discrimination based on laws or practices on grounds such as race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Thus the republic has come up with laws to protect such communities and offer them representation on platforms such as the county assembly, the national assembly and the senate. However, *the Constitution* takes into cognizance that the representation of such groups is different in the National Assembly and Senate in comparison to the county assemblies. Representation in the National Assembly and the Senate, representation of ethnic and other minorities is a factor to



be considered because such these houses represent all the communities within the Republic of Kenya. Article 97 of *the Constitution* provides:-

1. The National Assembly consists of-
 - a. Two hundred and ninety members, each elected by the registered voters of single member constituencies;
 - b. Forty seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;
 - c. Twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90 to represent special interests including the youth, persons with disabilities and workers; and
 - d. The Speaker, who is an ex officio member.

51. This proviso is different however for representation in counties because of the nature of the county assemblies which could be from one or two ethnic majorities or from one or two regions depending on where the county is located. For this reason, Article 90(2)(c) of *the Constitution* expressly exempts county assemblies from the considerations of ethnic and regional representation as a legal requirement. This position was also stipulated by the 2nd respondent pursuant to Section 34 (6B) of the *Elections Act* by issuing regulations prescribing guidelines to be complied with in preparation of party lists which is issued in the Kenya Gazette Vol. CXXIV-No. 101 dated 3rd June 2022, titled General Requirements for party Lists item (k) which reads each party list reflects the regional and ethnic diversity of the people of Kenya. It follows that this criterion is not mandatory in the case of party lists for county assembly seats but it is not prohibited. The *County Governments Act* No. 17 of 2012 supports the contention that community and cultural diversity ought to be reflected in the county assemblies. Section 7(2) of the Act provides:-

The political party nominating persons under sub section (1) shall ensure that

- a. Community and cultural diversity of the county is reflected in the county assembly; and
- b. There is adequate representation to protect minorities within the county in accordance with Article 197 of *the Constitution*.

52. Article 197 of *the Constitution* requires that the county assembly to ensure gender balance and diversity in the following terms:-

1. Not more than two thirds of the members of any county assembly or county executive committee shall be of the same gender.
2. Parliament shall enact legislation to-
 - a. Ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and
 - b. Prescribe mechanisms to protect minorities within counties.

53. Furthermore, case law has expounded the interpretation of Section 90(2)(c) of *the Constitution* as exempting county assemblies from considering ethnic and regional representation in their nomination lists. The Court of Appeal in *Commission for Implementation of the Constitution vs Attorney General & 2 Others* [2013] eKLR the court stated as follows:-



Article 90 of *the Constitution* decrees that the party lists must comply with two discernable principles namely:-

The requirement for gender equity in that the qualified candidates must be listed in order of priority but that order must alternate between men and women.

The requirement for lists to reflect the regional and ethnic diversity of the people of Kenya. This is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties. The exception to this, naturally is the county assembly which from the nature of things may be from an ethnic majority or from the one region in which the county is located. We would venture that on a proper reading of Article 90 (2) (c) , the requirement for regional and ethnic diversity should apply so as to reflect the face or diversity not of the people of Kenya necessarily, but definitely of the county in question.

54. Further in *Millicent Cherotich vs Omari Esha Wanjiku & 2 Others* [2018] eKLR where the court was tasked with considering the question of whether ethnic minority is a special interest group for consideration for the nomination of members to the County Assembly as envisaged by Article 177 of *the Constitution* similar to the current case held as follows:-

I would be hesitant to take it that these two cases cited to me have interpreted Article 90(2)(c) to set a fast and hard rule stating anything else other than its plain language. They appear to me to be invitations to consider further whether we can read into Article 177(c) the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament ethnic minorities and regional representation. There cannot be a hard and fast rule because as observed by the Court of Appeal counties are also diverse in nature. It would be difficult to have a similar provision on ethnic and regional representation as that for parliament obviously because from the nature of county assemblies they could be from an ethnic majority or from one region in which the county is located.

Hence the proposal that the county assembly should definitely reflect the face and diversity of the county.

It also appears to me that the court of Appeal did not hold or determine that county assemblies would be henceforth required to comply with regional, ethnic and cultural diversity. The Court of Appeal noted that the exception to comply was natural for historical and geo-political reasons. The Court went on to venture that regional and ethnic diversity should apply to reflect the face and diversity of the county in question. And as if to confirm that the matter is not settled, the Court pointed out stated that *the Constitution*, Electoral law and case law appeared to suggest a position contrary to the plain reading of Article 90(2)(c).

From the foregoing analysis and case law, it would be correct to say that the plain reading of Article 90(2)(c) as exempting the counties from including the representation of the ethnic minority and regional representation in the nomination of a representative of the special interest group into the county assembly is the norm except where it can be justified.

55. In my considered view, the legal position is that Article 90 (2) (c) of *the Constitution* expressly exempt county assemblies from the consideration of ethnic and regional representation. However, there is no legal provision prohibiting such consideration and the discretion is left to the counties to consider their circumstances and decide on whether such consideration for ethnic and regional representation may be required. I conclude by finding that it was a misdirection for the magistrate to find that such a category of marginalized and ethnic categories did not exist. The 3rd respondent was in order to nominate and the 2nd respondent in order to approve the category that the appellant was elected through nomination.



56. The 1st respondent further contends that the appellant's nomination was unlawful and illegal as she is not a registered voter in Nyeri County but she is a registered voter in Muranga County. Section 34(8) of the *Elections Act* provides that for a person to qualify for nomination by a political party he or she must be a member of the political party as at the date of such nomination and that the person has to be a registered voter. Article 193 of *the Constitution* deals with qualifications for election for members of a county assembly. The Article provides:-
1. unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person-
 - a. Is a registered voter;
 - b. Satisfies any educational moral and ethical requirements prescribed by this Constitution or an Act of parliament; and
 - c. Is either;
 - i. Nominated by a political party or
 - ii. An independent candidate supported by at least five hundred registered voters in the ward concerned.
57. Article 193 is clear that there is no requirement that the nominee be a registered voter in the place of nomination. Contrary to the 1st respondent's contention, the eligibility of the appellant to be nominated under the Nyeri County Assembly was well within the purview of the law based on the fact that she was a registered voter under Article 193(1) (a) of *the Constitution*.
58. The 1st respondent has further argued that the appellant made an application under the Gender Top up list pursuant to Article 177 (1) (b) whereas she was nominated under the Marginalized category under Article 177 (1) (c) of *the Constitution*. I have perused the court record and noted that the 3rd respondent, in compliance with the 2nd respondent's directive, submitted its party list to IEBC on 4th July 2022 as per the provision of Section 34(4) of the *Elections Act*. The said list was rejected for being non-compliant and the 2nd respondent directed that another list be resubmitted. The 3rd respondent thus corrected the anomalies in the rejected list and forwarded another list to the 2nd respondent. The 3rd respondent on 1st August 2022, wrote a letter to the 2nd respondent asking the 2nd respondent to allow them amend its list because it received several complaints and requested leave to resolve the issues and amend the list. The 2nd respondent permitted the 3rd respondent to amend its list on or before 6th August 2022 in line with Section 13(2A) of the *Elections Act*, 2011 and Section 40(2) of the *Political Parties Act* which gives political parties priority to hear and determine internal disputes. The 2nd respondent said it listed the names of the persons to be gazetted under the Marginalized category on priority basis and the appellant being among the first four nominees in the marginalized category was duly gazetted on 9th September 2022 vide a special issue of the Kenya Gazette No. 10712 Vol CXXIV-No. 186.
59. The 1st respondent took issue with the list published on the party lists where the name of the appellant appeared on the Gender top up list and then on the Marginalized category list. In my view the 3rd respondent is empowered to make and submit the party nomination list and also to review such list on its request or as directed by the 2nd respondent. In my view, the action of the 3rd respondent in the way it drew its list is an internal matter which is within its powers. Furthermore, the preparation and submission of the list as well as the review thereon are matters at the discretion of the 3rd respondent in choosing its preferred candidates.



60. This is an appellate in regard to County Assembly election through nomination and court is restricted to addressing issues of law as opposed to matters of fact. I have already said that the matters regarding preparation of party lists by the 3rd respondent were within its powers but strictly under the approval of the 2nd respondent. It was held by the Supreme Court in the case of Moses Mwigigi & 14 Others vs IEBC & 5 Others [2016] eKLR where the court stated:-

The effect is that, the process of preparation of the party list is an internal affair of the political party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution and the nomination rules as prescribed under Regulation 55.

A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the ‘elections’ for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list and to require the rectification by submitting a fresh party list or by amending the list already submitted.

61. Similarly a three judge bench of the High Court in the case of National Gender and Equality Commission vs IEBC & 3 Others [2013] eKLR observed as follows:-

Section 34 (6) of the Election Act, 2011 specifically provides that “The party lists submitted to the Commission under this section shall be in accordance with *the Constitution* or nomination rules of the political party concerned.” This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet the constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party member, inter alia, to the political parties disputes tribunal established under Section 39, Part VI of the *Political Parties Act*, 2011 or to the High Court in appropriate circumstances.

62. The 2nd respondent explained its role which is provided by the law which include ensuring that the party lists submitted to them were both in accordance with the provisions of *the Constitution*, statutes and the relevant regulations. The 2nd respondent must ensure that the nominee is eligible for election and that the party concerned has complied with its rules in preparing the list of nominees. In this appeal, I do find that the 2nd respondent complied with *the Constitution* and the relevant statutes in performing their role of approving the lists for gazettelement.

Conclusion.

63. Consequently I find that the appellant has demonstrated that she was duly nominated as a member of the County Assembly of Nyeri in accordance with *the Constitution* and the relevant laws. On the other hand, it is my considered view that the trial court misinterpreted the law, specifically Article 90 (2) of *the Constitution* in finding that the election through nomination as published in Gazette Notice No. 10712 Vol. CXXIV-No. 186 of 9th September 2022, was illegal, null and void.

64. It is also my considered view that the 1st respondent did not discharge the burden of proof in the petition as to deserve the orders granted in the judgement.

65. I find that the appeal is merited and is hereby allowed. The orders made in the judgement of the court below on 23rd February 2023 are hereby set aside. The election through nomination as gazetted on 9th September 2022 of the appellant is hereby upheld.



Costs

66. The issue of who is to bear the costs of this appeal must now be determined. Section 84 of the [Elections Act](#) as read with Rule 30 of the Election (Parliamentary & County Elections) Petition Rules, 2017 provide that “An election court shall award costs of and incidental to the petition and costs shall follow the cause”.
67. The 1st respondent in this appeal shall bear the costs of this appeal.
68. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 20TH DAY OF SEPTEMBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 20th day of September , 2023

