



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

ELECTION PETITION APPEAL NO. 01 OF 2018

ANTHONY NJOMO MAINA.....APPELLANT

VERSUS

JANE NJERI KAMANDE.....1ST RESPONDENT

PARTY OF DEMOCRATIC UNITY.....2ND RESPONDENT

ABDALLA MWAURA CHIKOPHE.....3RD RESPONDENT

THE INDEPENDENT ELECTORAL

BOUNDARIES COMMISSION.....4TH RESPONDENT

(Being an Appeal from the judgment of Hon. Njeri Thuku

(PM)at Lamu Law Courts on 18/12/2017)

JUDGEMENT

1. This judgment is in respect of Garsen Election petition Appeal No. 1 of 2017 filed **PARTY OF DEMOCRATIC UNITY**(hereafter referred as PDU) and Garsen Election Petition Appeal No. 1 of 2018 filed by **ANTHONY NJOMO MAINA**(hereafter referred as to the Appellant). The two Appeals were consolidated.

2. The Appellants filed their appeals against the whole judgment delivered on 18/12/2018 at Lamu Resident Magistrates court in which the Magistrate ordered as follows;

(a) A declaration is hereby issued I.E.B.C's INCLUSION OF Anthony Njomo Maina in P.D.U party as candidate and his participation in the general election on August 8, 2017 was a substantial breach of Election Law, Election Act and the Constitution on account of illegal party hopping and hence invalid null and void ab initio

(b) A declaration is hereby issued that the said Anthony Njomo Maina election as winner of the Member of County Assembly in the general election August 2017 is invalid, null and void ab initio on account of being incompetent and unqualified to be elected as such on P.D.U ticket.

(c) A declaration is hereby issued that Anthony Njomo Maina committed an offence under Election Act and ought to be disqualified from participating in an election.

(d) A declaration is hereby issued that Mr. Joseph Githukui Kamau – MCCP who garnered the highest votes was validly elected as Bahari Ward member of the County Assembly of Lamu.

(e) Regarding costs, costs are awarded of Kshs 500,000/- to be paid to the petitioner as follows the 1st and 2nd Respondent are to jointly pay costs capped at Kshs 250,000/- and the 3rd and 4th Respondents are to jointly pay costs capped at Kshs 250,000/-

(f) A certificate of this determination in accordance with section 86 of the Election Act shall issue to the Independent

Electoral and Boundaries Commission and Speaker of the Lamu County Assembly.

3. The Appellant in Garsen election petition Appeal No. 1 of 2017 was seeking the following orders;

(a) THAT the whole judgment delivered on 18/12/2017 be set aside.

(b) THAT this court do declare ANTHONY NJOMO MAINA as duly elected in the election held on 8th August 2017 for the member of County Assembly Bahari ward in Lamu County and a certificate do issue in accordance to section 86 of the election Act.

(c) THAT this court be pleased to grant any other order that it deems fit.

(d) THAT the costs of the Appeal and the petition be awarded to the Appellant.

4. The Appellant in Garsen Election petition Appeal No. 1 of 2018 was also seeking the following prayers;

(a) THAT the whole judgment that was delivered by the learned magistrate on 18th December 2017 in JANE NJERI KAMANDE V ANTHONY NJOMO AND THREE OTHERS IN ELECTION PETITION APPEAL NO 1 OF 2017 be set aside.

(b) That this court be pleased to declare ANTHONY NJOMO MAINA as duly elected member of county assembly Bahari ward in Lamu County on 8th August 2017 and do issue a certificate in accordance with section 86 of the Election Act.

(c) THAT the court do grant any other orders that it may deem fit.

(d) THAT costs of this Appeal and petition be awarded to the Appellant.

5. The consolidated grounds of Appeal in both the Appeals which are as follows;

(a) THAT the learned judge magistrate erred in law by making a finding that the magistrate's court has jurisdiction to hear a nomination dispute despite the express provision of Article 88(4) of the constitution.

(b) THAT the learned magistrate erred in law by holding that the petitioner had discharged her burden of proof successfully.

(c) THAT the learned Magistrate erred in law by finding that Anthony Njomo Maina infringed section 28 of the Election Act whereas no evidence was adduced to prove the same and a clear resignation in line with section 14 of the political parties Act existed.

(d) THAT the learned magistrate erred in law by failing to ascertain from the evidence how Anthony Njomo Maina compromised the IEBC system with regard to his candidature, taking into account the management system.

(e) THAT the learned magistrate erred in law by declaring that Joseph Githuki Kamau garnered the highest votes and was validly elected despite the fact that there was no scrutiny, recount or re-tally of the votes to declare him as such.

(f) THAT the learned magistrate erred in law by lowering the standard of proof of this particular election petition.

(g) THAT the learned magistrate erred in law by shifting the burden of proof from the petitioner and a number of the respondents notwithstanding the fact that the petitioner never discharged their burden.

(h) THAT the learned magistrate erred in law by making a finding that the petitioner and a number of witnesses were members of Jubilee party, despite the fact that membership was never proved as is demanded by law.

(i) THAT the learned magistrate erred in fact by finding that Anthony Jomo Maina participated in the Jubilee party primaries in complete defiance to the Jubilee constitution and nomination rules.

(j) THAT the learned magistrate erred in fact that Anthony Njomo Maina participated in the Jubilee in the Jubilee party primaries without evidence being adduced on the same.

(k) THAT the learned magistrate erred in law and fact by failing to appreciate and consider the provision of the Jubilee constitution and nomination rules.

(l) That the learned magistrate erred in law and fact by making conclusion that were not supported by evidence.

(m) THAT the learned magistrate erred in law by failing to ascertain from the evidence that Anthony Njomo Maina never joined the Jubilee party after express resignation

(n) THAT the learned magistrate erred in law and fact by failing to consider the evidence that was adduced by the returning officer.

6. The parties filed written submissions which they highlighted in court.

HISTORY OF THE PETITION

7. The petitioner Jane Njeri Kamande filed Lamu petition No. 1 of 2017 against ANTHONY NJOMO MAINA who was declared winner of the Member of County Assembly seat for Bahari ward in Mpeketoni Sub-county within Lamu county.

8. The petitioner is a registered voter of Lake Kenyatta primary school and a member of Jubilee party.

9. The petitioner filed the petition seeking the orders stated above for reasons that the Appellant breached section 28 of the Election Act in that he hopped to PDU within a period less than 120 days.

10. In the disputed election the Appellant garnered 2,122 votes while Joseph Githuku Kamau of Maendelea Chap Chap party (MCCP) got 1,945 votes.

11. The court allowed the petition and issued a declaration that JOSEPH GITHUKU KAMAU of MCCP was validly elected as member of County Assembly of Bahari ward in Lamu County.

12. The Appellant and his party(PDU) have now filed these Appeals which were consolidated for purpose of expeditious disposal.

13. The Appellant filed an application seeking stay of execution of the judgment delivered on 18th December 2017. The orders were granted for reasons which were to be given at a later stage which reasons I give as follows;

(i) It is in the interest of justice to grant stay as the appeal will be rendered nugatory and the Appellant greatly prejudiced if the same is not granted.

(ii) In view of the time limit within which the Appeal has to be determined the petitioner will not be prejudiced by the granting of the orders of stay of execution.

(iii) I also find that there is no automatic stay of execution pending appeal against an election petition concerning the seat of MCA.

(iv) In the High Court appeal **Baridi Felix Mbevo v Musee Mati & 2 others [2018] eKLR** the court held that in such circumstances "the Court would be obligated to look at the circumstances of the case and use its discretion to do what is just."

(v) The said court also grounded its finding on the fact that an Election Petition is a matter of public interest and in the principles established in the *Gitarau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others*, Supreme Court Civil Application No. 5 of 2014 where the Court held that 'the Court could consider staying proceedings if the intended Appeal is arguable, would be successful and be rendered nugatory and if it is in the public interest.' And in the case of *Samvir Trustee LTD vs. Guardian Bank LTD HCC.C No. 795 of 1995*, Warsame, J(As he then was) stated that;

"... The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner."

SUBMISSIONS

14. The PDU submitted through their advocate in court as follows;

(i) That the Appellant resigned from jubilee party and joined PDU party on 7/4/2017 and this was more than 120 days to the general election

(ii) That the petitioner did not prove her case to the required standard since what she told the court was what she heard from Boda Boda operators and she did not produce proper documents.

(iii) That the court did not consider the evidence of one Abdalla Mwaura Chikophe when it was making its determination. That the said witness said that if the Appellant had submitted his name even one day less than the required period he would not have been allowed to participate in the general elections.

(iv) The Appellant also submitted that the Magistrate's court did not have the jurisdiction to hear this case as the same was not an election petition but a party nomination issue. He said Article 88 (4) of the constitution is very clear that only IEBC has the jurisdiction to entertain such issues and if one is dissatisfied, he can only appeal to the high court.

(v) It was further submitted that IEBC had dismissed a complaint made by one Michael Kanja against the Appellant and that the Magistrate's court went ahead and sat on appeal and reviewed the IEBC order.

(vi) The Appellant also submitted that the petitioner did not discharge the burden of prove as no cogent evidence was adduced to warrant an election to be nullified. It was submitted that the evidence adduced by the petitioner was hearsay as she said she learnt about nominations from boda boda operators and further that the makers of the documents produced were not called.

(vii) That the election court arrived at a wrong decision by declaring the second run up as the winner.

(viii) On the issue of costs, the Appellant submitted that the costs follow the event and it is not a matter of discretion.

15. The Appellant also submitted as follows in court through his advocate;

(i) That this case was a nomination dispute and not an election petition as the validity of the election was not disputed.

(ii) That the election court had no mandate to declare a stranger as a winner of the elections and further that the person declared did not garner the highest votes.

(iii) That there was no application for scrutiny or recount and that the court did not move suo moto to order scrutiny and recount and it had no basis for declaring JOSEPH GATHUKU the winner of the elections.

(iv) It was further submitted that the validity of the election was not challenged and that the winner was ANTHONY NJOMO and that the person the court declared the winner was No. 2.

16. The Appeal was opposed by the Respondents who submitted in court as follows;

(i) The 1st Respondent conceded that the finding of the Magistrate's court that an election offence was committed ought to have been referred to the election offences court or dealt with and the 1st Respondent urged the court to reverse that finding alone and nothing more.

(ii) The 1st Respondent submitted that the issue of jurisdiction had been dealt with by way of preliminary objection raised by the Appellant and the court made a ruling which the Appellant did not appeal against.

(iii) It was further submitted that this case is not a nomination dispute. The 1st Respondent relied on the case of MOSES MWIRIGI & 14 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS [2016] eKLR at page 19 where the court said that the jurisdiction to handle dispute relating to the electoral process shifts from IEBC to the Judiciary upon the execution of the required mandate by the returning officer.

(iv) It was submitted that the petitioner proved her case by calling witnesses who swore affidavits that were not controverted by the Appellant.

(v) It was also submitted that the petitioner called a witness who said a nomination complaint was filed against the Appellant and that it is not true that the complaint was heard and dismissed. It was submitted that the complaint was dismissed for non-attendance.

(vi) It was further submitted that the complaint was never heard and determined on merit by IEBC as it was dismissed on a day it was listed for mention and this is irregular as the case was coming for mention and not for hearing on 6/6/2017 when it was dismissed and also the complainant was not aware that the case had been listed for mention.

(vii) It was further submitted that the Appellant who filed new evidence at Appeal stage by attaching a letter which was not produced during the hearing before the Magistrate did not give evidence to show the time he tendered his resignation from Jubilee.

(viii) It was further submitted that he participated in Jubilee nomination on 26/4/2017 and that 8th August was less than 120 days.

(ix) On the issue of the evidence adduced, it was submitted that the parties consented that electronic evidence be adduced. Further a party cannot approbate and reprobate at the same time.

17. I have carefully considered the submissions filed by the parties herein. I have also perused the authorities relied on in this appeal. My duty as the first Appellate Court is to reconsider and re-evaluate the evidence before the trial Magistrate and draw my own conclusions while bearing in mind that I did not see the witnesses and also only to make a finding on the evidence on record.

18. In my opinion, the duty of the High court when seated in its first Appellate capacity is the same as that of the Court of Appeal when hearing first appeals from the High Court. In the case of *Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212*, the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

(i) I find that the issues for determination in this appeal are as follows;

(a) Whether the magistrate's court had the jurisdiction to hear this matter.

(b) Whether the magistrate's court erred in making a finding that the Appellant had committed an election offence.

(c) Whether the Magistrate's court had a right to declare the 2nd runner up as the winner of the election.

(d) Who pays the costs of this Appeal?

(ii) On the issue as to whether this court had the jurisdiction to hear this case, I find that the petitioner did not challenge the validity of the election. The petitioner was challenging the nomination of the Appellant.

(iii) I find that a complaint was filed with IEBC which was dismissed on 6/6/2017 for non-attendance by the complainant.

(iv) I find that although the complaint was not heard on merit, the Complainant ought to have gone back to IEBC for a review of the order or appealed against it to the high court.

(v) I find that the petitioner had an opportunity before the general elections to challenge the nomination of the Appellant which she did not pursue.

(vi) **Section 4 (e)** of the IEBC Act provides that:

(4) As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e)the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;

(vii) The magistrate's court sitting as an election court did not have the jurisdiction to entertain the matter as the same is a nomination dispute and not an election petition and it arose before and not subsequent to the declaration of results.

(viii) The authorities relied on by the Respondent can be distinguished on the ground that there was a complaint before the relevant body in the current case which was not followed up by the complainant.

(ix) On the issue of whether the magistrate's court had the right to declare that the Appellant had committed an election offence. I find that the 1st Respondent conceded that this finding should be reversed.

(x) I also find that Section 28 of the Election Act does not create an offence. *Under the Election offences Act there is no offence known as party hopping. Section 28 states as follows;*

Submission of party membership lists

(1) A political party that nominates a person for an election under this Act shall submit to the Commission a membership list of the party—

(a) in the case of a general election, at least one hundred and twenty days before the date of the election; and

(b) in the case of a by-election, forty-five days before the date of the by-election.

(xi) The High Court in **Maendeleo Chap Chap Party & 2 others v Independent Electoral And Boundaries Commission & another [2017] eKLR** when asked to declare Section 28 of the Elections Act unconstitutional held, inter alia,

“[28.] Juxtaposing section 28 (1) (a) with Article 36, it is clear that the impugned section does not stop the petitioners from joining a Political Party. It has only limited the time when one cannot join another Political Party, during the critical period towards a general election or by-election.

...

[35]. Section 28 has only limited the right to change parties one hundred and twenty (120) days to the general election. The

respondents have argued and correctly in my view that this is a necessary limitation to allow for preparation of general elections. The limitation to change parties is not only in section 28 but also in Article 103 (1) (e) of the constitution. The limitation is reasonable because it allows both political parties and the 1st respondent complete nomination processes and meet the timeline set for elections. The importance of limitation and purpose cannot therefore be over emphasized. Citizens have a right and time to decide whether to join Political Parties and if so which ones or run as independents. These are rights granted by the constitution. However, they should be excised timely.

...

[39]...These are constitutional functions and for that reason, the limitation imposed by section 28 is reasonable and justifiable to the extent that it allows the 1st respondent undertake its constitutional mandate to the fullest extent including mandate under Article 88 (4) (k) to monitor compliance by Political Parties of election laws enacted under Article 82 (1) (b) relating to nomination of candidates.”

(xii) I therefore find that breach of Section 28 of the Election Act amounts to an irregularity and not an offence. In the Supreme court case of *Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR* where the court turned to the persuasive decision of the Supreme Court of Canada it held as follows;

“[176] ...Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”

(xiii) On the issue whether the trial magistrate was right in declaring that the person with the 2nd highest votes was the winner, I find that there was no recount done and the magistrate had no basis for making a finding that JOSEPH GITHUKU was the person with the highest votes.

(xiv) The Elections Act Section 75 (3) provides as follows;

In any proceeding brought under this section, a court may grant appropriate relief, including—

- (a) a declaration of whether or not the candidate whose election is questioned was validly elected;**
- (b) a declaration of which candidate was validly elected; or**
- (c) an order as to whether a fresh election will be held or not.**

(xv) I therefore find that although such a relief exists in law in the current , there was no prayer for recount and neither did the court order a recount on his own motion and therefore it was not right for the magistrate to say that JOSEPH GITHUKU had the highest vote without a recount.

(xvi) Section 80(4) of the election Act states as follows;

(4) An election court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if—

- (a) upon recount of the ballots cast, the winner is apparent; and**
- (b) that winner is found not to have committed an election offence.**

(5) The Commission shall, in writing, notify the relevant Speaker of the decision made under subsection (4).

(xvii) I accordingly find that this appeal has merit and the same is allowed. I accordingly set aside all the orders granted by the magistrate’s court on 18th December 2017 and declare as follows;

(a) THAT the whole judgment that was delivered by the learned magistrate on 18th December 2017 in JANE NJERI KAMANDE V ANTHONY NJOMO AND THREE OTHERS IN ELECTION PETITION APPEAL NO 1 OF 2017 be and is hereby set aside.

(b) THAT this court do declare ANTHONY NJOMO MAINA as duly elected in the election held on 8th August 2017 for the member of County Assembly Bahari wand in Lamu County and a certificate do issue in accordance to section 86 of the election Act.

(xviii) On the issue of costs, I find that the petitioner filed the petition as a voter and I order that each party bears its own costs of the petition and the appeal.

Dated, signed and delivered at Malindi this 6th day of April, 2018.

ASENATH ONGERI

JUDGE.