



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

ELECTION PETITION APPEAL NO. 5 OF 2018

MARTHLIDA AUMA OLOO.....APPELLANT

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

PHILISTER ATIENO MAKABONGO.....3RD RESPONDENT

JAMES OTIENO OCHIENG RUKU.....4TH RESPONDENT

(Being an appeal from the judgment and decree by Hon. R.K. Langat, Senior Resident Magistrate sitting at Rongo Law Courts in Migori Chief Magistrate's Election Petition No. 8 of 2017 delivered on 04/01/2018)

JUDGMENT

Introduction and Background:

1. This is an appeal against the dismissal of an Election Petition challenging the election of the **Philister Atieno Makabongo**, the 3rd Respondent herein, by way of nomination into the County Assembly of Migori under the special category representing persons living with disabilities by the Orange Democratic Movement.
2. By an Election Petition evenly dated and filed on 25/09/2017 the Appellant herein, **Marthilda Auma Oloo**, petitioned the election of the 3rd Respondent which culminated with the publication of the Gazette Notice No. 8380 on the 28th day of August 2017 on the principal ground that the 3rd Respondent was not qualified for nomination under the category of persons living with disabilities as at the date of her application to the Orange Democratic Movement party (hereinafter referred to as '**ODM**').
3. The Respondents filed their respective responses and upon consensus of the Counsels and approval of the trial court the petition was heard by way of written submissions. Judgment was rendered on 04/01/2018 thereby resulting into the appeal subject of this judgment.

The Appeal:

4. In a Memorandum of Appeal evenly dated and filed on 31/01/2018, the Appellant herein preferred seven grounds challenging the judgment and the decree of the trial court. The grounds were tailored as follows: -

1. THAT the Honorable Magistrate misdirected himself in finding that the 3rd Respondent was qualified to be nominated as a person living with disability, even though at the time she submitted her application for nomination, she was not registered and certified as a person living with disability by the National Council for Persons with Disabilities as required under Regulation 15 (2) of the Elections (Party primaries and Party Lists) Regulations 2017.

2. THAT the Honourable Magistrate erred in law and in fact in finding that the requirement by election laws to seek certification by the National Council for persons with Disabilities; by any aspiring candidate who intends to be nominated on the ground that he / she is a person with disability, would only be a consideration and effective at the time when such a candidate is successful and gazette and not at the time of candidate's application.

3. **THAT the Honourable Magistrate failed to take cognizance of the provisions of the Constitution, election Act and the Rules and Regulations made thereunder, in finding that failure seek the certification with the National Council for Persons with Disabilities by the 3rd Respondent at the time of her application for nomination was not a fatal omission that would lead to the nullification of her election to represent persons living with disabilities.**

4. **THAT the Honourable Magistrate erred in law and fact in failing to find that the nomination and subsequently the election of the 3rd Respondent was not conducted in accordance with the principles laid out in the Constitution, the Election Act, the Rules and Regulations made thereunder.**

5. **THAT the Honourable Magistrate erred in law and fact in finding that failure by the 1st and 2nd Respondent to confirm if indeed the 3rd Respondent was certified by the National Council for persons with Disabilities is not a grave election malpractice contrary to the constitutional and statutory provisions in regard to the elections.**

6. **THAT the Honourable Magistrate erred in law and fact failing to find that the 1st and 2nd Respondents abdicated their constitutional responsibility respectively in causing the election of the 3rd respondent who at the time of her application had not met all the requirements and qualifications a laid out in the Election Act, the Rules and Regulations made thereunder.**

7. **THAT the Honourable Magistrate thus erred in law and fact in taking into consideration irrelevant facts and disregarded the relevant material facts as well as the Constitutional and statutory provisions in relation to election; thus arriving at a wrong decision.**

5. Directions were taken on 03/03/2018 and upon consensus of the Counsels and the approval of this Court the appeal was heard by way of written submissions. All the parties duly complied with the said directions save the 4th Respondent herein, **James Otieno Ochieng Ruku**, who appeared in person and tendered oral submissions. Highlighting of the submissions was on 12/04/2018 whereafter the matter was set for this judgment.

6. **Miss Thiong'o** and **Mr. Rotich** Counsels both instructed by the firm of Sagana, Biriq & Company Advocates appeared for the Appellant. While relying on the Petition and the affidavits sworn by the Appellant herein, Counsels submitted that the main issue for determination in this appeal is on the process towards the election of the 3rd Respondent claiming that the first and second Respondents failed to comply with the provisions of the **Constitution** and the electoral laws and as such the appeal is in sync with **Section 75(4)** of the **Elections Act No. 24 of 2011** (hereinafter referred to as '**the Act**'), being an appeal on a point of law. Counsels referred to the Court of Appeal decision in **Lydia Nyaguthi Githendu vs. IEBC & 17 Others (2015) eKLR** (hereinafter referred to as '**the Lydia Nyaguthi case**') in buttressing that argument.

7. Counsels further submitted that the election of the 3rd Respondent was contrary to law in that it contravened **Article 177(1)** of the **Constitution**, **Sections 34 to 37** inclusive of **the Act**, **Part X** of the **Elections (General) Regulations, 2012** (hereinafter referred to as '**the Regulations**') and the **Elections (Party Primaries and Party Lists) Regulations, 2017** (hereinafter referred to as '**the Party Lists Regulations**') given that the 3rd Respondent failed to submit the mandatory certification as required under **Regulation 15(2)** of the **Party Lists Regulations**. It was also submitted that **Article 177(1)** of the **Constitution** was intended to offer window for representation of persons with special interests who were usually disadvantaged or did not enjoy adequate protection of the law prior to the promulgation of the **Constitution**. That, the special interests' positions were meant to ensure recognition and representation of the minorities and vulnerable who were historically discriminated and not meant as a rewarding avenue by political parties. That, since the 3rd Respondent is a wife of the ODM Migori County Chairman the process was intentionally flawed in favour of the 3rd Respondent who was not qualified for nomination in the first instance.

8. The Appellant's Counsels submitted further that because of the clear transgression of the **Constitution** and the law the sanctity of the election was compromised and the first and second Respondents failed to uphold and give effect to the purpose and the spirit of the **Constitution** and the national values and principles as enshrined under the **Constitution**. It is on that footing that it was submitted that first and second Respondents abdicated their constitutional responsibilities in causing the election of the 3rd Respondent who was registered as a person living with disability by the National Council for Persons with Disabilities (hereinafter referred to as '**the NCPWD**') on 14th day of July 2017 long after her application to ODM.

9. The Appellant variously faulted the trial court in holding that the 3rd Respondent's failure to seek and obtain certification with NCPWD at the time of her application was not a fatal omission that would lead to a nullification of the election. Reference was made to **Regulation 3** of the **Party Lists Regulations** which provided that nomination by party lists must be democratic, free, fair, inclusive, participatory and provide equal opportunities for all eligible candidates. In support of the argument that the first and second Respondent were obligated in law to ensure that the party lists met the criteria and the threshold of the **Constitution, the Act, the Regulations** and the **Party Lists Regulations** Counsels referred this Court to the decisions in **National Gender and Equality Commission vs. IEBC & Another (2013) eKLR**, **Linet Kemunto Nyakeriga & Another vs. Ben Njoroge & 2 others (2014) eKLR**, **Moses Mwicigi & 14 others vs. IEBC & 5 others (2016) eKLR**, **Ahmed Abdullahi Mohamad & Another vs. Mohamed Abdi Mohamed & 2 Others (2018) eKLR** and the **Lydia Nyaguthi** case.

10. Closing their submissions Counsels urged this Court to allow the appeal and declare the 4th Respondent as the duly elected member in place of the 3rd Respondent since the 3rd Respondent was not validly elected as her election could not pass the test in **Section 83** of **the Act**.

11. **Mr. Ayieko** Counsel instructed by the firm of Lumumba & Ayieko Advocates appeared for the 3rd Respondent. In opposing the appeal Counsel relied on the 3rd Respondent's Response to the Petition dated 5th day of September 2017 and the Replying Affidavit of the 3rd Respondent evenly sworn on the 5th day of September 2017 and submitted that the election of the 3rd Respondent was upon the publication of the Gazette Notice on 28/08/2017 on which date the 3rd Respondent was long registered with the NCPWD. Counsel referred to the

decision in the case of Moses Mwicigi & 14 others vs. IEBC & 5 others (2016) eKLR in support of the position and in urging this Court to find that the 3rd Respondent was validly elected as a person living with disability pursuant to **Article 260** of the **Constitution** and **Section 2** of the **Persons with Disabilities Act No. 14 of 2003** (hereinafter referred to as '**the Disabilities Act**'). Counsel further denied that the first and second Respondents abdicated their constitutional and statutory responsibilities in any way and contended that all the relevant laws were complied with. Seeking reliance on the Moses Mwicigi case and the decision in the case of Maendeleo Chap Chap Party & 2 others vs. IEBC & Another (2017) eKLR Counsel submitted that the nomination process is exclusively the preserve of a political party and that IEBC had no role to play at all.

12. The 3rd Respondent further submitted that the election which was already held must be respected as the will of the people and cannot be lightly treated or set-aside on alleged unsettled malpractices. Counsel relied on the decisions in Rahim Khan vs. Khurshid Ahmed & Others (1975) AIR 290, William Odhiambo Oduol vs. IEBC & 2 Others (2013) eKLR, Kiarie Waweru vs. Beth Wambui Mugo & 2 others (2008) eKLR, Joho vs. Nyange & Another (2008) 3 KLR (EP) 500 and Ben Njoroge & Another vs. IEBC & 2 Others (2013) eKLR in contending that the Petitioner did not prove the allegations in the Petition.

13. Concluding his submissions Counsel submitted that the Petitioner was required to challenge the election within the internal mechanism provided by ODM and not by filing a Petition and drew the Court's attention to the case of Yusuf Gitau Abdalla vs. Building Centre (K) Limited & 4 others (2014) eKLR. This Court was urged to dismiss the Petition with costs.

14. The Independent Elections and Boundaries Commission (hereinafter referred to as '**IEBC**') was represented by the firm of Liko & Anam Advocates who, with the leave of the trial court, filed a Response to the Petition dated 30/10/2017 on 07/11/2017 together with an Affidavit in support of the Response sworn by one Salome Oyugi on 29/11/2017. It was submitted that IEBC did not abdicate its constitutional and statutory responsibilities at all and that it complied with the law. That, in compliance with **Article 90** of the **Constitution** and **Section 34(6A)** of the **Act** IEBC issued guidelines on preparation of party lists vide Gazette Notice No. 5735 of 12th June 2017.

15. That, on receipt of the respective party lists and in line with the law, IEBC reviewed the Party Lists within 14 days and required the political parties including ODM to resubmit Amended Party Lists. That, ODM submitted its Final Party List on 19/07/2017 which list was uploaded on the IEBC website on 21/07/2017 and published in both the Sunday Nation and the Standard Newspapers on 23/07/2017. That, IEBC further issued a Notice on 21/07/2017 in the Daily Nation and the Standard Newspapers informing the public and the persons aggrieved by the Party Lists to lodge complaints accordingly.

16. It was further submitted that indeed the Final Party List was challenged in Political Parties Dispute Tribunal Case No. 527 of 2017 Clinton Mugesu Warema vs. ODM where ODM was ordered to resubmit its party list. That, the said order was stayed by the High Court in Nairobi Judicial Review No. 513 of 2017 thereby IEBC had to use the Final Party List it had uploaded on its website and published in the local newspapers.

17. IEBC contended that it reviewed the Final Party List from ODM and was satisfied that it met all the constitutional and statutory requirements and that the 3rd Respondent was a person living with a disability who was even registered with NCPWD and proceeded to declare the successful nominees to the County Assembly of Migori vide Gazette Notice No. 8380 of 28th August 2017 after allocating slots to ODM in proportion to the total number of seats won by candidates of ODM at the general election held on 8th August 2017.

18. It was IEBC's further submission that it fully complied with the law in allocating the seats ensuring that the membership of the said seats was gender sensitive and was comprised of members of marginalized groups including persons living with disabilities and the youth. Relying on the decisions in Philip Mukui Wasike vs. James Lusweti Mukwe & 2 others (2013) eKLR and Joho vs. Nyange & Another (supra) IEBC urged this Court to dismiss the appeal.

19. ODM did not participate in the hearing of the Petition and in this appeal as well. This Court has now been called upon to render itself in this matter.

Analysis and Determinations:

20. I have keenly read and understood the substance of this appeal. I have perused the Petition and all the responses and their accompanying Affidavits, the proceedings, submissions and the judgment of the trial court as well as the Record of Appeal and the parties' submissions before this Court.

21. As the first appellate Court, this Court derives its jurisdiction from **Section 75(4)** of the **Act**. Its role is to revisit the entire record but to limit itself to only settling matters of law. As this is an appeal from the decision of an election court, what constitutes matters of law in election matters was aptly settled by the Supreme Court in the case of Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 7 Others Sup. Ct. Petition No. 2B of 2014 (2014) eKLR.

22. Although the Supreme Court was dealing with an appeal from the Court of Appeal to itself nevertheless the principles enunciated in that judgment apply to this Court which is sitting on an appeal from the Magistracy as an election petition trial court. The Supreme Court expressed itself on what constitutes matters of law as follows: -

'[81] 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 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 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 the evidence.

[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.

[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge’s commitment to the highest standards of knowledge, technical competence, and probity in electoral – dispute adjudication, on the other hand.

23. With the foregone guidance and which is binding on this Court, this Court must therefore be so vigilant and strictly keep within the above confines. The Court should not accept any invitation ‘to re-examine the probative value of the evidence tendered at the trial court’ orto calibrate any such evidence, especially calling into question the credibility of witnesses...’. Put differently, this Court should resist the temptation of venturing into the realm of evidence, evaluating that evidence and reaching its own conclusions on factual matters. However, this Court reserves the jurisdiction to venture into the said realm of evidence with a clear purpose of determining the applicability or interpretation and/or construction of a provision of the Constitution, an Act of Parliament, subsidiary legislation or any legal doctrine.

24. The paramount issue for consideration is whether the 3rd Respondent was validly elected by way of nomination. Once settled, the issue as to whether IEBC and ODM abdicated their responsibilities will as well stand determined. Having said so, a brief look at the legal framework for nominations by way of Party Lists in Kenya is of great guidance in this discourse.

The Legal Framework:

25. The subject of nomination of Members to the County Assemblies (and to Parliament) and Party Lists has its origin in the **Constitution**. Since this matter relates to the membership of a County Assembly, **Article 177** of the **Constitution** (Membership of a County Assembly) provides as follows: -

‘177. (1) A county assembly consists of

(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;

(c) the number of members of 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.

(3) The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward.

(4) A county assembly is elected for a term of five years.

26. This legal provision is the source of the political parties’ mandate to nominate members to the County Assembly. The purpose of the said provision is to guarantee that no more than two-thirds of the memberships of any Assembly is comprised of the same gender and to further safeguard and ensure the representation from the marginalized groups including persons living with disabilities and the youth. The members contemplated under **Article 177(1)(b)** and **(c)** above are nominated by political parties proportionate to the number of seats garnered in **(a)** above. Those members can only be ‘drawn’ from a list which is prepared by a political party and presented to IEBC which list is eventually published in the Kenya Gazette by IEBC. That list is what is referred to as ‘**a Party List**’.

27. **Article 90** of the **Constitution** (Allocation of party lists seats) provides for party lists seats in the following manner: -

(1) Elections for the 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 a 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 of 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.*

28. The above provision clearly spells out specific duties on IEBC relating to *inter alia* the conduct and supervision of elections for seats for nomination purposes. In undertaking the said duty IEBC stands further guided by *inter alia* the Act under Sections 34, 35 and 36 thereof. For purposes of this discussion I will only reproduce the relevant provisions in the said sections of the Act which include: -

'34. (6) 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.

(6A) *Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and -*

(a) *issue the political party with a certificate of compliance; or*

(b) *require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.*

(6B) *For purposes of subsection (6A), the Commission may, be notice in the gazette, issues regulations prescribing guidelines to be complied with in preparation of party lists.*

(7) *The party lists submitted to the Commission shall be valid for the term of Parliament.*

(8) *A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.*

(9) *The party list shall not contain a name of a candidate nominated for an election.*

(10) *A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the County Assembly, as the case may be, for which the candidates are elected.*

35. *A political party shall submit its party list to the Commission at least forty-five days before the date of the general election.*

36.(1) *A party list submitted by a political party under-*

(e) *Article 177 (1) (b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county;*

(f) *Article 177 (1) (c) of the Constitution shall include 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 person representing a marginalized group*

(2) *A party list submitted under subsection (1) (a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.*

(3) *The party list referred to under subsection (1) (f) shall priorities a person with disability, the youth and any other candidate representing a marginalized group.*

(4) *Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.*

(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection (1) (e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

(8) For purposes of Article 177 (1) (c) of the Constitution, the Commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177(1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.

37.(1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.

(2) Notwithstanding the provision of Section 34 (10), if there are no more candidates on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty -one days.

(3) A vacancy in any seat in a political party list shall not be filled three months immediately before a general election.

(4) Where a political party fails to comply with the provisions of subsection (2) the Commission shall not allocate the seat for the remainder of the term of Parliament or the County Assembly.

29. Further guidance on Party Lists is provided under **Part X** of the **Regulations** being **Regulations 54 to 56B** inclusive which re-emphasizes that Party Lists must be in consonance with the **Constitution, the Act** and all the attendant regulations. **Regulation 54** provides for the procedure for the preparation and presentation of Party Lists until when a Final Party List is published in at least two newspapers of national circulation. Due to the centrality of the procedure in this matter I will reproduce verbatim the said **Regulation 54**, and as follows: -

“(1) Each political party shall submit to the Commission a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution and sections 34, 35, 36 and 37 of the Act.

(2) The party list referred to in sub-regulation (1) shall contain the name, address, age, sex, disability and category of disability, phone number, occupation, identity card number or passport number and coloured passport size photograph image, elective post sought and such other qualifications as are provided under the Constitution and the Act in the prescribed Form 24B.

(3) A party list submitted under Sub regulation (1) shall be in accordance with section 36 of the Act, and shall be –

(a) signed by the authorized official of the political party submitting the party list; and

(b) be submitted in hard copy, in electronic form and such other form that the Commission may specify.

(4) Each political party list nominee shall after nomination, submit to the Commission a letter stating his or her intention to serve if nominated.

(4A) Each political party list nominee representing persons with disabilities shall submit, to the Commission, a certification from the National Council for Persons with Disabilities.

(5) The Commission may reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution or the Act.

(6) The rejection by the Commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party.

(7) The Commission, after making the decision to reject a nominee, inform the political party concerned of that decision and request that political party to submit another name within such time as the Commission shall determine.

(8) The Commission shall publish the final part list in at least two newspapers with nationwide circulation.”

30. **Regulation 55** of the **Regulations** is of equal importance as it also deals with the procedure on Party Lists. The same is tailored as follows: -

(1) The part list contemplated under regulation 54 shall be prepared in accordance with the nomination rules of the political party.

(2) The Commission shall within fourteen days of receipt reject any party list that does not comply with the requirements of the Constitution, the Act or these Regulations.

(3) The political party whose party list or nominee has been rejected by the Commission under sub-regulation (2) shall resubmit the party list or nominee within seven days from the date that the party list was rejected under sub regulation (2).

(3A) Where a political party fails to amend the party list or resubmit the list as directed by the Commission, the Commission shall reject the party list.

(4) A political party submitting a party list under regulation 54 shall submit a declaration to the effect that the political party has complied with its rules relating to the nomination of the names contained in the list.

31. **Regulation 56** of the **Regulations** calls for the publication of the formula for allocation of Party Lists seats by IEBC. **Regulation 56A** of the **Regulations** deals with the procedure on the expulsion of a member elected by way of Party Lists from the nominating political party and **Regulation 56B** of the **Regulations** deals with the procedure on the resignation of a member elected through a Party List.

32. There are further provisions relating to Party Lists under the **Party Lists Regulations**. These Regulations provide for *inter alia* the guiding principles for conducting of party primaries and party nominations of Party Lists under **Regulation 4** thereof. **Regulations 6** provides that the rules guiding the nomination procedures must be approved by IEBC to conform to the **Constitution, the Act** and all the attendant regulations whereas **Regulation 7** provides for a Party Nomination Code of Conduct. **Regulation 15** deals with the requirements to be complied with by any aspiring candidate in their applications to their party's Election Board. **Regulation 15(2)** thereof makes further and specific requirement for aspiring candidates intending to be nominated on the ground that the candidate is a person living with disability. The said provisions state as follows: -

“15(2) Where an aspiring candidate intends to be nominated on the ground that the candidate is a person with disability, the candidate shall, in addition to the requirements specified under sub regulation (1), submit an application in Form 4 set out in the Schedule which shall be certified by the National Council for persons with Disabilities.”

33. IEBC is to reject any Party List which does not conform to the law. That is in line with **Regulation 26** of the **Party Lists Regulation** which provides as follows: -

(1) The Commission shall reject a party list or a name on the party list submitted by a political party where -

(a) the party list does not conform to the requirements of the Constitution, the Act or these Regulations; or

(b) the period for submitting revised part lists has lapsed.

(2) Where the Commission rejects a party list or a nominee on the party list, it shall require the political part to resubmit the party list or nominee within such period as the Commission may specify.

(3) A political party resubmitting a part list under sub regulation (2) shall resubmit a declaration under Regulation 18 to the effect that the political party has complied with the nomination rules and procedures of the party relating to the nomination of the names contained in the list.

(4) In the event that a political party fails to resubmit the party list or a name on the party list after it has been rejected under sub-regulation (1), the party shall not be considered in the allocation of seats.

(5) A person who has been nominated on a party list may decline the nomination by informing the political party and the Commission in writing, and the Commission shall replace that name with the next name of the same gender on the part list.

34. The foregone is the prevailing legal rubric about election by way of nomination by Party Lists to a County Assembly in Kenya. I will now subject the above to the facts in this case in resolving whether the 3rd Respondent was validly elected and in accordance to the law.

Whether the 3rd Respondent was validly elected:

35. I have taken the liberty of running through the legal framework as a basis of this consideration. In doing so, I affirm the position that an election is not an event but a process and that every single part of the entire process is as important as the other.

36. The process of electing the 3rd Respondent began with the calling of applications by ODM from suitable members for nomination. That was later reinforced by the issuance of the Guidelines on the Preparation of Party Lists by IEBC. The 3rd Respondent applied for consideration for Party List nomination among other candidates. I have seen a copy of her application on pages 67 and 68 of the Record of Appeal which is dated 05/06/2017 which date was the deadline for the applications to ODM. I will hereinafter refer to the 3rd Respondent's application as '**the application**'. The application was in the category of Persons Living with Disabilities and at the time of such submission the 3rd Respondent had not been registered as such with NCPWD.

37. On completion of the internal process ODM forwarded its Party List to IEBC. Guided by the law, IEBC reviewed the Party List in issue herein, among many others, and required ODM to instead resubmit a Final Party List. I have searched through the record severally but did not find the reasons for the review of the initial Party List.

38. ODM complied with the direction by IEBC and subsequently reviewed its Party List. It submitted what it referred to as '**The Final Party**

List’ on 19/07/2017. At the time of the submission of the Final Party List the 3rd Respondent had duly registered with NCPWD. The Final Party List was accepted by IEBC. However, that was not the end of the matter.

39. It is not in dispute that the Final Party List was successfully challenged by one **Clinton Mugesu Warema** before the Political Parties Dispute Tribunal in Complaint No. 527 of 2017. Although the reasons for the challenge are not part of the record before me, the Tribunal ordered ODM to resubmit a Fresh Party List. The matter escalated to the High Court at Nairobi and vide Judicial Review No. 513 of 2017 the High Court quashed the decision of the Political Parties Dispute Tribunal. The High Court order gave validity to the Final Party List which IEBC proceeded to publish in the relevant Newspapers and subsequently vide the Gazette Notice No. 8380 of 28/08/2017. That led to the election of the 3rd Respondent under the special category of persons living with disabilities.

40. The Appellant’s contention in this appeal is that since the 3rd Respondent did not avail the certification from NCPWD as at 05/06/2017 when ODM closed its doors to any applications then the 3rd Respondent was not qualified for nomination and as such the rest of the process was flawed.

41. As stated above, the requirement that a candidate who is interested to be considered for nomination under the category of persons living with disabilities must avail a certification from NCPWD is anchored in the law. That is under **Regulation 15(2) of the Party Lists Regulations**. The Regulation requires that such a candidate must avail to its Party’s Election Board a Declaration Certifying Disability in the format provided in Form 4 of the Schedule which must be certified by NCPWD. For purposes of this discussion I will reproduce the said Declaration: -

DECLARATION CERTIFYING DISABILITY

I,of(name of institution) do certify that(name of the aspiring candidate seeking nomination representing person with disability) holding.....ID/Passport number is a person living with disability, more specifically (type of disability) for the more specifically.....type of disability) for the last(no. of years / months).

I make this declaration conscientiously as I sign this form.

Declaration atthis.....day of.....20.....

Signature of Deponent –

Name

Profession

Workstation

ID/Passport No.

Phone number

Signature

42. That is the declaration which is to be certified by NCPWD. The declaration is to be made by any person other than the candidate. The Regulations however do not provide for the nature of certification to be undertaken by NCPWD. Could it be a certification that the declaration is as provided for in the **Party Lists Regulations** Schedule, or a certification that the candidate is a person living with disability or a certification that the candidate is registered with NCPWD as a person living with a disability, or any other form of certification?

43. Therefore, the only requirement is that the Declaration must be certified by NCPWD. As said, the nature of the certification remains in limbo. The law does not require a candidate seeking nomination under the category of persons living with disabilities to avail any evidence, be it a certificate or otherwise, that he/she is registered with NCPWD as a person living with disability. In other words, it is not the registration with NCPWD which qualifies one to be a person living with disability. Such a person must, in the first instance, be living with a disability well before the registration. That is not however to say that it is not important for persons living with disabilities to register with NCPWD. The colossal benefits available on registration are provided for under **the Disabilities Act**.

44. One must then revert to the **Constitution** and the law to understand how a person living with disability is defined in Kenya. **Article 260** of the **Constitution** defines ‘**disability**’ to ‘include any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long – term effect on an individual’s ability to carry out ordinary day to day activities.’ **Section 2** of the **Disabilities Act** defines ‘**disability**’ to mean ‘a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.’

45. The **Constitution** uses the word ‘**include**’ in the definition of disability. That means disability may be in any other form or nature further to what is stated in the **Constitution** as long that form or nature has or is perceived by significant sectors of the community to have a

substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities. The definition is therefore objective. The **Disabilities Act** also adopts an objective approach to the definition of disability to include any visual, hearing, learning or physical incapability which impacts adversely on social, economic or environmental participation. Disability therefore rests on perception. That is, it is the perception by significant sectors of the community that a certain condition has a substantial or long-term effect on an individual's ability to carry out ordinary day-to-day activities.

46. In this case the 3rd Respondent contended that she had all along been full of health and an adherent supporter of ODM who tirelessly campaigned for the party. That, while in an ODM campaign tour around Rongo in Migori County she was involved in a road traffic accident on 18/11/2011 and had to undergo extensive treatment in various hospitals in Kenya. That, the treatment culminated with a non-functional right ankle joint whereof she will be permanently on elbow crutches. She annexed copies of her ODM Certificate of Life Membership, medical and treatment notes among other documents in support of the assertion in her application to ODM for consideration as a person living with disability. She was later registered with NCPWD as a person living with disability.

47. The ODM Migori County Electoral College considered the 3rd Respondent's application and was satisfied that the 3rd Respondent was a person living with a physical disability and proposed her nomination. The decision was transmitted to and accepted by the ODM National Executive Council which transmitted the party list on behalf of ODM to IEBC.

48. The fact that ODM is a party with a national presence and following cannot be rivaled. It is a party comprised of members from various sectors of the Kenyan community. The nomination of the 3rd Respondent was hence not a decision made by a small clique of individuals but by ODM as the party. It is ODM which was satisfied that the 3rd Respondent's physical condition had a permanent effect on her ability to carry out her daily activities hence its proposition to IEBC.

49. Apart from ODM, there was the medical sector. According to the medical and treatment notes on record the 3rd Respondent sustained a permanent disability and will be on elbow crutches for the rest of her life.

50. From the above analysis, I am satisfied and so find and hold that since ODM and the medical fraternity were both of the considered perception that the 3rd Respondent was physically disabled, they constituted significant sectors of the Kenyan community and as such the 3rd Respondent was constitutionally and legally qualified to be considered as a person living with disability regardless of the fact that she was not yet registered with NCPWD as at the time of her application or did not render a certification of the Declaration whose nature remains unsettled.

51. Since the rest of the election process was not impugned in this appeal, I now return the finding that the 3rd Respondent was properly elected to represent persons living with disabilities in the County Assembly of Migori.

Whether the 1st and 2nd Respondents abdicated their constitutional and statutory responsibilities in causing the election of the 3rd Respondent: -

52. Having found that the 3rd Respondent was validly elected, I must find, as I hereby do, that none of the Respondents abdicated any of their constitutional and/or statutory responsibilities in causing the election of the 3rd Respondent.

Disposition: -

53. As I come to the end of this judgment I have no doubt that the election of the 3rd Respondent was conducted in accordance with the principles and provisions laid out in the Constitution, the Election Act and all other Rules and Regulations made thereunder and that there were no irregularities that affected the result of the election.

54. I must also point out that there is need for clarity on the nature of the certification of the declaration under **Regulation 15(2) of the Party Lists Regulations** and as such I hereby call upon the necessary entity under **Section 109 of the Act**, being IEBC, to consider the matter.

55. Consequently, the appeal is not merited and is hereby dismissed with costs.

56. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 07th day of June 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Rotich and **Miss Thiong'o** Counsels instructed by the firm of Messrs. Sagana, Biriq & Company Advocates for the Appellant.

Mr. Anam Counsel instructed by the firm of Messrs. Liko & Anam Advocates for the first Respondent.

Mr. Ayieko Counsel instructed by the firm of Messrs. Lumumba & Ayieko Advocates for the Third Respondent.

James Otieno Ochieng Ruku, the Interested Party in person.

Evelyn Nyauke - Court Assistant