



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELECTION APPEAL NO.13 OF 2018

MARGARET WANJIRU IRERI.....1ST APPELLANT

ESTHER WANJIKU MUHOHO.....2ND APPELLANT

JOSEPH KARIUKI WAITHERA.....3RD APPELLANT

- V E R S U S -

MONICA GATHONI GITHAE.....1ST RESPONDENT

SOLOMON KIMANI KURIA.....2ND RESPONDENT

I.E.B.C.....3RD RESPONDENT

JUBILEE PARTY.....4TH RESPONDENT

GEOFFREY NGARUIYA KARIUKI.....5TH RESPONDENT

RULING

The three appellants namely, Margaret Wanjiru Ireri, Esther Wanjiku Huhoho and Joseph Kariuki Waitthera (1st to 3rd appellant respectively) were aggrieved by the judgment of Hon. Wanjala, Chief Magistrate dated 13/1/2015 and filed this appeal by a memorandum of appeal dated 13/3/2018 against Monica Gathoni Githae, Solomon Kiani Kuria, the Independent Electoral and Boundaries Commission (IEBC); Jubilee Party and Geoffrey Ngaruiya Kariuki (1st to 5th respondents respectively).

The appeal is based on the following nine (9) grounds:

- 1. That the learned magistrate erred in law by failing to appreciate that the dispute before her was nomination dispute under Article 88(e) of the Constitution and the Petitioners having failed to challenge the party list when they were invited to do so by the Independent Electoral and Boundaries Commission, they could not later challenge the list by way of Election Petition.***
- 2. That the learned magistrate erred in law by failing to appreciate that she had no jurisdiction to entertain dispute before her.***
- 3. That the learned magistrate having found that the Appellants were indeed members of marginalized groups erred in law by nullifying their election by relying on a technicality about the description.***
- 4. That the learned magistrate erred in law by relying on a minor irregularity (description) which did not affect the result.***
- 5. That the learned magistrate erred in law by failing to appreciate that it is not mandatory to include youths and persons living with disability during the nomination.***
- 6. That the learned magistrate erred in law by directing Jubilee Party and IEBC to include the two Petitioners in the new list and by so doing failed to appreciate that in law, it is only the party which can consider who to nominate.***
- 7. That the learned magistrate erred in law and in fact by failing to appreciate that at Section 34(6) of the Election Act the only requirement is that the nomination lists must be in accordance with the parties nomination rules and the constitution.***

8. That the learned magistrate erred in law by failing to consider the provision of Article 100 on who are marginalized.

9. That the learned magistrate erred in law by failing to appreciate

(a) Burden of proof in Election Petition

(b) Standard of proof in Election Petition.

The appellants therefore pray that the appeal be allowed and the court further find that the petition No.1/2017 was not proved and proceed to dismiss it with costs.

The background of this matter is that the 1st, 2nd and 3rd appellants and the 1st, 2nd and 5th respondents are members of the Jubilee Party, 4th respondent, in Nyandarua County. They had applied to be nominated in the party list for Nyandarua County Assembly in the General Elections that took place on 8/8/2017. The 1st to 3rd appellants and 5th respondent were listed on the Jubilee list together with the 1st & 2nd respondents together with others all totaling 8 applicants; that the 1st to 3rd appellants and 5th appellants were duly nominated and gazette on 28/8/2017 as members of the Nyandarua County Assembly representing marginalized groups. The 1st and 2nd respondents were aggrieved by the said nomination and filed petition No.1 of 2017 in the Chief Magistrate's Court challenging the nomination contending that it violated the Electoral Laws and the Constitution of Kenya. In that the appellants and 5th respondent did not qualify to represent special interest groups and especially the character described as ethnicity and further that the list did not indicate persons with disability. The court rendered its judgment on 27/2/2018 allowing the petition declaring the nomination unlawful and invalid and ordered that the 1st & 2nd respondents to come up with fresh list of nominees which would include the petitioners to represent marginalized groups in strict compliance with the laws. The above decision proved this appeal.

In this appeal, the IEBC is the respondent, the Constitutional Commission which is established under Article 85 of the Constitution and charged with conducting elections and related purposes. The Jubilee party is the 4th respondent, a registered political party to which both, the appellants, 5th respondent and the 1st and 2nd respondent belong.

This appeal was supported by the 3rd, 4th and 5th respondents. The 1st and 2nd respondents had objected to the 5th respondent being allowed to join the appeal but this court's order of 4/7/2018.

The Applicant's Submissions:

The appellants who were represented by Mr. Karanja filed Submissions on 9/7/2018 together with a list of authorities.

Although the appellants filed 9 grounds of appeal, Mr. Karanja decided to argue only three of them, namely:

1. Whether or not the Chief Magistrate's Court had jurisdiction to make the determination under challenges;
2. Interpretation of marginalized groups;
3. Prioritization of the party list.

Council submitted that the appellants, 1st, 2nd and 5th respondents being members of the Jubilee Party, applied for nomination pursuant to Article 177(1)(c), Article 90(1) and Section 36 of the Elections Act; that the above 6 and 2 others were classified as marginalized group under Section 36(1)(f) of the Elections Act and their names were forwarded to IEBC for nomination in accordance with Article 90(2)(b) which provides that the candidates be listed in the alternate of male and female in the priority in which they are listed. Counsel further submitted that Section 36(f) reiterates the above provision and adds that the list must include 2 persons with disability, 2 youths and 2 persons representing marginalized groups; that the Jubilee Party submitted the names in order in order of priority as is required of it as follows:

1st appellant was No.1 - Female

5th respondent was No.2 - Male

2nd appellant was No.3 - Female

3rd appellant was No.4 - Male

1st respondent was No.5 - Female

2nd respondent was No.8 - Male – youth.

Having received the list, IEBC published it on 23/7/2017 as forwarded to it and invited any part aggrieved by the list to lodge an objection with IEBC under Article 88(4)(e) of the Constitution but none was lodged; that both the 1st respondent confirmed to have seen the list but did not complain whereas the 2nd respondent denied seeing the list but denied that he would have objected because he did not know about

prioritization.

On the question of jurisdiction, Mr. Karanja submitted that he raised the issue with the Chief Magistrate's court indicating this under Article 88(4)(e) of the Constitution and Section 74 of Elections Act, 2011. It is the IEBC charged with the mandate to resolve any dispute arising from nomination and priority lists and that is why IEBC had limited objections upon publishing the list. In support of this submission, the appellants relied on the following authorities:

1. National Gender and Equality Commission V IEBC 2013 Pet.147/2003 (NRB) where IEBC had received a party list and it was challenged by the plaintiff in court and the court held that the IEBC had the mandate to publish the list under Reg.54(8) of General Regulations and if any was aggrieved by it; they could complain to the IEBC.

Counsel also made reliance on the decision in **Isaiah Gicho Ndirangu v IEBC and 4 others Pet.83/2015 (NRB)** where the court considered the decision of **National Gender (Supra)** and held that addressing disputes regarding nomination the first part of call is the IEBC Dispute Resolution Committee and if dissatisfied with the decision of the committee, then they can come to court.

The third decision is that of **Moses Mwicigi & 14 others v IEBC Pet.1/2015** in which the Supreme Court underscored the objective of the Dispute Resolution Mechanism by the IEBC. In the said Court, the High Court had declined jurisdiction and the Supreme Court upheld the High Court decision and observed that if there is a dispute over nominations, then the parties should follow the dispute resolution mechanism by the IEBC. Counsel stated that the Court ruled that she had jurisdiction having been gazetted by the Hon. The Chief Justice to hear the Petition. Mr. Karanja further submitted that since jurisdiction is everything, once he raised it, the court should have considered it first and have the issue is still outstanding. He argued that the nomination dispute arose on 23/7/2017. It should have been filed within 7 days and determined before gazetting which took place on 28/8/2017. It was his view that all disputes on nominations have to be settled before elections. See **Diana Keithi Kilonzo & another v IEBC Pet.359/2013**.

On marginalization, counsel urged that the 1st and 2nd respondents' misconstrued it by alleging that it means youth and people living with disability. Counsel adopted the definition of the word given in the decision of Ranga Lewiscowran and others v A.G. Misc.Appl.305/2004 where the court defined marginalized as that which cannot be captured by normal electioneering process (Pg.26). Counsel submitted that each of the applicants applied for nomination in various categories.

1st appellant presented herself as a single mother and that single mothers are marginalized in Nyandarua.

2nd appellant is a young lady.

3rd appellant is a youth and boda boda rider.

5th respondent is an elderly man 79 years representing the elderly; that the 1st appellant admitted in her evidence that women in Nyandarua are marginalized and that the 2nd and 3rd appellant are also marginalized person; that when forwarded to IEBC the names were properly categorized with 1st appellant marginalized on basis of her status, the 5th respondent on age, 2nd appellant on gender and age and 3rd respondent boda boda riders. However what was provided in the gazette indicated that they were nomination based on ethnicity and it is because of that that court found the nomination to be invalid.

As regards the court's order that the 1st and 2nd respondents be included in the list, counsel stated that by doing that, the court would be overstepping its mandate because the party list can only be in accordance with the party list and the Constitution; that the list by public was closed and not even IEBC could change the order of priority.

3rd and 4th respondents' submissions Mr. Malobe appeared for the 3rd respondent and held brief for Mr. Ombasa who represents the 4th respondents. Both counsel had filed submissions which had been filed by the counsel. Mr. Ndaba associated himself with the submissions made on behalf of the appellants. Counsel raised two issues for determination;

(1) whether the 1st – 3rd appellants and 5th respondents were nominated in accordance with the Constitution and attendant laws;

(2) whether the 1st and 2nd respondents were entitled to petition the subordinate court.

According to counsel the 1st, 2nd, 3rd appellants and 5th respondents applied for nomination and each party was expected to have 8 candidates on its list, 2 with disability, 2 youth, 2 marginalized group and that no particular group was to be given priority over the other and that the court misdirected itself in misinterpreting the law on provisions of the party list and that IEBC had no authority to substitute its preference with that of the party and that the nomination of 1st – 3rd appellants and 5th respondent was in conformity with the law.

Costs of the application will be in the cause.

Dated, Signed and Delivered at NYAHURURU this 4th day of July, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Maina for applicant

Mr. Maina holding brief for Mr. Karanja for 3rd respondent

N/A for 1st & 2nd respondent

Soi – Court Assistant