



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
ELECTION PETITION APPEAL NO 2 OF 2018

(Appeal from original Decree in Nanyuki Chief Magistrate's Election Petition No 3 of 2017 – L Mutai, CM)

DENIS KARIARU MATHENGE.....APPELLANT

VERSUS

1. THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
2. WAFULA CHEBUKATI
3. JUBILEE PARTY
4. ZAMZAM SALMA HUSSEIN
5. PETER LEMERIAN MATUNGE
6. MARY SAMKEN KESHINE
7. CHRISTOPHER MARK MWANGI
8. CATHERINE NYOKABI KABUE.....RESPONDENTS

J U D G M E N T

1. The Appellant herein, **DANIEL KANIARU MATHENGE**, was the Petitioner in the election court below, *Nanyuki chief Magistrate's Election Petition No 3 of 2017*. By his petition therein the Appellant challenged the election (*by nomination in the relevant party list*) of the 4th to 8th Respondents (*respectively Zamzam Salma Hussein, Peter Lemerian Matunge, Mary Samken, Christopher Mark Mwangi and Catherine Nyokabi Kibue*). Those Respondents were nominated to sit in *Laikipia County Assembly* in the 8th August 2017 *General Elections*. They were declared elected (*by successful nomination*) through *Kenya Gazette Notice No 8380 of 28th August 2017*.

2. It was the Appellant's case before the election court (as set out in the petition) that the 4th to 8th Respondents did not qualify to be in the Jubilee Political Party list because -

(i) *The 4th and 5th Respondents were not from marginalised ethnic groups as they are Kikuyu, a tribe already adequately represented in the Laikipia County Assembly.*

(ii) *The 6th Respondent, Mary Samken, is equally a Kikuyu because "a search of the National Identity Card number at the 1st Respondent's portal for confirmation of electoral registration details number 70000 (revealed) the name (as) MARY ANN WANJIRU NYAGA (a Kikuyu name)".*

(iii) *It was not known what marginalized group the 7th Respondent represented; further, his name appears "as CHRISTOPHER MARK SAID in Gazette Notice No. 8752 published on 6th September, 2017".*

(iv) *The 8th Respondent is from Nakuru County and not from Laikipia County.*

(v) *Laikipia County Assembly did not have any person with disability representing persons with disability, thus violating Article 27 of the Constitution of Kenya, 2010 (equality before the law and freedom from discrimination); Article 54 (people with disability should be treated with dignity and respect); and Article 56 (minorities and marginalised groups should be allowed to*

participate and be represented in governance and other spheres of life).

(vi) The 1st Respondent failed and/or neglected its constitutional responsibility “of supervising the nomination list as is governed by Article 90 of the Constitution...” (proportional representation by use of party lists).

(vii) The gazetted party list was unconstitutional in that it violated Article 177 because it contained no representation for marginalised groups (including persons with disabilities and the youth).

(viii) The party list also violated Regulation 54 of the Elections (General) Regulations, 2012.

(ix) The party list as published did not ensure fair representation of persons with disability as required by Article 81 of the Constitution.

(x) The Party list did not promote representation of marginalized groups (including persons with disabilities) as required by Article 100.

(xi) At least 2 persons with disability should have been included in the gazetted party list.

(xii) The 1st Respondent should have ensured that all marginalised categories were fairly represented before gazetting the impugned party list.

(xiii) The 4th to 8th Respondents were therefore not validly elected.

3. The Appellant sought the following reliefs in the petition:

(a) A declaration that Gazette Notice No 8380, as regards the list for marginalised category in Laikipia County Assembly, was in gross violation of the Constitution.

(b) A declaration that the 4th to 8th Respondents were not validly elected (by nomination through the party list) to the Laikipia County Assembly.

(c) An order to strike out the name of the 8th Respondent and replacement by another qualified person.

(d) An order that the 3rd Respondent do prepare another party list that should include the Appellant and another person with disability.

(e) That costs of the Petition be assessed and awarded to the Appellant.

4. The Respondents filed their responses to the petition, and the matter proceeded to full hearing. The election court delivered its judgement on 6th March 2018. It dismissed the petition with costs to the Respondents. The costs of the Respondents (except the 3rd Respondent) were capped at KShs 300,000/00 each. Instruction fee for the 3rd Respondent was capped at KShs 150,000/00. It was further directed that the Respondents' costs be taxed and certified by the court's Executive Officer.

5. Being dissatisfied with the entire judgment the Appellant preferred the present appeal. There are some 16 grounds of appeal.

6. An appeal such as the present one must be on matters of law only. See **section 75(4)** of the **Elections Act, Cap 7**. Ground 13 of the memorandum of appeal clearly raises an issue of fact, that is, whether or not the 4th to 7th Respondents belonged to the Kikuyu community. The election court's finding of fact that they were not cannot be challenged in appeal. That ground of appeal is therefore dismissed.

7. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 20th July, 2018; the 1st and 2nd Respondents filed joint submissions on 23rd July 2018; the 4th, 5th and 7th Respondents also filed joint submissions on 23rd July, 2018; the 6th Respondent filed her submissions on 24th July, 2018; and the 8th Respondent filed her submissions on 23rd July, 2018. The 3rd Respondent never filed any submissions. On 27th July 2018 the Appellant filed further submissions in response to the Respondents' submissions.

8. I have read and considered all those submissions and the cases cited. I do not find it necessary to reproduce in this judgement the various arguments of the parties. I have also read through the record of the election court, including its judgment. I will deal with the grounds of appeal as they appear in the memorandum. Where more than one ground are on the same issue of law those grounds will be combined.

GROUND 1, 2 AND 3

9. The first three grounds of appeal are on the issue of the filing of the Respondents' responses to the petition and leave granted to the parties to file supplementary affidavits. It appears from the proceedings of the election court that the 6th and 8th Respondents had filed and served their responses on time. The 3rd, 4th, 5th and 7th Respondents had not filed theirs on time. However, the Petitioner's learned counsel consented to time being extended for them to do so. This consent was entered within the election court's discretion donated by **Rule 5** of the

Elections (Parliamentary and County Elections) Petitions Rules, 2017 (the **Rules**) to determine the effect of any failure to comply with the Rules. The determination here (by consent) was that the defaulting parties were granted extension of time to put in their responses.

10. The complaint by the Appellant that his counsel was coerced into withdrawing his application to strike out the responses is a very serious allegation made without any particulars of such coercion given, and without any evidential back-up. It is an allegation that must be frowned upon.

11. Similarly, the leave granted by the election court to the parties to file supplementary affidavits was in exercise of the Court's discretion contained in **Rule 12(9)** of the Rules which states:

“The election court may, on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.”

12. The Appellant has not demonstrated how the filing of supplementary affidavits by the parties could have prejudiced his preparation for hearing of the petition as alleged in Ground 3 of appeal. It is to be noted too that his counsel consented to the filing of supplementary affidavits.

13. I therefore find no merit in any of Grounds 1, 2 or 3 and hereby dismiss them.

GROUND 4

14. This ground of appeal states that the election court erred in law “by failing to appreciate the import of section 36(3) of the Elections Act”. That subsection reads -

“The party list referred to under subsection (1)(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalised group”

Section 36(1) (f) itself provides:

“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 persons representing a marginalized group”.

Article 177(1) (c) of the Constitution provides that a County Assembly shall consist of, in addition to those mentioned in paragraphs (a), (b) and (d) -

“(c) The number of members of marginalised groups, including persons with disabilities and the youth, prescribed by Act of Parliament...”.

15. From that constitutional provision, it is apparent that persons with disabilities and the youth are part of marginalized groups. Persons with disabilities are thus not a group distinct and separate from other marginalised groups. This obvious constitutional meaning is however rendered unclear by the statutory provision in **section 36(1) (f)** of the Elections Act, which appears to separate persons with disability and the youth from marginalized groups. The constitutional meaning is happily restored by **section 36(3)** of the Elections Act which places persons with disability and the youth among marginalized groups.

16. I therefore, respectfully, do not agree with the Appellant's assertion that the **Constitution** and the **Elections Act** place candidates with disabilities before or over and above candidates of other marginalized groups like the youth, minorities, etc. Candidates with disabilities appear first merely by chance of listing, not by any constitutional or legal priority. In this I take comfort in the case of **ADEN NOOR ALI-VS- IEBC and 2 OTHERS [2018] eKLR** where the **Court of Appeal** upheld a similar finding by the **High Court**.

17. The election court therefore appreciated the proper import of **section 36(3)** of the Elections Act. I find no merit in Ground 4 of appeal and hereby dismiss it.

FOUNDATIONS 5 AND 6

18. These grounds challenge the election court's finding that it was too late to challenge the party list before the 1st Respondent or at the trial of the election petition. It is the Appellant's position that the party list could be challenged before the **IEBC** and before the court in the election petition.

19. Under **sections 40 and 41** of the **Political Parties Act**. Jurisdiction regarding internal disputes like party lists for nomination to Parliament and County Assemblies is vested in the **Political Parties Disputes Tribunal**, and timelines given within which to resolve such disputes.

20. It was the Appellant's testimony before the election court that he was satisfied with the party list as published and his position at No 8 therein. He therefore did not challenge the list either by his political party's internal dispute resolution machinery, or in the **Political Parties Disputes Tribunal**. The fact that the Appellant mistakenly believed that as a candidate with disability he would be accorded priority over other marginalized candidates did not alter anything.

21. In the case of *NATIONAL GENDER AND EQUALITY COMMISSION – VS – IEBC & Another* [2013] eKLR the Court held:

“The IEBC does not have jurisdiction over resolution of disputes related to the process of political parties preparing their party lists for nomination to Parliament and to County Assemblies. That jurisdiction is vested in the Political Parties Disputes Tribunal.”

I therefore find no merit in Grounds 5 and 6 of appeal, and the same are dismissed.

GROUND 7 AND 11

22. Grounds 7 and 11 complain that the election court erred in law by finding that the elected member of *Laikipia County Assembly* for Thingithu Ward, represented persons with disabilities. There is merit in this complaint. Mr. Kagundu, the MCA for Thingithu Ward, was an elected MCA. He was not nominated in any party list to represent the special interest group of persons with disabilities. He may have been disabled himself at the time he was elected and/or sworn in; however, he was elected by the voters of Thingithu Ward to represent them in the *Laikipia County Assembly*. He was not in the assembly particularly to represent persons with disability. If indeed he was a person with disability (and it is possible that his disability was only temporary) and made representations in the county assembly on behalf of persons with disability, such representation would only be coincidental, not mandated.

23. The net result was that in the *Laikipia County Assembly* there was no member specially representing persons with disability. That shortcoming was one of the things that the party list was supposed to cure. However, the candidate with disability (the Appellant) appeared too far down at No 8 in the party list to be reached as there were only four slots available, and there were strict rules of following the party list as prioritised in respect to gender, etc. The *IEBC*, as already seen, had no jurisdiction to interfere with that list. But the Appellant (or anyone else) could have challenged the party list through the party’s internal dispute resolution mechanism or before the ***Political Parties Disputes Tribunal***, particularly in regard to his position at No 8 in the list. He did not, and it was now too late for anything to be done about it. It was much more the Appellant’s failure to do the needful than anyone else’s. The merits of these two grounds of appeal will thus not be of much assistance to him.

GROUND 8

24. The complaint in this ground is that the election court erred in law in its interpretation and application of **Articles 90 and 177** of the *Constitution of Kenya*. Those articles deal with, respectively, allocation of party list seats and membership of county assemblies.

25. Article 90 sets out two principles that party lists must comply with -

(i) Gender equity in that the qualified candidates must be listed in order of priority, but that order must alternate between men and women.

(ii) Party Lists must reflect the regional and ethnic diversity of the people of Kenya. County Assemblies are excepted from this requirement because from the nature of things a county may largely have an ethnic majority, depending on the region of Kenya where the county is located. But as observed by the *Court of Appeal* in the case of *Commission for the Implementation of the Constitution- vs- Attorney-General 72 others*, [2010] eKLR -

“...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”.

26. As for **Article 177** of the *Constitution*, the principles set out therein have already been discussed elsewhere in this judgement. I can find no evidence of lack of understanding on the part of the election court in the interpretation and/or application of the constitutional principles in the two articles discussed above. There is no merit in Ground 8 of appeal.

GROUND 9

27. This ground states that the election court erred in law by “failing to consider the import of the Kenya Gazette dated 12th June 2017 as regards the 4th to 8th Respondents”. I do not quite understand this ground. But it appears that the ground generally challenges the nomination of the 4th to 8th Respondents as per the party list.

28. I have already discussed elsewhere in this judgment the party list and the constitutional and legal principles that must be adhered to in the preparation thereof as set out in **Articles 90 and 177** of the *Constitution of Kenya*, and **section 36** of the *Election Act*. I cannot find in the judgement of the election court anything to justify the complaint that it “**failed to consider the import of the Kenya Gazette dated 13th June 2017 as regards the 4th to 8th Respondents**”. There is no merit in Ground 9 of appeal and the same is dismissed.

GROUND 10

29. This is another vague ground that states that the election court erred in law by finding that the 1st and 2nd Respondents “had not breached any legal requirement”. The passage in the judgment of the election court to which this ground appears to relate is as follows:

“I therefore find that the decision as to who gets on the political party list rests entirely on the political party and its members, and it is not a function of the IEBC. I therefore vindicate the 1st and 2nd Respondents from any perceived act or

omission that could have caused the Petitioner herein to lose out on the nominations to the Laikipia County Assembly. I find that the Petitioner has not proved his case against the 1st and 2nd Respondents and I hereby dismiss it.”

30. As already discussed and seen, this position of the law as seen by the election court, has the backing of several authorities, including the case of ***National Gender and Equality Commission – VS- IEBC & Another [2013] eKLR; MOSES MWICIGI & 14 Others – Vs- IEBC & 5 OTHERS [2016] eKLR; and BEN NJOROGE & ANOTHER –VS – IEBC & 2 OTHERS [2013] eKLR.*** There is thus no error of law in the finding of the election court. The party list should have been challenged much earlier under the party’s own internal dispute resolution machinery, or before the ***Political Parties Disputes Tribunal.*** The 1st and 2nd Respondents had no jurisdiction to interfere with the party list. There is no merit in Ground 10 of appeal, and the same is dismissed.

GROUND 12

31. The complaint in this ground is that the election court erred in law in finding that the 4th to 8th Respondents were validly nominated to sit in *Laikipia County Assembly*. The election court found as a matter of fact that the 4th to 7th Respondents were not Kikuyu and represented various marginalised minorities. The Appellant had asserted that they were Kikuyu. That was the main reason for his challenge against their nomination. He was unable to prove that allegation of fact; on the contrary, the court found that they in fact were not Kikuyu. Having so found there was nothing else by which to assail their nomination.

32. As for the 8th Respondent, it was common ground that her nomination was to top-up on gender equity. The Appellant’s challenge to her nomination was that she was not a resident of Laikipia County and was a registered voter in *Nakuru County*. The election court found as unproven the Appellant’s allegation that the 8th Respondent was not a resident of *Laikipia County* and found as uncontroverted her testimony that she was married and resident in *Laikipia County*.

33. As for her being a registered voter in *Nakuru County*, the election court found correctly, that there was no legal impediment in that fact alone to her nomination to sit in the assembly of a county where she was not a registered voter.

34. There is thus no merit in Ground 12 of appeal and the same is dismissed.

GROUND 14

35. The complaint here is that the election court erred in law in its interpretation of **section 109** of the ***Evidence Act, Cap 80*** as regards the 8th Respondent. Section 109 aforesaid provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

36. In this case the Appellant alleged that the 8th Respondent was not a resident of *Laikipia County*. He wished the court to believe that the 8th Respondent was not a resident of *Laikipia County*. It was his burden to so prove to the required standard. The election court found that he failed to discharge that burden. I do not find any error in the election court’s interpretation of section 109 of the Evidence Act. There is no merit in this ground of appeal, and the same is dismissed.

GROUND 15

37. This ground complains that the election court erred in law in condemning the Appellant, a person with disability, to pay allegedly exorbitant costs. To begin with, there was no regulation, rule or law placed before the election court, or indeed before this court, exempting persons with disability from paying costs in election petition proceedings, particularly those that they institute. As to the allegation that the costs awarded were exorbitant, no material has been placed before this court to so demonstrate. In any event, such costs would, under **Rule 31(1)** of the ***Rules***, be subject to taxation, as ordered by the election court, in the same manner as costs are taxed in civil proceedings in accordance with the ***Advocates Act***. That Act houses the ***Advocates (Remuneration) Order***, in which there is established a procedure for challenging taxed costs.

38. I find no merit in Ground 15 of appeal, and the same is dismissed.

GROUND 16

39. The last ground of appeal is that the election court erred in law in “making judgment against the weight of evidence”. This is a general rhetorical ground that does not add value to the appeal in any way. I need say no more.

40. In conclusion, I find no merit in this appeal. It is hereby dismissed with costs to the Respondents. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 4th DAY OF OCTOBER 2018

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 4TH DAY OF OCTOBER 2018