

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

ELECTION PETITION APPEAL NO.4 OF 2017

ENOSH OTIENO OBURE.....APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT

JULIUS ODHIAMBO GAYA.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

OFFICE OF THE REGISTRAR OF POLITICAL PARTIES...4TH RESPONDENT

JUDGMENT

The Appellant was aggrieved by the decision of the 1st Respondent exercising its jurisdiction under **Article 88(4)(e)** of the **Constitution** when it dismissed his complaint challenging the membership of the 1st Respondent as a member of Orange Democratic Movement (ODM) political party. It was apparent that the Appellant was relying on a document he claims he obtained from the 4th Respondent which is to the effect that the 2nd Respondent is not a member of the Orange Democratic Movement political party but rather a member of the People's Democratic Party. The 2nd Respondent disputes the allegation that he is not a member of Orange Democratic Movement (ODM). He has provided the 1st Respondent with his life membership certificate of the party. He also told the 1st Respondent that prior to offering his candidature as a nominee for the Central Karachuonyo Ward of Homa Bay County Assembly seat, Orange Democratic Movement (ODM) vetted him and was satisfied of his membership and indeed allowed him to participate in the nomination exercise that resulted in his (2nd Respondent) being declared a winner. Relying on this submission, the 1st Respondent dismissed the Appellant's claim thus provoking this appeal.

The issue for determination by this court is whether the Appellant established to the required standard of proof on a preponderance of facts that indeed the Appellant is a member of People's Democratic Party (PDP) and is masquerading as a member of the Orange Democratic Movement (ODM) political party. In the considered opinion of this court, after re-evaluating the facts presented by the 2nd Respondent, this court is satisfied that the 2nd Respondent, on preponderance of facts, satisfied the 1st Respondent and indeed, this court, that he is a *bona fide* member of Orange Democratic Movement (ODM) political party. Where there is conflicting evidence, the court must resolve the case on the basis of which evidence is to be believed or which evidence is credible.

It was clear to this court that the 2nd Respondent presented cogent evident which proved his membership of the Orange Democratic Movement (ODM) political party. The confusion caused by the two (2) letters written by the Registrar of Political Parties does not in any way distract this co urt from reaching the finding, similar to that reached by the 1st Respondent, that the 2nd Respondent indeed established that he is a member of Orange Democratic Movement (ODM) Political party and was legitimately nominated by

the party to offer his candidature for the said Central Karachuonyo Member of County Assembly seat of Homa Bay County.

The appeal lacks merit and is hereby dismissed but with no orders as to costs.

DATED AT NAIROBI THIS 14TH DAY OF JUNE 2017

L. KIMARU

JUDGE