Aluochier v Senate & 2 others (Civil Appeal E104 of 2023) [2025] KECA 522 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 522 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E104 OF 2023

MSA MAKHANDIA, DK MUSINGA & P NYAMWEYA, JJA

MARCH 21, 2025

BETWEEN

ISAAC ALUOCH POLO ALUOCHIER .... APPELLANT

AND

THE SENATE .... 1ST RESPONDENT

JEREMIAH M. NYEGENYE, CLERK OF THE SENATE .... 2ND RESPONDENT

AMASON JEFFAH KINGI .... 3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (M. Thande, J.) made on 30th January 2023 in Nairobi Constitutional Petition No. E489 of 2022)

JUDGMENT

1. This appeal arises from the election of the Speaker of Senate held on 8th September 2022, and the judgment made thereon on 30th January 2023 by the High Court of Kenya at Nairobi (M. Thande, J.) in Nairobi Constitutional Petition No. E489 of 2022. The High Court in this regard dismissed a petition filed by Isaac Aluoch Polo Aluochier, the appellant herein, that had sought to nullify the said election. The facts giving rise to the petition were as follows: Following a notification in Gazette Notice No. 10528 on 5th September 2022 of the first sitting of the Senate on 8th September 2022 at 9.00 am after the general elections, Jeremiah M. Nyegenye, the Clerk of the Senate, who is the 2nd respondent herein, subsequently published another notice in the Kenya Gazette, being Gazette Notice No.10531, notifying of the activities that were to take place at the first sitting of the Senate on 8th September 2022, including the election of the Speaker of the Senate. The 2nd respondent in the said Gazette Notice also invited interested parties to collect nomination papers for the said election, which were to be returned the duly completed, by 2.30 pm on 7th September 2022.

2. The appellant duly collected the nomination papers from the office of the 2nd respondent on 5th September 2022, and returned the duly completed nomination papers on 7th September 2022. Later on, the same date, the 2nd respondent announced the persons who had been duly nominated as candidates for the election of Speaker of the Senate scheduled to take place on the following day on the Parliament of Kenya's Facebook page, and the appellant and Amason Jeffah Kingi, the 3rd respondent herein, were among the 7 candidates declared to have been duly nominated to contest for the said election. The appellant contended that among the documents he submitted when he returned his nominations papers were those that demonstrated his eligibility for the election as a member of Parliament as provided in Article 99 (1) of *the Constitution*, and a letter addressed to the 2nd respondent dated 6th September, 2022, in which he provided a checklist of the key legal requirements under the *Elections Act* and *the Constitution* for nomination of Speaker of the Senate.

3. On 8th September, 2022 the 3rd respondent was declared elected as Speaker of the Senate, and was sworn in shortly thereafter. Subsequently on 28th September 2022, the appellant wrote to the 2nd respondent requesting for information on the nominations process, with a view to instituting court proceedings. However, as at 28th October 2022, 30 days after the request, the appellant had not yet received the information as was required by section 6(3) of the *Fair Administrative Action Act*, 2015. According to the appellant, none of the other candidates belonging to political parties demonstrated evidence of having been nominated by the said political parties, pursuant to Article 99(1)(c)(i), and so nominated by 11th May 2022, pursuant to section 13(1) of the *Elections Act*, or, if not belonging to a political party, demonstrated having complied with Articles 85 and 99(1)(c)(ii) as having the support of at least 2,000 registered voters from a county.

4. The appellant's case therefore, was that the nomination decisions taken by the 2nd respondent were required to be lawful with respect to which persons to nominate for the election for Speaker of the Senate, and that under Articles 85 and 99(1) of *the Constitution* and section 13(1) of the *Elections Act*, it was only the appellant who was eligible for election to the office of Speaker of the Senate. Accordingly, that the 2nd respondent should have, in compliance with Article 106(1)(a) as read together with Senate Standing Order 11, forthwith declared the appellant as Speaker-elect, without any ballot or vote being required, and the 1st and 2nd respondents thereby denied the appellant his constitutional right to hold office as Speaker of the Senate.

5. In addition, that the nomination results were released by the 1st and 2nd respondents at around 6pm on 7th September, 2022, and there wasn't sufficient time to both lodge an electoral dispute with the Independent Electoral and Boundaries Commission (IEBC), and have the same determined. Furthermore, under Article 88(4)(e) of *the Constitution* the IEBC did not have jurisdiction to resolve the electoral dispute following the declaration of the election results on 8th September 2022. According to the appellant, the presentation of such a pre-election dispute to the High Court for resolution was not subject to the restrictions of an election court, and the High Court as a judicial review court in the exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution*, possessed jurisdiction for the resolution of the dispute.

6. The appellant accordingly sought the following relief in the High Court:

    a. The decision of the 2nd Respondent, on behalf of the 1st Respondent, communicated on the Parliament of Kenya Facebook page on 7th September, 2022, that the following seven persons were duly nominated as candidates for the contest of Speaker of the Senate, be quashed, with the said candidates being: 1. Aluochier Isaac Aluoch Polo, 2. Musyoka Stephen Kalonzo, 3. George Bush, 4. Kingi Amason Jeffah, 5. Kinyua Beatrice Kathomi, 6. Karuri Frederick Muchiri, and 7. Kuria George Njoroge.

b. The only duly nominated candidate for the election of Speaker of the Senate, being the only one fully compliant with all legal requirements for election to the said office, was the Petitioner – Isaac Aluoch Polo Aluochier.

c. Pursuant to Senate Standing Order 11, the Petitioner, Isaac Aluoch Polo Aluochier, being the only duly nominated person, was the Speaker-elect upon the expiry of the nomination period at 2:30pm on 7th September, 2022.

d. The purported election of the 3rd Respondent, Amason Jeffah Kingi, is hereby quashed, as he was not lawfully nominated as a candidate for the election of Speaker of the Senate.

e. The Petitioner, Isaac Aluoch Polo Aluochier, be sworn in as soon as practically possible as the Speaker of the Senate, being the Speaker- elect following the expiry of the nominations at 2:30pm on 7th September, 2022.

f. Monetary compensation be paid to the Petitioner, equivalent to the remuneration he would have earned in office as Speaker of the Senate, commencing the first sitting of the Senate on 8th September, 2022, payable by or on behalf of the 1st Respondent.

g. The 2nd Respondent to repay the public all public funds losses on account of the unlawful installation into office of the 3rd Respondent as Speaker of the Senate, including but not limited to any remuneration paid to the 3rd Respondent.

h. Costs be paid to the Petitioner, as against the 1st and 2nd Respondents.

7. In response, the 1st and 2nd respondents filed a Notice of Preliminary Objection dated 23rd November 2022 on the grounds that the High Court lacked jurisdiction to determine the petition, as it was an electoral dispute challenging the declaration of the 3rd respondent as the Speaker of the Senate, cunningly drafted as a dispute on alleged violation and infringement of the Bill of Rights; the appellant had not petitioned Senate in respect to the election of the office of the Speaker before filing the petition as required by Article 119 of *the Constitution*; and that in questioning the proceedings of the Senate in respect to the elections of a Speaker of the Senate, the petition undermined and contravened the doctrine of separation of power of Parliament as regards the internal proceedings regulated by the Standing Orders of the House.

8. The 1st and 2 respondents additionally filed a replying affidavit sworn by the 2nd respondent on 23rd November 2022, in which they averred that that the election of the Speaker of the Senate was conducted in strict conformity with the provisions of *the Constitution*, the Senate Standing Orders and all applicable laws. After citing the relevant provisions of the applicable laws and reiterating the process leading to the said election, the 1st and 2nd respondents stated that the names of the candidates who collected the nomination papers were recorded in a register indicating the date and time of collection; upon the return by candidates of the duly completed nomination papers , the names of the said candidates were recorded in a register showing the date and time when each candidates' nomination papers were received; and that the 2nd respondent verified all the nomination papers to confirm the candidates' eligibility pursuant to Senate's Standing Order 5, namely that the nomination papers had the names and two signatures of Senators-elect who supported the candidate, and a declaration that the candidate was qualified to be elected as a Member of Parliament under Article 99 of *the Constitution* and was willing to serve as Speaker of the Senate.

9. Furthermore, that pursuant to Standing Order 5 (5), upon the close of the nomination period, and by a press release notice dated 7th September 2022, they published the list of persons who collected nomination papers for the election to the office of Speaker and Deputy Speaker, the list of persons who

had not returned their nomination papers, and the list of the persons who had been duly nominated. Additionally, a total of 7 candidates were duly nominated and one withdrew his candidature for the position of Speaker of the Senate on 8th September 2022. The 1st and 2nd respondents stated that 41 people collected nomination papers, 13 returned the duly completed nomination papers, including the appellant and 3rd respondent, and the 2nd respondent thereupon prepared ballot papers showing the names of all candidates validly nominated. Additionally, that after the publication of the qualified candidates, the Senators voted for their preferred Speaker on 8th September 2022 during the first sitting of the Senate, and the results were that the Aluochier Isaac Aluoch Polo, George Bush, Karuri Fredrick Muchiri, Kunyua Beatrice Kathomi and Kuria George Njoroge got 0 votes, while Kingi Amason Jeffah got 46 votes. The 3rd respondent was thereafter declared the duly elected Speaker of the Senate.

10. It was the 2nd respondent's assertion that the appellant and other candidates were facilitated to access the parliament building for the purpose of campaigning, and since the appellant did not garner any votes, the 1st and 2nd respondents did not violate his political rights. They argued that the appellant having participated in the ballot, ought to accept the will of the members of the Senate who exercised their rights accordingly. Therefore, while the petition was drafted as a claim of violation of the appellant's rights and fundamental freedoms, it was an electoral dispute in which the appellant was aggrieved by the nomination, election and subsequent declaration of the 3rd respondent as Speaker of the Senate. It was their claim that the appellant's claim regarding eligibility were mere allegations as he had not furnished any evidence.

11. The 1st and 2nd respondents further stated that the election of a Speaker was an election sui generis, being an ex officio member of Parliament, and is governed by an internal process of Parliament under the Standing Orders. In addition, that the doctrine of separation of powers demands that the Court does not interfere with such internal arrangements of Parliament, and the actions done by the 2nd respondent in his capacity as the returning officer for the election of the Speaker of the Senate fell within the category of acts covered by section 12 (3) of the Parliamentary Powers & Privileges Act, 2017. The High Court accordingly lacked jurisdiction to entertain the petition.

12. On the request for information, it was averred that on 28th September 2022, the appellant wrote a letter to the 2nd respondent seeking, among others, the register of all the persons who returned nomination papers irrespective of whether their names were included in the ballot papers, and that the register was furnished on 3rd October 2022, but without the copies of all the nomination papers. Further, that the 2nd respondent explained to the appellant that to avail the copies would violate provisions of Article 31 of *the Constitution* on the right to privacy and section 6 of the Access of Information Act, 2018 that provides for limitations on access to information.

    Lastly, that the appellant ought to have first lodged his complaint to the Commission of Administrative Justice in respect to the documentation requested in his letter dated 28th October 2022 under section 22 of the *Access to Information Act*, No 31.

13. The 3rd respondent's response to the petition was in a replying affidavit he swore on 23rd November 2022 in opposition, in which he reiterated the averments made by the 1st and 2nd respondents.

14. After considering the pleadings and the submissions by the parties, the High Court (M. Thande, J.) delivered a judgment on 30th January 2023, wherein it was held that by dint of Article 165(3) of *the Constitution*, the High Court had the requisite jurisdiction to entertain the petition since it raised a question of law as to whether the election of the Speaker of the Senate was done in contravention of *the Constitution*, and the remedy available under Article 119 of *the Constitution* did not oust the authority of the Court to determine the constitutionality of any act done by the Senate. On whether the petition

violated the doctrine of separation of powers, the learned Judge held that while the interpretation of [the Constitution] calls for a delicate balance in the respective mandates of the different arms of government, any unconstitutional exercise by the Senate of its mandate could not be shielded from judicial scrutiny on account of the doctrine of separation of powers. The Judge accordingly found that the respondents' preliminary objection was without merit.

15. On the merits of the petition, while noting that Article 106 of *the Constitution* and Standing Order 5(3) of Senate's Standing Orders were unequivocal that the Speaker of Senate is elected from among persons who are qualified to be elected as members of Parliament, and that Article 99 (1)(c) of *the Constitution* was therefore applicable to the election of Speaker of the Senate, the learned Judge found that the appellant had not demonstrated that his rights under Articles 38 and 47 of *the Constitution* have been violated. According to the learned Judge, having been duly nominated and allowed to participate in the election, the appellant exercised his rights under Article 38 and his claim that his rights under Article 38(3)(c) were violated were therefore unfounded. In the premises, the Court found that his right to hold office was not adversely affected and the provisions of Article 47(1) and (2) of *the Constitution* are inapplicable. Additionally, that it was not enough for the appellant to argue that by submitting that Article 99(l)(c) was inapplicable to the position of Speaker, the respondents implicitly admitted that the 2nd respondent did not ascertain the eligibility of the candidates for the election. The learned Judge found that the appellant was required to place cogent proof before the Court to support his allegations, and was also required to support, with evidence, his claim that only he met the qualifications for election to the office of Speaker of the Senate. Therefore, having found that the appellant had failed to establish his claim, the learned Judge declined to grant the orders sought in the petition and dismissed it with costs.

16. The appellant was aggrieved by the decision of the High Court, and filed a Memorandum of Appeal in this Court dated 26th February 2023, wherein he raised thirteen (13) grounds of appeal that challenge the High Court's findings on the legality of the nomination and election of the 3rd respondent as Speaker of Senate; the contravention of the appellant's rights during the process of nomination; and the reliefs that were merited.

17. We heard the appeal on this Court's virtual platform on 13th May 2024. The appellant, Mr. Isaac Aluochier, appeared in person, while learned counsel Ms. Thanji, appeared for the 1st and 2nd respondents, and learned counsel Mr. Mwaura, holding brief for Mr. Wambulwa, appeared for the 3rd respondent. The parties placed reliance on, and highlighted their respective submissions dated 28th February 2023, 6th July 2023 and 12th July 2023.

18. In commencing the determination of this appeal, we are mindful that the duty of this Court as a first appeal court, was reiterated and set out in the decision of Selle and Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123, as to reconsider the evidence, evaluate it, and draw conclusions of facts and law. We will only depart from the findings by the trial court if they were not based on evidence on record; where the court is shown to have acted on the wrong principles of law as was held in Jabane vs Olenja (1986) KLR 661, or where its discretion was exercised injudiciously as was held in Mbogo & Another vs Shah (1968) EA 93.

19. This appeal raises one primary issue, namely, the law on, and process of resolution of a contest on qualifications of persons nominated to stand for election as Speaker of Senate. Depending on the outcome of this issue, we will then determine the secondary issues as regards whether the appellant's rights were violated in the circumstances of this appeal, and if so, what remedies he is entitled to.

20. On the first issue of the resolution of a contest on the qualifications of the nominees for Speaker of Senate, the appellant submitted that he satisfied the legal requirements in section 107 (1) of the

Evidence Act by stating that the information was contained in the returned nomination papers in the custody of the 2nd respondent, and from a reading of section 112 of the *Evidence Act* together with sections 108 and 109 of the Act, it was evident that the burden of proving or disapproving the information contained in the returned nomination papers lay on the 2nd respondent, who had custody of the same, Therefore that since the 2nd respondent does not disapprove the appellant's assertions, then those assertions prevailed. In addition, that the 2nd respondent did not require candidates for the office of the Speaker of the Senate to demonstrate compliance with Article 99 (1)(c) of *the Constitution*, and that pursuant to section 119 of *Evidence Act* the Court should presume that unless proven otherwise, no candidate provided additional optional information demonstrating compliance with Article 99 (1)(c) as the said information was not sought by the 2nd respondent as a Returning Officer.

21. It was the appellant's claim that while he provided additional information demonstrating compliance with Article 99 (1)(c), the 3rd respondent did not, therefore, it was his conclusion beyond reasonable doubt, and this Court ought to presume that that the 3rd respondent and the other candidates did not comply with the said Article, since the 2nd respondent failed to avail to the Court any evidence of the compliance in their nomination papers. Accordingly, that the High Court was grossly in error in failing to invalidate the nomination and election of the 3rd respondent.

22. The appellant placed reliance on the decision of the Supreme Court in the case of Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR that once a petitioner discharges the initial burden of proof on a petitioner, the evidential burden of proof shifts to the respondent. He submitted that he had demonstrated, and the High Court agreed with him, that Article 99 (1)(c) of *the Constitution* was part of the eligibility requirement for candidates for the office of the Speaker of the Senate as provided in Article 106 (1)(a) as read together with the Senate Standing Orders; that the 2nd respondent, in official nomination papers, only required affidavit evidence from candidates acknowledging compliance with Article 99, but did not confirm such compliance; therefore, no candidate demonstrated in official nomination papers that he or she was compliant with the said Article. Thus, the appellant demonstrated that the 2nd respondent had not conducted the election in accordance with the said Article, and the appellant ought to have been declared as the Senate Speaker elect pursuant to Senate Standing Order 11, and should therefore be sworn into office as soon as practically possible and commence discharging his duties as Senate Speaker.

23. On the disclosure of the returned nomination papers, the appellant submitted that section 6 (4) and (6) (a) of the *Access to Information Act* provided the parameters for making disclosures in the public interest, and that the 2nd respondent had adequate legal protection in disclosing the same to the Court in the public interest under the Act, and had no reason to refuse to disclose the nomination papers, as affirmed in section 6 (4) of the Fair Administrative Action, 2011 and Article 10 (1) of *the Constitution*

24. The 1st and 2nd respondents' counsel on the other hand submitted that by stating that he is the only candidate who met the nomination requirements as contained in his nomination papers, the appellant did not discharge his burden of proof, as he did not produce any evidence to support his allegations. The burden of proof did not therefore shift to the 2nd respondent as no prima facie case was made by the appellant. As regards standard of proof, the election of a Speaker is sui generis, and the standard of proof was thus higher than a balance of probabilities, since the dispute herein was an election petition disguised as a constitutional petition. It is therefore not enough for the appellant to merely state that he was the only duly nominated candidate and then require the respondents to bear the evidentiary burden. As it stands, the assertions by the appellant are therefore mere allegations. Reliance was placed on the decisions by the Supreme Court of Kenya in Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others [supra] and in Odinga & another vs Independent Electoral

and Boundaries Commission & 2 others.- Aukot & another (Interested Parties).- Attorney General & another (Amicus Curiae)(2017)1 KESC 42 (KLR)

25. The 3rd respondent's counsel, while submitting that the nomination and election of Speaker of the Senate was conducted in accordance with the internal rules and arrangements of Parliament being the Standing Orders, and that there was no breach of *the Constitution*, asserted that the appellant had failed to prove his case with respect to the allegation that he was the only duly nominated candidate for the election to the office of Speaker. Further, that the appellant has also failed to demonstrate how his political rights under Articles 38 and 47 of *the Constitution* were violated.

26. Article 106 (1) (a) of *the Constitution* sets out the law and process of election of Speaker of Senate, namely, that the Speaker shall be elected by Senate members in accordance with the Standing Orders, from among persons who are qualified to be elected members of Parliament but are not such members. It is our view that Article 106 provides for two distinct requirements. The first is the process of election, which is to be conducted in accordance with the Senate's standing Orders. The relevant Standing Orders are Order 5 on the processes of nomination, and Order 6 which provides for the process of election of the Speaker. The second distinct requirement is the substantive one of qualifications of the candidates, which qualification are those required of members of Parliament as provided by Article 99 of *the Constitution*. Article 99 states that a person seeking to be elected as a member of Parliament shall meet the following qualifications:

  a. be registered as a voter;

  b. satisfy any educational, moral and ethical requirements prescribed by *the Constitution* or by an Act of Parliament; and

  c. is nominated by a political party, or is an independent candidate who is supported––

    i. in the case of election to the National Assembly, by at least one thousand registered voters in the constituency; or

    ii. in the case of election to the Senate, by at least two thousand registered voters in the county.

27. In this regard, it is also notable that Standing Order 5(4) provides that "the Clerk shall maintain a register in which shall be shown the date and time when each candidate's nomination papers were received and shall ascertain that every such candidate for election to the office of Speaker is qualified to be elected as such under Article 106 of *the Constitution*". The ordinary and usual meaning of "ascertain" is to "find out for certain" (The Concise Oxford English Dictionary). A constitutional and legal duty is therefore placed upon the 2nd respondent to be completely convinced as regards the qualifications set out in Article 99 upon receiving nomination papers from candidates.

28. The 2nd respondent in this regard described the processes that were followed, which were largely in accordance with the Standing Order 5 and 6, namely the notification of vacancy in the office of the Speaker of Senate and invitation for nominations of candidates; the receipt of nomination papers of candidates which were accompanied by the names and signatures of two Senators-elect who supported the candidate and a declaration by them that the candidate is qualified to be elected as Member of Parliament under Article 99 of *the Constitution*; the maintenance of a register showing the date and time when each candidate's nomination papers were received; upon the close of the nomination period the publication to all Senators of a list showing all qualified candidates and copies of their curricula

vitae; then prepare ballot papers showing the names of all candidates validly nominated; and the holding of the elections. The 2nd Respondent in addition deponed as follows in his replying affidavit:

> " 17. That before the publication of the qualified candidates, I vetted and established that the seven (7) candidates had met the requirements and qualifications set out in Article 106 of *the Constitution*, Standing Order 5 of the Senate Standing Orders and the applicable laws."

29. The appellant's grievance is in relation to the second substantive aspect of the qualifications of the persons nominated as candidates. His case in a nutshell is that he discharged his onus and burden of proving that the said candidates did not meet the qualifications set out in Article 106 and 109, by making reference to the information in the returned nomination papers which were in the custody of the 2nd respondent. Therefore, that the 2nd respondent had the duty to disprove the statement, failing which, the Court should presume that the candidates were not qualified. The appellant urged that while the cleared candidates complied with the official nomination paper requirements, including affirming by affidavit compliance with Article 99, it is only the appellant who substantively complied with Article 99 (1) (c) and met the Constitutional requirements in Article 106 (1)(a) and the Senate Standing Order 5.

30. Therefore, the fact in issue was whether or not the candidates nominated for the election of Speaker of Senate held on 8th September 2022 met the qualifications set out in Article 106 (1) (a) of *the Constitution*. The *Evidence Act* defines a fact in issue as a fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. Section 107 of the *Evidence Act* places the onus to prove the existence of any fact in issue on "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts". Section 109 of the Act in addition 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." The onus was therefore on the appellant, as the party claiming that the other candidates did not meet the qualifications set out in Article 99, to prove the existence of this fact, and demonstrate through credible evidence that the nominated candidates did not possess the qualifications.

31. The appellant did not present any witness testimonies or documents to support his allegation, and instead invoked the provisions of Section 112 of the *Evidence Act* to attribute the evidential burden to the 2nd respondent. The said section provides that when any fact is especially within the knowledge of any party to civil proceedings, the burden of proving or disproving the fact is upon that party.

32. The operation of section 112 was explained by the Supreme Court of Kenya in in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Petition No. 2B of 2014 [2014] eKLR as follows:

> "189. Section 112 of the *Evidence Act*, on which the learned Judges of Appeal placed reliance, is an exception to the general rule in Section 107 of the same Act. Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof. The Supreme Court of India, in Shanbhu Nath Mehra v. State of Ajmer AIR 1956 SC 404, considered the import of Sections 106 and 101 of the Indian *Evidence Act* (which are in pari materia with Sections 112 and 107 of our *Evidence Act*), as follows:
>
> > 'Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof. 'Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must

prove that those facts exist.'...This lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.'

The Court further observed:...the word 'especially' Para indicates stress. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

33. The Supreme Court also relied on the decision of the Supreme Court of Singapore in Surender Singh vs Li Man Kay and Others, SGHC168, (2009) and Sarkar's Law of Evidence :Vol 2 at page 1672 to find that section 112 of the *Evidence Act* applies only to those matters which are supposed to be within the knowledge of a defendant, and cannot apply when the fact or facts are such that they are capable of being known also by a person other than the defendant, and which the defendant could prove without difficulty or inconvenience.

34. Can it then be said that the evidence of qualifications of the nominated candidates was a fact 'especially' within the knowledge of the 2nd respondent in the context of the provisions of Section 112 of the *Evidence Act*? It is our view that it was not, for the simple reason that the principal custodians and repositories of this information were the nominated candidates themselves, whom, being affected persons, the appellant ought to have joined as parties in his petition. The appellant could have and ought to have made an application for the production of evidence of their qualifications within the said proceedings, to aid his cause in discharging his burden of proof as well as in the public interest. The procedure available under the *Access to Information Act* was therefore not only inapplicable in this respect, nor could it be used for the purposes intended by the appellant.

35. The appellant would also want us to presume that the nominated candidates did not meet the said qualifications arising from the failure by the 2nd respondent to provide him with the said information. Under section 119 of the *Evidence Act*, a court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Courts are therefore permitted to make a legal inference that certain facts exist without proof in such circumstances.

36. It is notable that section 119 of the *Evidence Act* only permits presumption of facts arising from logical inferences from other sets of facts, unlike in presumptions of law such as the presumption of death provided for in section 118 of the Act, which compel a finding in favor of the presumed fact in the absence of contrary evidence. The implications on the burden of proof on the parties is that where a presumption applies, the party relying on it must first prove the set of facts on which it is hinged, before the opponent can come forward with rebutting evidence. In the present appeal, no such set of facts giving rise to a reasonable inference that the nominated candidates did not possess the required qualifications were laid out by the appellant, and all he did was to again transfer the burden of setting out these facts to the 2nd respondent.

37. In the circumstances, there was no evidence that supported the orders sought that the appellant was the only candidate who possessed the necessary qualifications and who was validly nominated for election as Speaker of the Senate, or that he should have been declared to have been elected Speaker without any ballot being required. The learned Judge of the High Court therefore did not err in finding that

the appellant did not establish his case, and that there was no violation of his right to hold political office under Article 38 or to fair administrative action under Article 47 of *the Constitution*. For the same reasons, the appellant was also not entitled to any of the other reliefs that he sought arising from the nomination and election of Speaker of Senate held between 5th and 8th November 2022.

38. We accordingly find that this appeal has no merit. The appeal is hereby dismissed with no order as to costs, as the issues raised therein were of public interest.

39. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025

D. K. MUSINGA (PRESIDENT)

....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

....

JUDGE OF APPEAL

P. NYAMWEYA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR