



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, GATEMBU & MURGOR, J.J.A)

ELECTION PETITION APPEAL NO. 10 OF 2018

BETWEEN

EMMANUEL CHANGAWA KOMBEAPPELLANT

AND

DICKSON KARANI YAA1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION2ND RESPONDENT

ABDIWAHID HUSSEIN RETURNING

OFFICER KILIFI NORTH CONSTITUENCY.....3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Njoki, J.) dated 25th July, 2018 in

H. C. Election Petition Appeal No. 4 of 2018)

JUDGMENT OF THE COURT

1. Following the 2017 General Elections, **Emmanuel Changawa Kombe** (the appellant), was declared by **Abdiwahid Hussein** (the 3rd respondent), the then returning officer for Kilifi North Constituency, as the duly elected Member of the County Assembly for Dabaso Ward in Kilifi County. **Dickson Karani Yaa** (the 1st respondent) who was one of the contestants for the said seat was not happy with that declaration.

2. As a result, he challenged the same in the Chief Magistrate's Court at Kilifi (Election Petition No. 2 of 2017) on a number of grounds and also sought scrutiny and re-count of all the votes cast for the elective post in question amongst other orders. However, the learned Chief Magistrate, Dr. Julie Oseko in a judgment dated 19th February, 2018 found that the identified irregularities did not affect the integrity of the outcome or results of the said election. In the end, she dismissed the 1st respondent's petition.

3. Unrelenting, the 1st respondent lodged an appeal against the said decision in the High Court being Election Petition No. 4 of 2019 which was allowed vide a judgment dated 25th July, 2018. The learned Judge (Njoki, J.) issued a declaration to the effect that the appellant was not validly declared as the duly elected Member of the Kilifi County Assembly. As such, she went on to direct for fresh elections to be held.

4. This time round, the appellant came before us challenging the High Court's judgment. Be that as it may, when the appeal came up for hearing our jurisdiction to entertain the same was questioned. According to Mr. Kinaro, learned counsel for the 1st respondent, we have no jurisdiction to entertain the appeal as far as it relates to the election of a Member of a County Assembly. He argued that our jurisdiction to hear appeals with respect to election petitions was circumscribed by **Section 85A** of the **Elections Act**. In point of fact, a decision of the High Court with respect to any challenge in an election for a Member of County Assembly was final. Making reference to this Court decision in ***Mohammed Ali Sheikh vs Abdiwahab Sheikh Osman Hathe & Others; Emmanuel Chagao Kombe (Interested Party) [2018] eKLR***, counsel submitted that a five Judge bench of this Court unanimously held as much.

5. On her part, Ms. Mwangi who appeared for the 2nd and 3rd respondents and also held brief for Mr. Angima who is on record for the appellant, contended that by virtue of **Article 164 (3)** of the **Constitution** this Court had the requisite jurisdiction to delve into the appeal herein. Besides, there were appeals with respect to the question of whether this Court has jurisdiction pending before the Supreme Court.

6. Having taken into consideration the arguments put forth on behalf of the parties, we are clear in our minds that the decision by the five Judge bench of this Court in the **Mohammed Ali Sheikh case** which found that we have no jurisdiction to entertain the appeal before us is binding. We are conscious of the fact that there are pending appeals before the Supreme Court on this issue but to the best of our knowledge the said Court has not issued any stay of the five judge bench decision or rendered itself otherwise. As it stands, the position is that we lack the jurisdiction to entertain the appeal.

7. Consequently, the only option available is to strike out the appeal for want of jurisdiction which we hereby do. The appellant shall pay the costs of the appeal to the 1st respondent.

Dated and delivered at Mombasa this 25th day of July, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR