**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MAKHANDIA & MURGOR, JJ,A)**

**CIVIL APPEAL NO. 238 OF 2017**

**BETWEEN**

**MOHAMMED ABDUBA DIDA.....APPELLANT**

**AND**

**THE DEBATE MEDIA LIMITED.....1ST RESPONDENT**

**THE MEDIA COUNCIL OF KENYA.....2ND RESPONDENT**

***(Appeal from the judgment and decree of the Constitutional and***

***Human Rights Division of the High Court Nairobi (Mativo, J.)***

***delivered 7th July 2017)***

**in**

**Petition No. 324 of 2017)**

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**JUDGMENT OF THE COURT**

The appellant***, Mohammed Abduba Dida, ( Dida)*** is dissatisfied with the decision of the Constitutional and Human Rights Division of the High Court, which concluded that Mr. Dida, a Presidential candidate in the 2017 General Elections had not been discriminated against by the respondents when they designated the 10th July 2017 and 24th July 2017 to hold two televised presidential debates but without him as a participant.

In a notice of motion dated 29th June, 2014 (erroneous date) and supported by an affidavit sworn by Dida of the same date, he sought conservatory orders against the respondents to restrain them from carrying on the presidential debates on the two dates pending the hearing and determination of the application on the grounds that Dida was a presidential candidate contesting under the Alliance for Real Change Party having been cleared as such by the Independent Electoral and Boundaries Commission (IEBC); that by holding the presidential debates on two different dates, the respondents were not laying a level playing field for all the presidential candidates; that in the interest of justice, all the presidential candidates should be afforded the same status as to outline their vision for the country on 10th July 2017 and 24th July 2017.

Mr. Dida deponed that, the respondents had unconstitutionally categorized the presidential candidates according to those who had garnered 5% of popular support countrywide and those with less than 5% popular vote countywide, and that it intended to conduct the presidential debate according to those categorizations; that the categorization of presidential candidates according to national opinion polls was prejudicial to his interests as a presidential aspirant as one section of presidential candidates would be elevated to the detriment of other candidates; that the Constitution of Kenya and other electoral laws did not categorise presidential candidates in accordance with national opinion polls and that all presidential candidates cleared by IEBC were equal before the law; that in any event it was the public that had the right to judge all the candidates based on their performance in outlining their individual party manifesto during the debates.

Simultaneously with the application, Dida filed a petition of the same date in which he contended that his Constitutional rights had been violated as on or about 23rd day of June, 2017, he received an invitation from the 1st respondent for him in his capacity as the presidential

candidate for the Alliance for Real Change Political Party to participate in a presidential debate briefing. The letter was accompanied by guidelines for the intended two presidential debates slated for the 10th July and 24th July, 2017 respectively. The attached guidelines provided *inter alia* that;

> ***"a) A candidate MUST be constitutionally eligible to run for the office of the president and a holder of the formal clearance from the IEBC.***
>
> ***b) MUST have attained at least 5% of the popular support countrywide in at least two national opinion polls conducted by reputable research firms.***
>
> ***c) Candidates with less than 5% popular support showing in opinion polls will take part in separate single pool debates to be conducted on the same dates."*** *(the guidelines)*

He asserted that his rights were violated because the guidelines relegated his status to that of a second class presidential candidate. He therefore prayed for;

> *a) "A declaration that all presidential candidates are equal with regard to articulating their manifestos at and during such public debates.*
>
> *b) An order that the debates scheduled for the 10th of July and 17th of July, 2017 respectively do not proceed unless all the presidential candidates are on the same podium.*
>
> *c) Costs of and any other order that this Honourable court deems fit and just to grant."*

In a replying affidavit sworn by ***Waruru Wachira***, a director of the 1st respondent and Chairman of its Steering Committee, it was deponed that the 1st respondent was incorporated as a private limited liability company to carrying on the business of *inter alia*, broadcasting and telecasting, programmes relating to discussions or debates on national issues or public affairs; that sometime in 2016, in preparation for the 8thAugust 2017 General Elections, the 1st respondent sought to organize debates between candidates for the office of President; that a team was formed to carry out background research work, which included a visit to the United States of America to gather information on international best practices in respect of the 2016 United States Presidential Debates, and to interact and engage with the officials from the American Commission on Presidential debates, an independent non – profit corporation that sponsors and produces those debates; that on 9th May, 2017, informed by the research, international best practice and consultations, the 1st respondent announced ahead of the, 8th August 2017 General Elections that it would conduct three debates in the course of the month of July, 2017 comprising two debates for the candidates for the position of President to be held on 10th and 24th July, 2017, and a third for the candidates for the position of Deputy President to be held on 17th July, 2017; that subsequently thereto, guidelines for the debates were published on 9th June, 2017.

It was further deponed that the 1st respondent's decision to develop a pre-established selection criteria was informed by organizational challenges involving multiple candidates on the podium at the same time, where the concern was that, with numerous candidates talking across the podium to each other it meant that any meaningful engagement and interrogation would be limited; that there was the real possibility of the debates turning into a farce and undermining the primary objective of enabling potential voters to assess the individual candidate's capabilities; and that for these reasons, it was considered necessary to hold two debates for the position of President, where the selection criteria for each debate was the candidate's likelihood of success during the General Elections.

In so doing, it was deponed, the 1st respondent had not determined which Presidential debate was superior, nor was it seeking to influence the public in any way; that the selection criteria was derived from available information, and there was nothing new or controversial about a selection of participants according to their likelihood of their success. For instance, it was stated, participation in the United States of America 2016 Presidential debates was only open to candidates who were; i) constitutionally eligible to hold the office of the President of the United States of America; ii) had achieved ballot access in a sufficient number of States to win a theoretical electoral majority in the general elections and iii) could demonstrate a level of support of at least 15% of national elections as determined by five selected national opinion polls.

The criteria, developed by the 1st respondent, it was deponed, was not only exacting, but also ensured that no candidate was excluded; that it was considered that at this stage of the country's development, a 15% national threshold would be onerous to meet, and that since the Constitutional requirement to petition for a referendum was one million voters, which translates to about 5% of the electorate, that 5% of the voting population should be the threshold to determine the debate in which a candidate would participate; that the application of an objective, fair pre-established criteria cannot constitute unfair treatment as alleged by the appellant or at all.

In concluding that the appellant had not proved his case to the required standard and that discrimination against him had not been established, the Constitution and Judicial Review Division of the High Court (Mativo, J), stated thus;

> ***"In my view, it was not based on grounds relating to personal characteristics of the individual of the petitioner or group. There is no sufficient evidence to show that it imposed or had the effect of imposing burdens, obligations, or disadvantages on the petitioner or group of persons. It was not alleged nor is there anything in the petition to show that the guidelines or the decision complained of, withholds or limits the petitioners' access to opportunities, benefits, and advantages available to him as a presidential candidate. In fact no material to this effect was presented to the court."***

Displeased with the court's decision, Dida appealed to this Court on grounds that the learned judge erred in holding that the guidelines did

not amount to unfair discrimination against some of the presidential candidates; in failing to appreciate the facts of the petition and the provisions of ***Article 27*** of ***the Constitution***; in holding that the burden of proving unfair discrimination was on the appellant; in wrongly relying on hearsay evidence; and in awarding costs notwithstanding that the petition raised serious constitutional concerns.

When the parties appeared before us ***Mr. P. Ongwae,*** learned counsel for the appellant submitted that, though the orders were overtaken by events, the discrimination meted out against the appellant could not be overlooked; that ***Article 27*** of ***the Constitution*** had been violated; that the declaration sought was that all presidential candidates were entitled to be treated equally, and that the petition raised serious constitutional concerns.

In response, ***Mr. Amoko,*** learned counsel for the 1st respondent stated that he would rely on written submissions which he had filed and which he highlighted before us. With regard to the non-appearance by the 2nd respondent, counsel stated the suit against it was withdrawn on 5th July, 2017.

Counsel submitted that the two debates had already taken place on 10th July 2017 and 24th July 2017, and that they were conducted in accordance with the guidelines; that the Presidential Elections had also taken place, so that there was nothing left for this Court to determine.

On whether the appellant was discriminated against, it was submitted that the petition was too general in nature; that the appellant did not show how the guidelines and rules unfairly discriminated against him. It was further submitted that the learned judge rightly concluded that a case of discrimination had not been made out, as the appellant had not demonstrated how the guidelines had differentiated between the candidates or that a differentiation, if any, was discriminatory; and that the appellant had failed to articulate the errors made by the learned judge in the judgment.

Regarding the burden of proof, counsel submitted that the onus was on the appellant to prove that the 1st respondent's actions were discriminatory, and that such actions violated his rights. Counsel cited ***Anarita Karimi Njeri vs R (1979) KLR 154*** and ***Githunguri Dairy Farmers Co-operative Famers Society Ltd vs Attorney General & 2 others [2016] eKLR*** to support the proposition that the burden of proof that a fundamental right has been breached rested upon the person who asserts it.

On the claim that the learned judge relied upon hearsay evidence, it was submitted that the appellant did not provide any evidence to support this assertion, and that the learned judge relied solely on the matters that were placed before him for consideration.

Regarding the 1st respondent's cross appeal, counsel faulted the learned judge for finding that the appellant had framed a constitutional petition that adequately disclosed a constitutional violation under ***Article 27*** of ***the Constitution***; and that the requirements of ***rule 10*** of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013*** had been complied with. It was submitted that, the petition did not specify the nature of the violation, but merely recited the rights of persons under ***Article 22*** of ***the Constitution***; that it was not shown how the pre-established criteria for selection of participants violated his rights; that it did not disclose any violation on grounds of race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture dress language or birth.

As this is a first appeal, the guidelines as set out in ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212*** are pertinent. They are that;

> ***"On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence."***

We have considered the pleadings, the submissions, the judgment and the relevant law and are of the view that the issues for consideration are;

*i) Whether the petition disclosed a constitutional violation under Article 27 of the Constitution;*

*ii) Whether the learned judge rightly concluded that the burden of proof lay with the appellant;*

*iii) Whether the appellant was discriminated against; and*

*iv) Whether the learned judge relied on hearsay evidence.*

Before we address the outlined issues, a preliminary question for our consideration, is whether the appellant's prayers for a declaration that all presidential candidates are equal during public debates, and an order stopping the debates of 10th July 2017 and 24th July 2017 unless all the presidential candidates appeared on the same podium, were rendered otiose, since the debates had already been held, and the Presidential Elections concluded.

Though it was conceded that the debates were concluded, Dida's grievance was that the guidelines that came into existence were discriminatory and contrary to the Constitution. Our view is that, irrespective of whether the debates had taken place, the guidelines having come into existence, and having subsequently been imputed by the appellant to have violated his rights, there remained a question whether this was in fact the case, a matter we think ought to be determined, not only for the appellant's sake, but also for the sake of posterity.

That said, we will begin with the issue raised in the 1st respondent's cross appeal on whether the learned judge was right in finding that the appellant's petition disclosed a claim involving the violation of the fundamental right to fair treatment.

***Rule 10*** of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013*** commonly referred to as the ***"Mutunga Rules"*** sets out the particulars to be disclosed in a constitutional petition. Of relevance to the circumstances of this case are, the constitutional provisions violated, and the nature of the injury caused or likely to be caused to the petitioner or to the person in whose name the petition has been instituted.

> ***Article 22 (1)*** of the ***Constitution*** provides;
>
> ***"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."***

The proposition in ***Anarita Karimi Njeru (supra)***, requires that where a person alleges the contravention or a threat of a contravention of a constitutional right, he or she must set out the specific right infringed and the particulars of such infringement or threat.

In ***Trusted Society of Human Rights Alliance vs Attorney General & 2 Others [2012] eKLR***, the court stated;

> ***"… the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged."***

The court went on to state that,

> ***"The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."***

In the petition, Mr. Dida referred to various constitutional provisions including ***Articles 22 (1), 27 (1), 27 (4), 27 (5), 33 (1), 35 (1) (b)*** and ***38 1 (b) (c)***. While it is true that the petition did not address or point to any specific acts of violations that could be attributed to the 1st respondent in respect of the majority of the constitutional provisions referred to, Dida has claimed that his rights were *"…violated specifically for being subjected to guidelines that essentially treat him as a second class presidential candidate"*. In effect, Dida's complaint was that the 1st respondent's guidelines were discriminatory and violated his rights to fair or unequal treatment as contemplated under ***Article 27*** of ***the Constitution.***

***Articles 27 (1)*** and ***(2)*** deal with equal treatment and discrimination and state that;

> ***" (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> ***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms".***

***Articles 27 (4)*** and ***(5)*** stipulate that;

> ***"(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth".***
>
> ***"(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified in clause (4)".***

In analyzing the above provisions, which constitute part of the Bill of Rights, we are required to apply the general principles of constitutional interpretation to ascertain whether they are applicable to the circumstances of the case. Such analysis requires a broad and generous approach of the text and context of the provision, combined with a liberal and purposive approach. As aptly and succinctly explained by the Constitutional Court of Uganda in ***Kigula & others vs Attorney General [2005] 1 E.A. 132*** **at** ***page 133*** in the following terms:

> ***"The principles applicable in the interpretation of the Constitution include the widest construction possible in its context, should be given according to the ordinary meaning of the words used, the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other, all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument, the Constitution should be given a generous and purposive interpretation to realize the full benefit of the guaranteed rights, the Constitution of Uganda enjoins Courts in the country to exercise judicial power in conformity with law and with the values, norms and aspirations of the people."***

More particularly, ***Article 27 (4)*** as read with ***sub article (5)*** prohibits discrimination against a person by the State or another person or persons *"…on any ground…"*, including the grounds classified as race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. A broad and liberal interpretation of the provisions would mean that not only is discrimination on the grounds classified or specified prohibited, so too are any other grounds not specifically

referred to by the provisions. So that discriminatory conduct would not merely be limited to the classifications set out, but could also include, any other ground, not specified by ***Article 27 (4)*** and ***(5).***

When the nature of the allegations is considered within the context of this interpretation, it becomes apparent that, the alleged discrimination was on grounds that the guidelines unfairly discriminated against him, so that it would fall into the category of unclassified grounds. In which case, Dida would be entitled to a determination of whether the guidelines unfairly discriminated against him, and we find that, the learned judge was right in concluding that the petition was properly before him.

Having set out the right alleged to have been contravened, and the particulars of such infringement or threat, we turn to consider the question of the burden of proof.

In the Zimbabwean case of ***Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General (1993) 2 LRC (Const) 279***, when considering where the burden of proof rested in disputes concerning fundamental rights, Gubbay, CJ stated thus;

> ***"I consider that the burden of proof that a fundamental right, of whatever nature has been breached is on he who asserts it…[it] is essentially a matter of fact and some evidence would have to be adduced to support the contention. The Respondent is not obliged to do anything until a case is made out which requires to be met".***

This is to say that, ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not fall within the grounds classified by ***Article 27 (4)***, more so the reason for the petitioner have to prove that his or her rights have been infringed in respect of the grounds alleged. In other words, the burden of proof was on Dida to show that, on a balance of probabilities, the guidelines were in violation of the prohibition set out in ***Article 27*** which burden did not shift until a case was made out. And this is why the learned judge stated, and we agree, that, *"…where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair."*

With the above in mind, we turn to consider whether the guidelines discriminated against Dida.

***Black's Law Dictionary, Ninth Edition*** defines ***"discrimination"*** as,

> ***"Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured."***

And direct and indirect discrimination was distinguished in the case of ***Nyarangi & Others vs Attorney General [2008] KLR 688*** when it was stated that;

> ***"Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in a job application was found "to disqualify negros at a substantially higher rate than white applicants".***

With regard to differential or unequal treatment it was observed in the case of ***Kedar Nath vs State of W.B. (1953) SCR 835 (843)*** that;

> ***"Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."***

Similarly, in the case of ***Federation of Women Lawyers Fida Kenya & 5 Others vs Attorney General & another 2011 eKLR*** it was stated thus;

> ***"In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".***

So as to ascertain whether discrimination or unfair discrimination was founded, it is instructive that in disparate jurisdictions varying stages of enquiry have been adopted. For instance, in the Canadian Supreme Court case of ***Andrews vs Law Society of British Columbia, [1989] 1 S C R 143*** McIntyre J. based his analysis of whether discrimination under section 15 of the Canadian Charter of Rights and Freedom, Part 1 of the Constitution Act, on infringement of equal rights, was made out by seeking to answer three questions. Firstly, whether there had been denial of one of the four basic equality rights; secondly whether there was discrimination; and thirdly whether the discrimination was based

on enumerated or analogous grounds. The case of ***Law vs A.G Canada [1999] 1 S C R 452*** which followed ***Andrews (supra)*** also adopted a three step enquiry to determine whether a violation of rights was established, as follows;

> ***(a) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?***
>
> ***(b) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?***
>
> ***(c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration?***

The Zimbabwean case of ***Harksen vs Lane NO & Others (1997) ZACC 12*** the Constitutional Court also tabulated a three stage enquiry as to whether there was a violation of the constitutional prohibitions which are;

> ***"(a) Does the provision differentiate between people or categories of people? If so, does the provision bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.***
>
> ***(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:-***
>
> ***(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect then adversely in a comparably serious manner.***
>
> ***(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it is found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation…***
>
> ***(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (…of the …Constitution)"***

A similar approach was adopted in the case of ***Centre for Rights Education and Awareness (CREAW) & 7 others vs Attorney General [2011] eKLR*** which cited ***Jacques Charl Hoffmann vs South African Airways, CCT 17 of 2000*** and set out the criteria for determining whether the provision or conduct resulted in unequal treatment when it stated that;

> ***"This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation bears a rational connection to a legitimate government purpose. If the differentiation bears no such connection, there is a violation of Section 9 (1). If it bears a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9 (3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application***."

From the above cited authorities two fundamentals become apparent, one is that provisions or rules that create differences amongst affected persons do not of necessity give rise to the unequal or discriminatory treatment prohibited by ***Article 27,*** unless it can be demonstrated that such selection or differentiation is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose. And the second is that, whether or not there has been a violation of the Constitution should be determined by applying a three stage enquiry to the circumstances of each case. The three stage enquiries are; firstly, whether the differentiation created by the provision or rules has a rational or logical connection to a legitimate purpose; if so, a violation of ***Article 27*** will not have been established. If not, a second enquiry would be undertaken to determine whether the differentiation gives rise to unfair discrimination. If it does not, there is no violation of the constitution. But if the selection or differentiation gives rise to unfair discrimination, then the third enquiry would be necessary to determine whether it can be justified within the limitation provisions of the constitution.

The court in ***Harksen vs Lane NO & Other (supra)*** went further to observe that where the allegation is on specified grounds, then the unfair discrimination will be presumed. If the allegations are on unspecified or unclassified grounds, as in this case, unfair treatment will have to be established by the complainant; the test being the consequence of the discrimination on the complainant and others in his or her situation.

In applying the three stage enquiry set out above to the instant case**,** we begin with the question of whether the provisions in the guidelines were linked to a legitimate purpose.

As seen above, the 1st respondent created two distinct debating categories, one comprising candidates who garnered less than 5% in the

opinion polls, and the other comprising those with more than 5% in the opinion polls. The 1st respondent's explanation for the differentiation or categorization of the candidates into two debates boiled down to the organizational challenges attendant to the holding of a single debate comprising multiple candidates, where it took the view that, any meaningful engagement or interrogation of the candidates and their manifestos would be limited. The result would be that, the debate could turn into a farce thereby undermining the primary objective of the debates which was to enable potential voters to assess the individual candidates' presidential capabilities.

The explanation that the purport of the two debates was to ensure that they were conducted in an orderly and dignified manner, with each candidate being provided sufficient time and opportunity to expound on their manifesto is rational and connected to assuring the integrity of the debates which we find to be a legitimate purpose. The appellant, on his part, did not demonstrate that there was an illegitimate purpose for conducting two debates or categorizing them, and neither was it shown that there was a skewed or surreptitious purpose behind the two debates. Accordingly, we are of the view that the purpose for the two debates and the categorization thereof was legitimate.

The first stage having been overcome, we move to the second stage which is to determine whether the categorization into two debates amounted to unfair discrimination. To answer this question, it will be necessary to consider whether holding two debates affected Dida as a presidential candidate, thereby resulting in unfair and unequal treatment; the onus being upon him to demonstrate that the categorization negatively affected him.

According to Dida, the guidelines setting up two categories of debates on the basis of the likelihood of success of the presidential candidates were discriminatory, and contrary to the Constitution because they reduced *"…his status to that of a second class presidential candidate"*.

The 1st respondent's director, sought to explain the process employed in categorization of the debates. It was asserted that, the determining factor of 5% of votes garnered by candidates in the opinion polls was derived from the constitutional imperative used to establish a people's referendum of one million voters, or 5% of the total electorate. It was also stated that opinion polls were utilized in other jurisdictions, such as the United States as a basis upon which to categorise debates.

Much as the appellant has alleged that utilization of the national opinion polls as the basis for establishing the different categories was prejudicial and unconstitutional, it was not explained how this was the case, particularly as the opinion polls were not faulted in any way. In addition, since there was no material showing that as a result of the opinion polls Dida had been attributed to either above or below the 5% threshold specified, and no information was provided of the debate to which either himself or the other presidential candidates were assigned to, it is difficult to see how an elevation or reduction in status would arise. Moreover, we were not told that one or other of the debating categories was superior or inferior to the other, and if so, the reasons for this, so that one's status was perceived to be enhanced or reduced depending on the debating category assigned to them.

It is also instructive that, Dida did not elaborate on how the assignment to the different debates gave rise to a perception that a candidate was of a first or second class presidential status, as no particulars were provided that connected the debating categories to a reduction or elevation of status either presidential or otherwise.

Essentially, the appellant merely asserted that the debating guidelines were unconstitutional and discriminatory without ascribing any cogent basis for such allegation. This, in our view, was not sufficient to demonstrate that the guidelines subjected him to unfair treatment, particularly, in a case such as this, where the allegation concerned a ground that was unclassified, and which required to be proved.

In the circumstances, having found that the guidelines were established for a legitimate purpose that was rationally connected to the debates, and that nothing in evidence demonstrated that they subjected Dida to unfair and discriminatory treatment, we find that the allegations of unfair treatment were unfounded, and that his rights were not violated.

On the complaint that the learned judge's conclusion was based on hearsay, there was no specific case made out in support of the assertion. We find it unwarranted and without justification.

Finally on the issue of costs, it is true that the learned judge awarded costs to the 1st respondent. Under ***section 27 (1)*** of the ***Civil Procedure Act***, costs follow the event, but this notwithstanding, costs are a matter within the absolute discretion of the court to award or not to award costs, and ordinarily the appellate court will decline to interfere with such exercise of discretion.

In Halsbury's Laws of England, 4th Edition Vol.37 paragraph 714, it was specified that;

> ***"In general costs are in the discretion of the court, which has full power to determine by whom and to what extent they are to be paid, although there are a number of limitations upon the exercise of this discretion. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. The discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice".***

Despite the learned judge having awarded costs to the 1st respondent as being successful, we consider that the court did not take into account the public interest element in the petition. The appellant was a presidential aspirant and the presidential debates were for the benefit of the public. A decision by the court on whether categorization of the debates was discriminatory is a matter of public interest and we so find.

In view of the above, the appeal is without merit, and is dismissed. We however set aside the order on costs, and in its place, order each party to bear their own costs in the High Court and in this Court.

***It is so ordered.***

***Dated and delivered at Nairobi this 4th day of May, 2018.***

**P.N. WAKI**

**……**

**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

**……**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**……**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**