IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MURGOR & OTIENO-ODEK JJ.A)

CIVIL APPEAL NO. 12 OF 2018

BETWEEN

ADEN NOOR ALI..APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.................1ST RESPONDENT

THE JUBILEE PARTY...............................2ND RESPONDENT

JENIFFER SHAMALLA........................... 3RD RESPONDENT

(*Being an appeal from the judgment and decree of the High Court at Milimani*

(S.N. Mutuku, J.) delivered on 19th December 2017

in

Election Petition Appeal No. 11 of 2017)

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JUDGMENT OF THE COURT

This appeal concerns a complaint by ***the appellant, Aden Noor Ali*** against the election to the National Assembly through nomination by ***the 2nd respondent, the Jubilee Party.***

The facts of the dispute are that the appellant claimed that ***the 1st respondent, the Independent Electoral and Boundaries Commission*** (*IEBC*) violated the provisions of ***Article 90 (2) (a)*** and ***Article 177*** of the ***Constitution*** when carrying out the nominations to the National Assembly, by unlawfully and unconstitutionally listing the name of the 3rd respondent under the special interest category ahead of the marginalized or minority nominee in the Jubilee Party list. Before the listing, on or about 19th July 2017, the IEBC received the party list of nominees for Member of National Assembly from the Jubilee Party for special seats. The appellant was dissatisfied with the party list and filed a complaint with the Political Parties Disputes Tribunal (*PPDT*), which rendered a decision on 29th July 2017 ordering inter alia, that the Jubilee Party's party list be declared null and void for reasons that the 3rd respondent's name was included without specifying the special interest group that she represented. The PPDT also ordered the party list to be reconstituted.

In compliance with the orders, the Jubilee Party reconstituted their party list to define the interests of the nominees, this time specifying the special interest category of the 3rd respondent as minority mixed heritage (Asian African). Thereafter on or about 17th August 2018, it resubmitted the party list to the IEBC.

Following the General Elections on 8th August 2017, the Jubilee Party became entitled to six nominations for special seats in the National Assembly, and the 3rd respondent who was listed fourth on the Jubilee Party's party list was duly nominated and gazetted vide Kenya Gazette Notice No 4986 of 25th August 2017 as elected member for the special seat in the National Assembly as minority representative.

Dissatisfied with the Jubilee Party's actions, the appellant filed an election petition on 5th September 2017 seeking to nullify the 3rd respondent's election by nomination claiming that the IEBC acted in contempt of the judgment and decree of the PPDT which directed the Jubilee Party to remove the 3rd respondent from the list of nominees in so far as she purported to represent the minorities or marginalized group; that despite the order, the Commission gazetted the 3rd respondent; as the minorities representative and in so doing, contravened ***Article 81, 82, 90, 100*** and ***177*** of the ***Constitution*** and the ***Elections Act***. The particulars of the dispute specified that;

1. The IEBC and the Jubilee Party contravened ***Article 90*** and ***100*** of the Constitution;

2. The IEBC and the Jubilee Party did not abide by the Judgment and decree issued by the PPDT;

3. The 3rd respondent was not validly nominated to the National Assembly;

4. The IEBC in reliance on a wrongful process and in breach of the applicable law proceeded unlawfully to gazette and publish the 3rd respondent as qualified nominee to the National Assembly under an unspecified Special Interest; and

5. By reason of the foregoing, it was contended that the respondents are guilty of election offences and corrupt practices under the Act.

As a consequence, the appellant sought the following reliefs;

1. That the nomination of Jennifer Shamalla to the National Assembly be determined and declared null and void.

2. That the gazettement and publication on the Kenya Gazette Notice No 4986 of 25th August 2017 on the nomination of Jennifer Shamalla to the National Assembly to represent an unspecified Special Interest be determined and declared null and void;

3. That there be a declaration that the Petitioner (the appellant) is the bonafide nominee of the Jubilee Party to the National Assembly to represent the Marginalized/Minority group.

4. The Respondents be condemned to pay the Petitioner's costs of and incidental to this petition.

5. Such further and other consequential orders as this Honourable Court may lawfully make.

During the hearing before the trial court, the appellant testified that the 3rd respondent and himself were members of the Jubilee Party. It was his testimony that he applied to be a representative of minorities while the 3rd respondent applied to be a nominee under the special interest category specified under ***Article 90*** and ***Article 97*** of the ***Constitution***. He stated that when the Jubilee Party list was submitted, the 3rd respondent was listed as the fourth nominee on the party list, and the appellant was listed as the ninth. The appellant's complaint was that the first four positions in the list were reserved for special marginalized groups that is, persons with disability, youth, a worker and a minority or marginalized category and he had been designated the fourth position and not the ninth. The appellant complained to the Jubilee Party and then to the Party's Tribunal, but was not satisfied with the actions taken.

As a consequence, he filed a complaint with the PPDT, and in its judgment of 29th July 2017, the PPDT ordered that the 3rd respondent's name be struck off from the list, because the special interests she represented, were not specified; and the Jubilee Party was ordered to rearrange the remaining names on the list.

It was further contended that, in defiance of the PPDT's order, IEBC did not remove the 3rd respondent from the party list, but instead went ahead to gazette her as a nominee; that the 3rd respondent was included in the re- constituted party list, where she was referred to as the representative of minorities mixed heritage and that since a special interests category could not remain on the list without being specified, the court should strike out the 3rd respondent's name from the list and replace it with his name, as the minorities representative.

Salome Apiyo Oyugi testified on behalf of the IEBC. Of pertinence, in her testimony she stated that, the IEBC was required to review the party lists for compliance with the Constitution and the Elections Act, and also ascertain whether it took into account the special interests, whether the names alternated between male and female nominees, and whether it adhered to the requirement for regional diversity; that where lists were not compliant they were returned to the political parties for the issues raised to be addressed. Once approved, all compliant lists were published and aggrieved persons were provided then an opportunity to lodge complaints. The appellant lodged complaints with the PPDT and the IEBC, but later withdrew the latter complaint.

When cross-examined, Ms. Oyugi stated that she was aware of the PPDT's judgment that ordered the reconstitution of the Jubilee Party's party list and that a reconstituted list was resubmitted to the IEBC. It was her evidence that the reconstituted party list specified that the 3rd respondent's special interest representation was of minorities mixed heritage, but that in the gazette notice of 25th August 2017, her representation was indicated as special interest which is the wording of the statute; that the reconstituted list complied with the orders of the PPDT. The witness observed that the appellant's main complaint was that he should have been placed in the fourth position on the list.

There was no witness evidence tendered by the Jubilee Party, but the court allowed its counsel, Mr. Sigei to submit on matters of law only.

The 3rd respondent also testified. She confirmed that she represented the special interest area of minorities mixed heritage. She did not agree that the appellant was listed as fourth on the party list as this would be in violation of the law, which specified that the list should alternate between male and female nominees. The witness also confirmed that the list was reconstituted after the PPDT's judgment to define the special interest group she represented which was the minorities mix heritage group.

On 19th December 2017, the election court in its judgment dismissed the appellant's petition on the basis that it lacked merit.

The Election Court (S.N. Mutuku, J.) concluded that;

> "The Petitioner has failed to demonstrate that the 1st Respondent violated the Constitution, specifically Articles 81, 82, 90, 100, and 177, and the relevant electoral laws in nominating and gazetting the 3rd Respondent as Member for National Assembly. He has failed to demonstrate that the Constitution and the electoral law prioritize any category of special interest over the others. He has failed to demonstrate that the respondents are in contempt of the judgment of the PPDT and he failed to demonstrate that he deserved to be ranked in position four (4) in the 2nd Respondent's party list. The law is not on the Petitioner's side. It does not support his claim as contained in the Petition. He did not adduce evidence in support of the claims he makes in the Petition and for this reason, the prayers he is seeking in the Petition dated 6th September 2017 cannot issue. My determination of this matter confirms that Jennifer Shamalla was validly nominated and gazetted as Member of the National Assembly and I so declare. Her nomination to the National Assembly is valid and the special interest she represents is specified, valid and is recognizable in law."

The appellant was dissatisfied with that decision and filed this appeal on grounds that the learned judge fell into error by holding that the petition was unmerited yet, it raised serious constitutional and other legal issues which were not addressed; misapprehended the petition to mean an appeal from the decision of the PPDT, yet it was an election petition; by failing to adjudicate all the issues raised by the appellant thereby delivering an incomplete judgment; failing to appreciate the facts and the law thereby arriving at the wrong decision; and by awarding costs of the petition to the 1st and 3rd respondents yet it raised serious constitutional issues of public interest; by failing to appreciate the prayers sought by the appellant, dwelling on non issues thereby arriving at the wrong decision and by failing to appreciate the rights of minority groups as provided for in the Constitution.

Learned counsel ***Mr. Ondabu*** for the appellant appearing with Mr. Ongwae filed written submission on 23rd March 2018 which were highlighted in Court. In addressing the complaint that the High Court failed to address the constitutional legal and other issues with regard to the nomination of a member of Parliament, counsel submitted that appellant who was the Election Board Chairman of the Jubilee Party was the only person nominated to represent the minorities, and that the category for minorities/mixed heritage (Asian African) was not specified and did not exist at the time the Jubilee Party members applied for nomination. He further submitted that the 3rd respondent was listed fourth under the special interest category in the first party list submitted to the IEBC and had not applied to the Jubilee Party to be nominated under the minority/marginalized category. The IEBC however, gazetted her as the minority mixed heritage representative which was a category invented or introduced as an amendment after the party list was submitted, and was outside the stipulated statutory period. This in counsel's view denied the appellant the opportunity to represent persons of this category.

Counsel complained that the learned judge erred in failing to address the issue of whether minorities are a special interest group that need separate representation in Parliament, and that the fact that the 3rd respondent was of mixed parentage and employed young men from the Samburu ethnic community was not a legal basis to represent a special interest group.

Regarding the issue that the learned judge failed to determine the matter as an election petition and instead determined it as an appeal from the PPDT, counsel contended that the learned judge dwelt on the decision of the PPDT which she determined was compliant instead of addressing the facts of the case; that the learned judge failed to appreciate that the dispute concerned nominations where all avenues of resolution required to be exhausted prior to instituting proceedings in court.

Counsel also took issue with the learned judge for considering the minorities or marginalized category in the Orange Democratic Party's list of nominees, for reasons that it was not one of the issues that had been placed before the learned judge for determination. He faulted the learned judge for failing to deliver a ruling on whether or not the Jubilee Party pleadings should be expunged from the record since the deponents of the affidavits did not testify in court.

On the final issue of costs, counsel contended that the learned judge wrongly awarded costs of the petition to the IEBC and the 3rd respondent, yet the petition raised weighty constitutional issues relating to the political rights of minority/marginalized groups in Kenya; that this was a matter of public interest wherein the court ought to have ordered each party to bear its own costs. In support of this contention counsel cited the case of ***Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others [2013] eKLR.***

On her part, learned counsel for the IEBC, ***Ms. Okimaru*** also filed written submissions on 27th April 2018, which she orally highlighted. Counsel opposed the appeal and begun by submitting that the jurisdiction of this court in election disputes is set out in ***section 85 A*** of the ***Elections Act*** and is limited to matters of law. Counsel argued that the matters appealed are concerned with matters of fact, and furthermore, that the nature of the dispute before the High Court was an election petition, and not a constitutional petition concerning minorities; that the Supreme Court in the case of ***Moses Mwicigi & 14 others vs Independent Electoral and Boundaries Commission [2016] eKLR*** determined that even where the election is by way of nomination, the dispute between the parties is an election petition. It was further submitted that though a constitutional provision maybe breached in the course of the election process, this did not convert the election petition into a constitutional petition.

On the issue of whether the election court properly interpreted and applied the general principles stipulated in the Constitution, and the

electoral legislation, counsel submitted that under the law, the roles played by the IEBC and the Jubilee Party are separate and distinct; that under ***Article 97 (1)(c)*** of the ***Constitution***, ***sections 34 (2), (5), (6) and (8), 35, 37 (2) and (4)*** of the ***Elections Act 2011***, ***regulation 55*** of the ***Elections (General) Regulations 2012*** and ***regulations 20 and 21 (2)*** of the ***Elections (Party Primaries and Party Lists) Regulations, 2017*** as the exclusive role of the Jubilee Party to nominate candidates who are its members for parliamentary seats. It was also pointed out that at no time did the appellant raise the issue of the 3rd respondent's membership before the Election court, or that ***section 34 (8)*** of the ***Election Act*** had been contravened; and that therefore this was not a matter that could be raised on appeal.

On the role of the IEBC, counsel asserted that contrary to the appellant's complaints, the election court had rightly found that the IEBC's powers were limited to reviewing and ascertaining that the party list submitted by a political party was in compliance with the law and that it had no powers to amend or select candidates for nomination. It was also asserted that the election court found that there was no evidence demonstrating that the IEBC and the Jubilee Party violated the electoral laws by listing the 3rd respondent under the special interest category; that the IEBC complied with the law in following the prioritized list as reconstituted by the Jubilee Party, and that the IEBC complied with the law when it gazetted the 3rd respondent. It was further argued that there was no court order prohibiting it from gazetting the 3rd respondent as a nominee, and therefore the contention that the IEBC and the Jubilee Party were in contempt was unwarranted.

Counsel further asserted that the election court rightly found that priority listing is supported by the election laws; that ***Article 97 (1) (c)*** of ***the Constitution*** provides for special interest inclusive of youth, persons with disabilities and workers, and that currently special interest is not defined by a statute, and there is no limit on the categories. In support of the proposition that special interests are yet to be defined, counsel cited ***Micah Kigen & 2 Others vs Attorney General & 2 others [2012] eKLR***. Counsel contended that the appellant's only grievance was that the 3rd respondent's mixed heritage was not a legal basis of representation, yet the appellant had not controverted the current status of special interests or provided any other definition.

As to whether the election court took into account extraneous matters, counsel submitted that the appellant did not specify the issues not adjudicated upon by the election court; that regarding the appellant's application to expunge the Jubilee Party's pleadings from the record, no such application was made before the court, and that in any event during the proceedings, the appellant consented to submissions being made on behalf of the Jubilee Party on points of law. And on whether the election court made a determination on the Orange Democratic Party lists, counsel stated that no such decision was made in the judgment.

On the matter of costs, counsel submitted that since the dispute concerned an election petition, it was a mandatory requirement for the court to award costs, and that being an election petition the question of public interest did not arise.

On his part, learned counsel ***Mr. Sigei*** for the Jubilee Party also highlighted his written submissions of 27th April 2018. Counsel associated the Jubilee Party's case with the submissions of the IEBC, and reiterated that this Court's jurisdiction in election disputes is limited to matters of law. He submitted that the election court rightly found that the appellant failed to discharge the burden of proof by demonstrating that the 3rd respondent's nomination was erroneous. On the issue that the court considered the evidence of parties who did not testify orally, counsel observed that the court did not take into account this evidence and expressly so stated, in its determination.

Learned counsel ***Mr. Maloba*** for the 3rd respondent appearing with Mr. M. Amalemba and Ms. A. Gulenywa, also highlighted their written submissions of 27th April 2018. Mr. Maloba submitted that the appellant's main complaint was that the Jubilee Party should have submitted the party list specifying him as minority representative at position number four. Counsel further submitted that there was no law that designated the fourth position exclusively to minorities, or that specified that there was a hierarchy of positions that categorized the minority category the fourth position.

Counsel further asserted that the mandate to form party lists is the exclusive function of the Jubilee Party, and that the IEBC's sole obligation in this process was to ensure that the party lists complied with the mandatory requirements of the law; that the Jubilee Party's party list comprised 12 nominees, where the 3rd respondent was listed as the fourth nominee, and the appellant as the ninth nominee; that the 3rd respondent was a female and the appellant was a male, and that having been listed as the fourth nominee on the party list, she was elected to one of the six special seats in the National Assembly. Counsel submitted that the learned judge rightly concluded that the appellant had not demonstrated why the 3rd respondent was wrongly nominated, or how the party list should have ranked him as fourth, and still comply with the law.

On the issue that the election court treated the petition as an appeal from the PPDT and not as an election petition, counsel argued that to the contrary, it was the appellant who filed the petition as an appeal with the intention of obtaining a determination from the election court that the PPDT's decision was violated. Counsel further submitted that, given that the IEBC and the Jubilee Party had complied with the decision of the PPDT, the question of violation of an order did not arise.

On costs, counsel asserted that there is no question that the suit was in respect of an election petition, and under ***section 84*** of ***the Elections Act,*** costs were mandatory.

We have considered the pleadings, and the parties' submissions, and are of the view that the following issues fall for determination;

i) whether the election petition appeal was properly before this Court;

ii) whether the 3rd respondent was validly nominated to the National Assembly by the Jubilee Party to represent special interests as the minority/marginalized group representative, and if so, whether the election court applied the provisions of the Constitution, the Elections Act and the regulations to the process of election of the 3rd respondent through nomination;

iii) whether the nature of the dispute in the High Court was a constitutional petition or an election petition;

iv) whether the dispute was determined as an appeal or an election petition;

v) whether the court took into account extraneous matters; and

vi) whether the court properly awarded costs.

Beginning with the first issue. This arises from the respondents' contention that the appellant seeks to raise matters of fact while ***section 85A*** of the ***Elections Act*** limits the jurisdiction of this Court to matters of law; that on that basis, we should down our tools and divest ourselves of this appeal. See the case of the ***The Owners of Motor Vessel "Lillian S' vs Caltex Oil Kenya*** Ltd [1989] KLR 1.

It is trite law that the jurisdiction of courts and tribunals is conferred by the Constitution and statute. Therefore despite the assertions, we are satisfied that we have jurisdiction, as to begin with the appeal emanates from the decision of the High Court sitting as an election court. ***Article 164 (3) (a)*** of ***the Constitution*** donates a constitutional mandate to this Court to hear and determine all appeals arising from the High Court. And indeed the jurisdiction of this Court in election petitions is stipulated under ***Section 85A*** of ***the Elections Act.***

When this issue was considered in the case of ***Gitarau Peter Munya vs*** Dickson Mwenda Kithinji & others, Supreme Court Petition No 2 of 2014, the Supreme Court set out the principles that would provide guidance in defining what constitutes "matters of law". The court identified three elements; technical, practical and evidentiary, and summarized it to mean, *"…a question or an issue involving the interpretation, or construction of provisions of the law; the application of the law to a set of facts recorded by the election court and the conclusion arrived at by the trial judge in an election petition."*

It is apparent from the memorandum of appeal that the appellant's complaints are concerned with the interpretation and alleged violations of various provisions of Constitution and the Elections Act which matters were directly in issue in the High Court regarding political party lists. These are matters of law, and within our mandate under the Elections Act to determine in this appeal.

Before delving into the gravamen of the appeal, it is essential that we set out the constitutional context applicable to the circumstances of this case. Elections and election related matters are founded on principles set out in ***Article 1(1)*** of ***the Constitution,*** thus;

> "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the constitution."

Under ***Article 1 (2)*** of ***the Constitution*** the sovereign powers are delegated to various state organs. More particularly, at ***Article 88***, the Constitution establishes and mandates the IEBC to manage and supervise elections to any elective body or office established under the Constitution, which in this case would include an election of Member to the National Assembly by nomination. While ***Article 88 (5)*** of the Constitution commands the IEBC to *"…exercise its powers and perform its functions in accordance with the constitution and national legislation"*.

Article 81 sets out the general principles for the electoral system including the freedom of citizens to exercise their political rights, entrenchment of the gender two-thirds rule, fair representation of persons with disabilities, universal suffrage based on fair representation, and free and fair elections by secret ballot, free from violence, intimidation, improper influence or corruption, and which is conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 82 (2) of ***the Constitution*** ordains Parliament to enact legislation to ensure that voting at every election is simple, transparent and takes into account the special needs of persons with disabilities and other persons or groups with special needs.

Against this backdrop, we now deal with the crux of this appeal which is whether the 3rd respondent was validly nominated to the National Assembly by the Jubilee Party as a representative of the minority/marginalized group.

To comprehensively determine this question, it will be essential to address the following;

a) Whether there was a process of nomination specified by the Constitution and electoral laws and regulations for election through nomination;

b) Whether the Jubilee Party and the IEBC adhered to the specified processes;

c) Whether the Jubilee Party reconstituted the party list;

d) whether the 3rd respondent ought to have been struck off the party list;

e) Whether the party list could specify special interests or minorities mixed heritage (Asian African); and

f) Whether the Jubilee Party list could be amended after submission to the IEBC.

Beginning with whether there is a nomination process in the case of election through nomination, in the electoral process, the Constitution envisages that there will be both elected and nominated members of the National Assembly. ***Article 97 (1) (c)*** of the Constitution provides that there will be;

"(a)....

(b)....

(c) twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(d)…."

Article 90 of the ***Constitution*** specifies that in an election through nomination, political parties are required to prepare party lists. It provides;

"(1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b),(c), and (d), and for the members of county assemblies under article 177 (1) (b) and (c) shall be on the basis of proportional representation by use of party lists.

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that-

(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) except in the case of seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people in Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election"

In effect, ***Article 97 (1)*** makes provision for nominations of members of parliamentary political parties to the National Assembly to represent special interests which include the youth, persons with disabilities and workers. ***Article 90 (1)*** is directed at the political parties and provides that nominations would be through the use of party lists, which political parties would be required to prepare. The provision goes on to direct each political party participating in the general election to submit a list of all the persons who would stand elected if the party were to be entitled to special seats in the National Assembly. The list should comprise the appropriate number of qualified candidates; it must alternate between male and female candidates in the priority in which they are listed, and must reflect the regional and ethnic diversity of the people in Kenya.

Pursuant to the provisions of the Constitution, ***section 34*** of the ***Elections Act*** provides that;

"1)…

2) A political party which nominates a candidate for election under Article 97 (1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97 (1) (c) of the Constitution.

(3)…

(4)…

(5) The party list under (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.

(6A) Upon receipt of the party list from a political party under subsection

(1) the Commission shall review the list to ensure compliance with the prescribed regulations and—

a) issue the political party with a certificate of compliance; or

b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.

(7) The party list submitted to the Commission shall be valid for the term of Parliament".

The elections provisions also comprise Rules and Regulations governing party lists. ***Regulation 20 (1)*** of the ***Elections (Party Primaries and Party Lists) Regulations 2017*** specifies that a party list shall contain the names of all the persons who will stand elected to the seats garnered by the party, and that the seats shall be allocated between male and female candidates. At ***regulation 20 (2)*** it is also specified that the party lists should take into account ***Article 82 (b)*** of ***the Constitution*** on the two- thirds gender representation rule, and ***Article 100*** on the promotion of marginalized groups.

Regulation 21 (1) and (2) specify that***;***

"(1) The person authorized by the political party to certify that candidates have been nominated shall submit to the Commission the list of nominees and the party list together with a declaration in Form 6 set out in the Schedule, stating that the party's nomination and preparation of party lists have complied with the Constitution, the Act and party nomination rules and procedures of the political party in the conduct of the party nominations to party lists;

(2) Where, after scrutiny of the lists, the Commission is of the opinion that a party list does not conform to the requirements of Articles 97 (1) (c), 98 (1) (b), (c), (d) and 177 (1) (b) and (c) of the Constitution, the Act, or these Regulations, the Commission shall require the political party to review and amend its party list so that it conforms to the requirements of the law and guidelines of the Commission".

Under the ***Elections (General) Regulations 2012, regulation 54*** provides for the submission of the party lists for special seats and specifies that the list shall comprise the name, address, age, sex, disability and category of disability, *inter alia* of the candidate. ***Regulation 55*** specifies that the party list shall be prepared in accordance with the political party's rules. ***Regulation 56*** stipulates that political parties shall publish the formula for allocation of seats. Once the party list is complete, ***section 34*** of ***the Elections Act*** and the regulations specify that it shall be submitted to the IEBC, which will ascertain whether it complies with the provisions of the Constitution and the Election laws and regulations.

Under ***Article 88 (4) (k)*** of ***the Constitution,*** it is stipulated that, amongst other responsibilities, the IEBC is required to undertake "…*the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties."*

The IEBC is therefore required to ensure that the party list complies with all the stipulated prerequisites including the appropriate number of qualified candidates; alternate listing of male and female nominees in order of priority, and that the list is reflective of regional and ethnic diversity. So that where there is compliance, the political party will be issued with a certificate of compliance, and where there is no compliance, the IEBC can reject the party list.

The judgment of the election court set out the provisions of the law in a similar manner to the outline enumerated above, and concluded that the law provided an elaborate legal regime that governed election by nomination.

Next we turn to whether the IEBC and the Jubilee Party complied with that process in the instant case. It will be observed at this stage that, the process of nomination carves out separate and distinct roles to be played by the IEBC and the political parties. It is the responsibility of the political party to submit a compliant party list, and the choice of nominees in the list is the sole prerogative of the political party.

In answer to this, the learned judge stated;

"The 1st respondent demonstrated that it acted in accordance with the law by receiving the list as prepared by the 2nd respondent, reviewing it for compliance, requiring amendment to specify the special interest represented by the 3rd respondent, receiving the re-submitted list, satisfying itself that the re-constituted list complies with the law and proceeding to publish it in the Daily Nation and the Standard, both publications of national circulation and gazetting the party list. The 1st respondent then proceeded to designate candidates to the National Assembly in the priority order in which they were listed."

The court was also satisfied that the Jubilee Party complied with the provisions of the law.

In the Supreme Court case of ***Moses Mwicigi & 14 others vs Independent Electoral and Boundaries Commission [2015] eKLR*** the court emphasized that***;***

"Article 90 clearly spells out, and bestows upon IEBC certain duties and responsibilities, which include being responsible for the conduct ***and supervision of elections for seats for nomination purposes. IEBC***

is also required to ensure that each participating political party nominates and submits a party list, indicating the appropriate number of qualified candidates and alternates, between male and female candidates, in the priority in which they are listed".

> ***The foregoing provisions place upon the IEBC the duty to ensure that the party lists submitted comply with the relevant provisions of the law, as set out earlier on. IEBC is expressly designated as the regulatory body to ensure compliance with the law. The Constitution, by Article 88(4)(e), mandates the IEBC to intervene and settle disputes relating to, or arising from nominations."***

In addressing the responsibilities of the political parties the Supreme Court went on to say;

> "Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations".

In the case of ***Lydia Mathia vs Naisula Lesuuda & another, [2013] eKLR*** this Court observed that;

> "The definition of "party lists" under section 2 of the Elections Act suggested ownership of the list by the political party that has prepared it. The practice, indeed the law is that the power over who gets the reserved seats resides with the parties themselves and no other authority."

From the evidence, it is not in dispute that the Jubilee Party submitted a party list of twelve members to the IEBC where male and female nominees were alternating, and which took into account regional diversity.

But the appellant objected to the list contending that the 3rd respondent was unlawfully placed in the fourth position on the list while he was in the ninth position which was reserved for minorities /marginalized groups which he represented. The appellant sought to have his name listed in the fourth position, instead of the ninth. He complained to the Jubilee Party Tribunal and when his displeasure was not assuaged, he lodged a claim with the PPDT.

The PPDT ordered the 3rd respondent's name to be struck off from the list, because the special interest she represented, was not specified. The Jubilee Party was also ordered to reconstitute the party list.

The question that we must consider at this point is whether the party list was reconstituted. The reason for this is that, the appellant argued that the Jubilee Party did not reconstitute that list as ordered, and that the same list had been amended to specify that the 3rd respondent was the representative of minorities mixed heritage (Asian African), and that therefore Jubilee Party did not comply with the PPDT's decision.

In addressing this issue the learned judge stated;

> "Ms. Oyugi explained that this re-constituted party list was forwarded through a letter dated 16th August 2017 marked "SO4A". The forwarding letter states that the Party was acting in compliance to (sic) the regulations of the 1st Respondent guiding the party list. The amended list specifies the special interest of the 3rd Respondent as mixed heritage (Asian /African). I have no reason to doubt Ms. Oyugi's evidence in the absence of evidence to the contrary."

As observed from the evidence of Ms. Oyugi, who testified on behalf of the IEBC, the letter of 16th August 2017 and the reconstituted list all point to the fact that the party list was reconstituted and resubmitted to the IEBC. The reconstituted party list submitted on the 16th August 2017 comprised the following;

1) David Ole Sankok - Person with disability

2) Mucheke Halima Yussuf - Worker

3) Gideon Keter - Youth

4) Jennifer Shamalla - Minority – Mixed Heritage (Asian-African)

5) Maina Kamanda - Farmer

6) Cecily Mbarire - Technocrat

7) Bishop Jackson Koske - Person with disability

8) Faith Nyaguthi Waigwa - Lawyer

9) Aden Noor - Minority

10) Sandra Vall Adiambo Ochallo – Worker

11) Samwel Mburu Kamau - Business Person

12) Agnes Gakure Kariuki - Special Interest

Whether or not the Jubilee Party resubmitted a reconstituted party list is a matter of fact. Given our mandate we must defer to the finding of the High Court on this issue. Accordingly, the election court having accepted that the party list was reconstituted and resubmitted, we too adopt its finding having regard to the circumstances of the case.

Following the General Elections on 8th August 2017, the Jubilee Party qualified for six special seats in the National Assembly. The nominees were allocated the six seats on the basis of the formula developed by the Jubilee Party, and the 3rd respondent who was fourth on the Jubilee Party's party list was vide Kenya Gazette Notice No. 4986 of 25th August 2017 elected to a special seat in the National Assembly under special interest. The appellant who was listed as ninth missed a special seat in the National Assembly, which has provoked this election petition.

From the above, it is clear that it was the Jubilee Party's responsibility to prepare and submit a party list that complied with the provisions of the law. Upon submission of the reconstituted party list, which the IEBC found to be compliant, it became a new list that was open to aggrieved parties to lodge complaints.

The above notwithstanding, the appellant maintained that the 3rd respondent was not validly elected for two main reasons, firstly, that following the PPDT order, the name of the 3rd respondent should have been struck off the Jubilee Party's party list and his name inserted in the fourth position, and secondly, that the Jubilee Party unlawfully amended the re- constituted party list to replace the 3rd respondent's special interest representation with that of minority mixed heritage (Asian African) representation, and by so doing, it deprived him of the seat designated for the minorities representative.

This brings us to the next question of whether the 3rd respondent ought to have been struck off the party list. And in determining it, the court had this to say;

> "PPDT declared that the inclusion of the name of the 3rd respondent in the party list for nomination to the national Assembly without stating the special interest she represented was unlawful, null and void…It also ordered the Respondent, it is not specified which Respondent, to strike off the 3rd Respondent's name from the list of nominees. PPDT also ordered Jubilee Party to re-constitute the party list in accordance with the law. There is no order directing the 2nd Respondent not to include the 3rd Respondent in the re-constituted party list."

The judgment of the PPDT, indeed, ordered that the party list to be declared null and void for reasons that the 3rd respondent's name was included without specifying the special interest she represented. It also ordered the 'respondent' (without specifying which of the three respondents) to strike off the 3rd respondent's name from the list of nominees, and to re- constitute the party list in accordance with the law. Given the manner in which the order is crafted, it is apparent, and we agree with the learned judge that the order did not specify that the reconstituted party list should exclude the 3rd respondent, in the event that the special interest group that the 3rd respondent represented was specified.

The next issue was the appellant's complaint that, the Jubilee Party unlawfully replaced his representation of minorities with that of the 3rd respondent whose representation was initially indicated as special interest, and later as minorities mixed heritage (Asian African), and by so doing, it did not follow the laid down procedure when it invented/introduced a new category of minorities mixed heritage (Asian African) after the party list was submitted; that once submitted the party list could not be amended, with the result that Jubilee Party failed to adhere to the PPDT's decision.

What the appellant appears to allege is that the categorization of special interest and minorities/marginalized (Asian African) heritage was not a legal basis of representation; that it was not a category known in law and was newly introduced following the PPDT's decision, which was contrary to the electoral laws.

Though the appellant claimed that the learned judge did not address this issue, the judgment is clear that the court made a determination on the issue when it stated that;

> "Article 97 (1) (c) of the Constitution provides for "special interest" including the youth, persons with disabilities and workers… Article 100 of the Constitution, that contemplates enactment of the law to promote representation of marginalized groups, lists women, ethnic and other minorities and marginalized communities as some of the special interest to be included in the contemplated legislation. All these categories are recognized by the law as falling under "special interest" As the law stands today, there is no definition of categories of "special interest" other than the various categories contained in the Constitution and the pronouncements of courts. This lack of definition of "special interests" leaves the situation rather fluid leaving the matter with the political parties to define the categories they consider as "special interests" of course within the confines of the law."(emphasis ours)

What the learned judge meant was that save for the Constitution that specified the categories of *youth, persons with disabilities and worker* as well as *women, ethnic and other minorities and marginalized communities,* there was no specific legislation that particularized the categories to be included in the party list, and therefore, all the specified categories fell into the definition of special interest groups.

In the case of ***Lydia Nyaguthi Githendu vs Independent Electoral and Boundaries Commission & 17 others, [2015] eKLR*** this Court held;

> "We must express the view that the constitutional scheme vests, to some extent an unregulated power to the political parties to regulate and formulate the list of candidates, and a secondary power to the Commission to supervise, with the Court retaining the ultimate and final authority to address and determine instances of violation or infringement of fundamental rights".

In the case of ***Micah Kigen & 2 others vs Attorney General (supra)*** the High Court observed that;

> "Where the Constitution has provided for the representation of specific groups or interests it has explicit provisions for these specific groups and interest represented. It would be inconsistent with the Constitution to limit the right of any special interests identified by political parties to be represented in the National Assembly."

When the law as it currently stands is considered, it is true that, despite the stipulations of ***Article 100*** of ***the Constitution*** which specifies that Parliament shall enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities, and marginalized communities, it is appreciated that no such legislation has been enacted to date.

Until legislation is enacted providing a definition of special interest groups, and setting out the various special interest categories as well as the criteria to be adopted to ascertain the nominees of specific special interest group, and further providing guidelines to be followed by political parties during nomination of their members, political parties will remain at liberty to identify and select categories of special interest groups under which to nominate their representatives at will.

In this case, there was nothing prohibiting the Jubilee Party from specifying the minorities mixed heritage (Asian African) as a category of the minorities or marginalized category, and it was entitled so to do. Needless to say, the appellant did not substantiate how the minorities and marginalized Asian African heritage did not amount to a special interest category, or indeed how it differed from his own representative status which only specified him as a representative of *'minorities*.'

Essentially, we agree with the learned judge when she stated that *"…I find that this court cannot fault the 2nd respondent for identifying mixed heritage as a "special interest." The current electoral law gives the political parties that latitude to define "special interests…"* So that having only stated that the 3rd respondent was in a special interest group, and by correcting it to specify minorities mixed heritage (Asian African) as a special interest group, the Jubilee Party was merely identifying a special interest group which it was entitled to do under the current electoral nomination dispensation.

We next consider whether the Jubilee Party was allowed to amend the party list after submitting it to the IEBC. It is not in dispute that the PPDT ordered the Jubilee Party to re-constitute its party list, and it is clear that the Jubilee Party would have been unable to resubmit the party list to the IEBC unless it was reconstituted. In view of the existence of such order and the necessity to resubmit the reconstituted party list, the Jubilee Party was compelled to adjust the party list. Hence by virtue of the order the Jubilee Party was allowed to adjust the party list despite it having been submitted to the IEBC.

Given that there is no legislation particularizing the categories of special interests, we find that the Jubilee Party was entitled to amend the party list to specify the 3rd respondent as a representative of the minorities- mixed heritage (Asian African). We further find that nothing estopped it from amending the party list as ordered by the PPDT to reflect that amendment.

The final question touching on the validity of the 3rd respondent nomination concerned the appellant's claim that, in view of the reconstitution of the party list, minorities were relegated to the ninth position, with the 3rd respondent replacing him in the fourth position, yet the law prioritized the manner in which the list of nominees representing special interests should be ranked. In respect of this contention, the learned judge stated that;

> "To my understanding neither the Constitution, nor the Election Act and the relevant Regulations provide for the prioritizing of the names in the party lists…by placing some categories of special interests before others in the Constitution and other relevant statutes was not intended to prioritize these categories over others. This to me was just a chance listing of the categories. I take the view that to prioritize some categories over others would amount to discrimination. There is the likelihood that some categories of special interest placed lower in rank would never make it to the top elective positions due to the place they occupy…"

We would agree with the learned judge's observations and would go further to add that it is a mandatory requirement under ***Article 90 (2) (b)*** of ***the Constitution*** for seats to be allocated alternately between male and female nominees. The Jubilee Party list specified a male as the first nominee, and the 3rd respondent, who is a female, was place as the fourth nominee, which placement was in accordance with the requirements of ***Article 90 (2) (b).*** By insisting on being fourth in the list, as a male nominee, it is evident that the appellant did not qualify. Being a position for a female, and the appellant being a male, he could not be position as fourth on the list as reconstituted; as to do so would have rendered the party list as incompetent, null and void. In so far as the validity of the 3rd respondent's nomination is concerned, the Constitution and the electoral laws defined a process under which elections through nomination were to be undertaken which involved the submission of party lists. Having considered the evidence we can find nothing to support the contention that the IEBC and the Jubilee Party did not comply with the laid down nomination procedure. Accordingly we are satisfied that the learned judge rightly concluded that the election through nomination of the 3rd respondent was valid and in accordance with the law.

We can find nothing to support the allegation that the 3rd respondent was not validly elected by nomination to the National Assembly, and like the court below, we are satisfied that the allegation is unwarranted and without foundation. We consider that the election court appropriately applied the provisions of the Constitution, the Elections Act and the regulations to the process of election of the 3rd respondent through nomination and rightly concluded that the 3rd respondent was validly elected through nomination as member of the National Assembly. As such, we find that this complaint is unfounded, and without merit.

Having substantially addressed the issue of the validity of the 3rd respondent's nomination, we turn to consider whether the respondents were in contempt of the PPDT's judgment and committed election offences for reconstituting and submitting the party list. In this regard, the learned judge concluded that there was no evidence to support the claim that the respondents or any of them was in contempt of court of the PPDT judgment.

Indeed, in resubmitting the reconstituted party list, we too are satisfied that both the IEBC and the Jubilee Party did so to comply with the PPDT's judgment. We are therefore of the view that the question of contempt of court did not arise. On the issue that the IEBC and the Jubilee Party had committed election offences, we are satisfied that nothing turned on it as, the appellant did not raise it or seek to prove any allegations against any of the respondents either jointly or severally.

On the allegation that the election court determined the dispute as an appeal from the PPDT and not as an election petition, the Constitution, under ***Article 87,*** provides;

> "(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
>
> ***"(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission."***

The role of the IEBC is set out in ***Article 88 (4) (e)*** of ***the Constitution***, which specifies that the Commission is responsible for **"…***the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results…."*

In the ***Moses Mwicigi case (supra)*** it was stated that;

> "It is clear to us that the Constitution provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'."

And in the case of ***Independent Electoral and Boundaries Commission Vs Jane Cheperenge & 2 Others, Petition No. 5 of 2016,*** the Supreme Court recently held that;

> "At this juncture, we reiterate and affirm the position that, upon gazettement of nominated members of County Assemblies, any aggrieved party would have to initiate the process of challenging the said nominations by filing an election petition at the Resident Magistrate Court designated as an Election Court under Section 75 of the Election Act."

Similarly, where there is a challenge to an election through nomination to a special seat of a member of the National Assembly, the process is by filing an election petition in the High Court as specified by ***Rule 6 (1) (a)*** of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

From the above, it is clear that what was before the learned judge was an election petition in respect of an election through nomination to a special seat of a member of the National Assembly, and a review of the judgment makes it clear that the learned judge appreciated that she was determining an election petition and not an appeal. This is evident from the remark in the judgment that the "*…court was sitting as an Election Court and not appellate Court"* and that the judgment of the PPDT was not therefore an appeal before the learned judge.

This notion is further support, by the provisions of the Constitution and electoral law appertaining to election through nomination, that were set out and the analysis of the facts against those provisions to reach a finding on the validity of the nomination and gazettement of the 3rd appellant to the National Assembly. Particular regard was had for whether the political party and the IEBC, as the entities responsible, complied with the law during the nomination process. In its determination of whether the nomination of the 3rd respondent was valid, the court took into account the criteria necessary for nominees to the party lists, and whether it was complied with. Conversely, the only reference to the PPDT was in addressing the appellant's complaint concerning the orders of the PPDT and whether or not the respondents complied with those orders. We do not think that such reference can be construed to be a determination of an appeal. In all respects, when the judgment is analysed, it is clear that the learned judge was dealing with an election petition and not an appeal, and we find the appellant's allegation in respect of this issue to be unfounded.

We find the claim that the election court ignored the constitutional issues on the rights of minorities and other marginalized groups that the appellant raised to be unsubstantiated given the contents of the petition, the memorandum of appeal and the appellant's submissions. We say

this because, it is undisputed that, what was before the election court was an election petition arising out of an election through nomination.

In relation to whether the election court took into account extraneous matters, the appellant particularized two allegations, firstly, that the learned judge took into account the Orange Democratic Party's party list of minorities/marginalized groups, and secondly, that the learned judge failed to rule on whether or not the Jubilee Party's pleading would be expunged from the record.

To begin with, we do not agree that the inclusion of the Orange Democratic Party and their party list was an issue that the trial court determined, since it was merely referred to for comparative value, in so far as the Jubilee Party's pleadings was concerned. Additionally, we find that though the appellant contends that the learned judge did not rule on the application to expunge the Jubilee Party's pleadings from the record, on 21st November 2017, the typed proceedings show that the learned judge ordered; *"…the 2nd respondent is allowed to submit. This court will address the issues now arising at the time of writing judgment".* And in conformity with the order, the judgment addressed the issues as follows;

> "The 2nd respondent was allowed by this court to submit on points of law only since it did not present a witness in court. The contents of its pleadings were not adopted in evidence and therefore will not be considered by this court"

Finally, on costs, the appellant argues that the matter before the election court was a nomination dispute which raised weighty constitutional issues concerning the political rights of minority/marginalized groups in Kenya; that these were matters of public interest and as such the court ought to have ordered each party to bear its own costs.

On the other hand, the IEBC and the 3rd respondent argue that what was before the court was an election petition and not a constitutional petition under ***Article 22*** of ***the Constitution***, and that it did not comprise matters of public interest, so as to oust the requirements of ***section 84*** of the ***Elections Ac***t that make it a mandatory requirement for the election court to award costs.

There is no question that the parties appreciate that this was an election petition and not a constitutional petition. Therefore, though there may have been weighty constitutional questions, and some public interest elements for determination, this did not transform the suit into a constitutional petition and preclude the election court from awarding costs.

> Section 84 provides;
>
> ***"An election court shall award costs of and incidental to a petition and costs shall follow the cause."***

In the case of ***Martha Wangari Karua vs Independent Electoral and Boundaries Commission & 3 others, Election Petition Appeal No 1 of 2017 (Nyeri)***,this Court had this to say on the award of costs;

> "Section 84 of the Elections Act provides that it is within the discretion of the election court to award costs and that costs shall follow the cause. Rule 30 of the Election Petition Rules gives the court unfettered discretion which means that the discretion exercisable by the taxing master under paragraph 16 of the Advocates Remuneration Order 2009 has been circumscribed. It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant".

As such, the election court has no discretion but to make an order for costs in election petitions. Perhaps the only discretion available lies in the quantum of the award. In ordering the appellant to pay the costs, the court capped the costs at Kshs.1, 000,000 each to the IEBC and the 3rd respondent. The learned judge reasoned that the costs took into account that had the appellant not sued the respondents, the costs of the petition would not have been incurred.

Having examined judicial decisions on the award of costs in election petitions in 2013 and 2017, it is our view that the capping of costs at Kshs. 1,000,000 to be reasonable, given the circumstances of the case. Consequently we decline to interfere with the learned judge's discretion.

The final Orders of this Court are as follows:

1. This appeal has no merit and is hereby dismissed.

2. The order by the election court for payment of the 1st and 3rd respondents costs capped at Ksh.1,000,000/= each be and is hereby upheld.

3. The appellant shall bear the costs of this appeal.

It is so ordered.

Dated and delivered at Nairobi this 19th day of June, 2018.

P.N. WAKI

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JUDGE OF APPEAL

A.K. MURGOR

....

JUDGE OF APPEAL

J. OTIENO-ODEK

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR