



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & GATEMBU, JJA)

CIVIL APPEAL NO. 159 OF 2017

BETWEEN

ASWIM FAUD RUDAINY..... APPELLANT

AND

KAZUNGU WANJE BAYA..... 1ST RESPONDENT

JUBILEE PARTY..... 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION..... 3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Riech, J.) dated 28th May, 2017

in

Election Petition Appeal No. 69 of 2017)

REASONS FOR THE JUDGMENT OF THE COURT (Rule 32(5) of the Court of Appeal Rules)

1. In a judgment delivered on 16th June 2017, this Court dismissed the appellant's appeal herein from the judgment of the High Court (Riechi, J) dated 28th May 2017 and reserved reasons for doing so. We now give our reasons for dismissing the appeal.

Background

2. The appellant, Aswin Faud Rudainy, and the 1st respondent Kazungu Wanje Baya, were contestants for nomination by Jubilee Party, the 2nd respondent for the position of Member of County Assembly Shella Ward, Malindi Constituency, Kilifi County in a nomination exercise held on 26th April 2017. The 1st respondent was declared the winner having garnered 740 votes while the appellant garnered 707 votes. The appellant contested that result and complained before the Jubilee National Appeals Tribunal that he lost on account of a polling station, Nidhamia Hall polling station, having been closed and the polling station relocated to Malindi High School. He asserted that the 1st and 2nd respondent colluded to relocate

the polling station from Nidhamia Hall, which he claimed to be located in his stronghold, in order to disadvantage him.

3. The Jubilee National Appeals Tribunal dealt with the dispute in what is said to have been ex parte proceedings and ordered that results of Malindi High School polling station be excluded from the final tally of votes cast on the basis that the relocation of a Nidhamia Hall polling station to Malindi High School had been done abruptly and arbitrarily without due consultation with the electorate and without adequate notice to the candidates. In its ruling delivered on 9th May 2017, the Jubilee National Appeals Tribunal had this to say:

“Consequently, the Tribunal finds that the appeal herein has merit and nullifies the nominations results for the Member of County Assembly declared in Malindi High School in Sheila Ward, Malindi Constituency and directs the National Elections Board to issue a Certificate to the winner from the results declared in the other four Polling Stations namely Karira Primary School, Upweoni Primary School, Sir Ali Primary School and Uhuru Gardens Primary School.”

4. The effect of the decision by the Jubilee National Appeals Tribunal to exclude the votes cast at Malindi High School polling station from the final tally of votes was that the appellant emerged as the 2nd respondent’s nominee for the position of Member of County Assembly Sheila Ward, Malindi Constituency, Kilifi County.

5. Subsequently, and following a complaint by the 1st respondent that the decision of the Jubilee National Appeals Tribunal was arrived at without due process, the 2nd respondent issued the nomination certificate to the 1st respondent.

6. Thereafter, and with a view to enforcing the decision of the Jubilee National Appeals Tribunal given on 9th May 2017, the appellant made an application before the Political Parties Disputes Tribunal (PPDT) to nullify the nomination certificate issued by the 2nd respondent to the 1st respondent.

7. PPDT considered the application and the affidavits filed in support and in opposition to the application. In a judgment delivered on 19th May 2017, the PPDT declined to do so and dismissed the appellant’s application. When doing so, the PPDT had this to say:

“[7] The Complainant essentially want us to declare that he won the party nomination for the seat of Member of County Assembly for Sheila Ward. This is disputed by the 1st and 2nd respondent. The IDRMs ruling was to the effect that the Complainant won this nomination exercise. However, the 1st and 2nd respondent dispute this. The 1st respondent is adamant that he was never served with notice of the IDRMs hearing. He alleges that the Affidavit of service furnished by the complainant as evidence of service was illegible, false and fraudulent. A perusal of the documents filed reveal that the affidavit of service is indeed illegible. We are unable to read or decipher the contents of the affidavit.

In totality, we find that the claimant has not furnished us with sufficient evidence showing his win. As such, we cannot grant the orders as sought by the Claimant.”

8. Aggrieved, the appellant appealed to the High Court. In its judgment delivered on 28th May 2017, which is the subject of the present appeal, the High Court at Nairobi (Riechi, J) did not find merit in the appeal and dismissed it. The appellant then lodged the present appeal.

The appeal and submissions by counsel

9. Learned counsel, Mr. Saluny who appeared with Mr. Akusala for the appellant referred the Court to the memorandum of appeal and the appellant’s written submissions and urged: that the High Court erred in disregarding the decision of the Jubilee National Appeals Tribunal given on 9th May 2017; that the 1st

respondent did not take any steps to challenge the award of the Jubilee National Appeals Tribunal; that the only issue that was before the PPDT was the enforcement of the decision of the Jubilee National Appeals Tribunal.

10. Citing the decision of this Court in **Florence Nyaboke Machani vs. Mogere Amosi Ombui & 2 others [2014] eKLR**, counsel submitted that the decision of the Jubilee National Appeals Tribunal remains valid as it was never challenged; that the High Court did not have jurisdiction to delve into the merits of the matter as the proceedings before the PPDT were not in the nature of an appeal; and that the issue of votes cast dealt with by the High Court was not a matter that was before the PPDT.

11. According to counsel the nominations were not free and fair and did not reflect the will of the people in that the change of the polling station from Nidhamia Hall polling station to Malindi High School was not communicated to the candidates and the voters in good time; that there was a legitimate expectation that the polling stations would remain as initially agreed and information on closure or change of polling station would be relayed well in advance.

12. Opposing the appeal, learned counsel Mr. Washe for the 1st respondent submitted that the appellant was seeking to enforce an illegal order before the PPDT; that as a member of the 2nd respondent, the appellant is bound to comply with the nomination rules of the Party; that the appellant was required to effect service of its complaint before the Jubilee National Appeals Tribunal upon the 1st respondent, as the successful candidate, but did not do so.

13. Counsel urged that the decision of the Jubilee National Appeals Tribunal was in any case overturned; that the affidavit of service relied upon by the appellant purportedly to demonstrate that service had been effected is illegible; that the PPDT and the High Court properly considered the matter; that there was a proper basis for changing the polling station from Nidhamia Hall to Malindi High School; that Nidhamia Hall was in any case situated only 120 meters from the next polling station and voters were not disenfranchised. He urged us to dismiss the appeal with costs.

For the 2nd respondent learned counsel Mr. Omugunda submitted that the appellant's appeal does not raise any points of law and should be dismissed. Counsel found support in the decision of this Court in **Mercy Kirito Mutegi vs. Beatrice Nkatha Nyaga & 2 others [2013] eKLR** and argued that the circumstances under which the polling station was relocated is a matter of fact that was dealt with by the High Court.

15. On his part, learned counsel Mr. Lawi for the 3rd respondent urged the Court to dismiss the appeal submitting that the 3rd respondent did not conduct the nominations exercise for the 2nd respondent; that this appeal is overtaken by events in light of Section 13 of the Elections Act requiring political parties to nominate candidates at least 90 days before the general election, and to submit names of nominees to the 3rd respondent at least 60 days before the elections.

Analysis

16. Having considered the appeal and the submissions filed by the parties herein and highlighted by their respective counsel together with the authorities relied on, the question for determination is whether the learned Judge, and by extension the PPDT, erred in refusing to uphold the decision of the Jubilee National Appeals Tribunal given on 9th May 2017 nullifying the votes cast at Malindi High School polling station the exclusion of which would have resulted in the appellant winning the nomination. Our mandate under Section 41 (2) of the Political Parties Act is confined to points of law.

17. The appellant complains that it was not open to the PPDT or to the High Court to interrogate the merits of the decision of the Jubilee National Appeals Tribunal given on 9th May 2017; and that all the PPDT was required to do was to enforce that decision without question. That cannot be right. There was material presented before the PPDT in the form of an affidavit sworn by the 1st respondent that when he

became aware of the decision of the Jubilee National Appeals Tribunal given on 9th May 2017 that was made in his absence, he appeared before that Tribunal on 10th May 2017 after which the decision of 9th May 2017 was reversed. There was also a replying affidavit sworn by Marykaren Kigen Sorobit, the Deputy Executive Director and Director of legal affairs of the 2nd respondent, in which it was deposed that the decision of 9th May 2017 by the Jubilee National Appeals Tribunal “was overturned”. In those circumstances, the PPDT could not, without question, give effect to an award that had been overturned.

18. Furthermore, one of the complaints by the appellant before the PPDT was that:

“On the eve of the primaries to be held on 26th April, 2017, the Returning Officer Malindi unliterary (sic) and without the consent of the other aspirants or notice to the general public decided to remove Nidhamia Hall Polling Station from former Sheila Ward and unilaterally and illegally added a polling station to former Maweni Ward that is Malindi High Polling Station... [and that] due to last minute close (sic) of the Nidhamia Hall polling station, which is my strong hold, without due notice or reasonable explanation, I lost to the 1st respondent with 33 votes.”

19. The question whether the votes cast at Malindi High School polling station should have been included in the final tally was therefore a matter on which the PPDT and the High Court were called upon to determine. It is a matter within the remit of the PPDT and the High Court under Section 40 and Section 41(2) of the Political Parties Act. In our view, both the PPDT and the High Court correctly dealt with the matter. As the learned Judge stated:

“The Appellant, both at the Political Parties Dispute Tribunal and here prays that the Malindi High School Polling Station votes be removed from the tally which will mean that he will be declared the winner. With respect that approach will distort the votes and will not reflect the will of the people of Sheila Ward. This will clearly lock out the 245 voters who exercised their free will in the nomination. In my view, it will be an act of distortion of the electoral process to exclude the votes from a polling station in the final tally. If the court had found the relocation of the polling station disenfranchised the voters, it would have ordered a repeat of polling at the polling stations.”

20. We concur fully with the reasoning and the decision reached by the learned Judge. As already stated, there was affidavit evidence that Nidhamia polling station was approximately 120 meters from another polling station, namely, Sir Ali Primary School polling station and approximately 300 meters from yet another polling station, namely Uhuru Gardens polling station. It cannot therefore be said that voters were disenfranchised given the proximity of those polling stations to the relocated polling station. The total tally of the 5 polling stations resulted in a win for the 1st respondent with 740 votes against the appellant’s 707 votes and the conclusion by the learned Judge that the appellant was validly nominated by the 2nd respondent cannot therefore be faulted.

21. It is for those reasons that we concluded in our judgment delivered on 16th June 2017, that the appeal is devoid of merit.

Dated and delivered at Nairobi this 21st day of July, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR