



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA, GATEMBU, JJA)

CIVIL APPEAL NO 143 OF 2017

BETWEEN

HON. WANJIKU MUHIA.....APPELLANT

AND

FAITH WAIRIMU GITAU.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

(Being an Appeal from the Judgment and Order of the High Court of Kenya at Nairobi delivered on 19th May, 2017 (Mutuku, J) in

ELECTION PETITION NO. 25 OF 2017)

REASONS FOR THE JUDGMENT OF THE COURT

(Rule 32(5) of the Court of Appeal Rules)

1. In a judgment delivered on 8th June 2017, this Court allowed the appellant's appeal from the judgment of the High Court (Mutuku, J. dated 19th May 2017 and reserved reasons for doing so. We now give our reasons for allowing the appeal.

Background

2. The appellant and the 1st respondent sought nomination by the 2nd respondent for the position of Woman Representative for Nyandarua County and in that regard participated in the 2nd respondent's nominations held on 26th April 2017. According to the 2nd respondent, the 1st respondent won the nomination by 106,004 votes against the appellant's 75,296 votes.

3. On 28th April 2017, the appellant appealed to the 2nd respondent's internal dispute resolution mechanism, Jubilee Party Appeals Tribunal, seeking nullification of the nomination on grounds, among others, that the nomination process was flawed; that there was photocopying of ballot papers; that there were tallying discrepancies; that there was multiple voting; that polling went on beyond the time permitted; and that there was scarcity of polling materials in some polling stations.

4. That appeal was opposed. The 1st respondent maintained that the nomination process was free and fair; that she won the elections for the position and that the nomination truly reflected the will of the people of Nyandarua.

5. In its ruling delivered on 7th May 2017, the 2nd respondent's Appeals Tribunal determined that the appellant had not established that there were electoral malpractices that substantially and materially affected the outcome. That tribunal stated:

“If the winning majority is not so large that even a substantial reduction, scrutiny or recount still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules. Consequently, the Tribunal finds that the Complainant did not provide evidence in support his (sic) allegations to substantially affect the outcome of the results. It is trite law that the burden of proof in an election dispute is on the Complainant to establish that there were irregularities, malpractices or fraud in the conduct of the disputed election for the tribunal to grant him the remedy sought.”

6. With that, that Tribunal rejected the appeal and declared, *“the 1st respondent was validly nominated”* and directed the 2nd respondent to *“issue a certificate of nomination to the 1st respondent.”*

7. Dissatisfied, the appellant lodged a complaint with the Political Parties Disputes Tribunal (PPDT) seeking orders, among others, to quash the nomination of the 1st respondent as the legitimately nominated party representative for the seat of Woman Representative, Nyandarua County; and an order compelling a repeat of the nomination for that position. She complained of numerous electoral malpractices including a claim that the respondent had resorted to burning all ballot papers cast during the nomination prior to the hearing of her case *“thus leaving no room for recount or verification of [her] claims.”*

8. In its defence, the 2nd respondent asserted, *“the party primaries were free, fair and accountable and that all challenges faced during the exercise were resolved amicably and with the concurrence of other stakeholders”*.

9. Regarding the complaint that the ballot papers were burnt, the 2nd respondent stated that it is a “stranger” to that claim and maintained that the 1st respondent had won the nomination fairly. The 1st respondent asserted that the ballot papers were burnt on orders from the County Elections Board of the 2nd respondent as the nominations were complete and the schools were bound to resume session.

10. In a judgment delivered on 12th May 2017, the PPDT found that there was evidence before it that the respondents had maliciously colluded to burn the votes cast, with a view to suppressing evidence and the truth *“the idea being to hide the truth in case the complainant was to get an order for recount or verification of votes cast.”* The PPDT concluded thus:

“Having found that there is apparent collusion between the respondents at suppression of the truth, the interests of justice demands that the people of Nyandarua County should not be subjected to another nomination exercise where these two respondents may again be in the same corner.”

11. Accordingly, the PPDT declared as null and void the nomination of the 1st respondent by the 2nd respondent for the seat of Woman Representative, Nyandarua County. The PPDT also ordered that the nomination certificate issued to the 1st respondent as the nominee for that seat be revoked and declared the appellant as the duly nominated woman representative of that County. The 2nd respondent was accordingly directed to issue the appellant with the nomination certificate for that position.

12. The 1st respondent was aggrieved. On 13th May 2017 she lodged an appeal to the High Court under Section 41 of the Political Parties Act. S. N. Mutuku, J, heard that appeal and delivered judgment on 19th

May 2017 allowing the 1st respondent's appeal on the grounds, among others that, the 1st respondent had not discharged its burden of proof before the PPDT. The High Court ordered that "*the decision of the Political Parties Disputes Tribunal in Complaint No. 210 of 2017 is hereby set aside*"; that "*the decision of the County Returning Officer and the 2nd Respondent's National Appeal's Tribunal declaring the Appellant as the nominee of the Jubilee Party Nyandarua County Woman Representative is hereby upheld.*"

13. That decision is the subject of the present appeal.

The appeal and submissions by counsel

14. In her memorandum of appeal, the appellant complains that the learned Judge erred in holding that the PPDT did not have jurisdiction under Section 40 of the Political Parties Act to declare the winner or to grant the prayers that were sought; that there was evidence, which the Judge ought to have considered, demonstrating that it was impossible to determine the votes garnered by the 1st respondent; that the Judge relied on unauthenticated tallying sheets presented by the 2nd respondent; that the Judge failed to interrogate the issue of the 2nd respondent burning ballot papers immediately after the voting when "*it was almost certain the (sic) disputes arising out [of] the nominations were bound to be instituted and would necessitate a recount.*"

15. Learned counsel for the appellant, Prof. Ojienda, SC, relied on written submissions that he highlighted. He submitted that the PPDT has jurisdiction under Section 40(1)(fa) of the Political Parties Act to determine the dispute and to declare the duly nominated candidate based on the evidence presented before it. Referring to the case of **Football Kenya Federation v Kenyan Premier League Limited and 4 others [2015] eKLR**, a decision of the High Court at Nairobi, counsel urged that the Court must lean in favour of a construction of statute as conferring jurisdiction in the absence of an express provision limiting the jurisdiction of the PPDT.

16. Counsel also referred to another High Court decision in **Osman Khalif Abdi v ODM and others Election Petition Appeal No. 47 of 2017** to support the argument that the PPDT has jurisdiction, in appropriate cases, to declare the winner in the discharge of its duty to give effect to the will of the electorate and that in the circumstances of this case, the PPDT properly exercised its jurisdiction in declaring the appellant the winner. Furthermore, counsel argued, the PPDT had the power, under Article 159 of the Constitution, to give effect to substantive justice and to grant the appropriate relief notwithstanding that there were two contradictory prayers that had been sought.

17. Counsel for the appellant further submitted that the nomination exercise was marred by irregularities, to the extent that it was impossible to determine, as the High Court did, that the 1st respondent was the winner. According to counsel, the irregularities affecting the results consisted of unsigned tallying sheets; burning of ballot papers during the subsistence of the appeal before the Tribunal; pre-marked ballot papers in favour of the 1st respondent; and the extension of the election exercise beyond midnight of 26th April 2017 in the 1st respondent's strongholds. In support of the proposition that an election will be nullified if it is not conducted in accordance with the law as to elections and if the errors or mistakes are found to have affected the results, counsel referred to the judgment of the High Court in **Peter Kimori Maranga & another vs. Joel Omagwa & 2 others [2013] eKLR**.

18. Further, counsel submitted, it was not possible to verify the results or to conduct re-tallying on account of the ballots having been burnt and that the PPDT was right in concluding that the burning of votes cast amounted to suppression of the evidence.

19. Opposing the appeal, learned counsel Mr. L. Karanja, who appeared with Mr. Ndegwa Wahome, Mr. Stanley Kihiki and Mr. Kariuki Njiiri for the 1st respondent, relied on written submissions that he highlighted. He submitted that appeals to this Court can only be on points of law by reason of Section 41(2) of the Political Parties Act; that on the strength of the decision of this Court in **Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR** this Court should accept the findings of fact of the lower court; that

under Section 31 of the Elections Act the power to nominate or select a candidate is vested in the political party and the PPDT acted outside its jurisdiction in selecting the appellant as the 2nd respondent's candidate.

20. Counsel urged that the jurisdiction of the PPDT is limited to determining whether the nomination process “*was reasonable, lawful, legal and/or suspect*”; that it was not open to the PPDT to exercise a mandate that is vested on another body; that although it was within the power of the PPDT to admit the complaint, the extent to which it could go was limited to determining whether the allegations made by the appellant were substantiated and whether a case for nullification was established to the required standard.

21. According to counsel for the 1st respondent, the issue of the destruction of voting materials and ballot papers could not arise since the appellant had not sought a recount of votes before the Tribunal; that there was no basis for the conclusion that the destruction of the materials was done with the object of concealing or suppressing evidence. Citing the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 others [2015] eKLR**, counsel stated that the appellant had not in any case established a basis for recount.

22. Counsel went on to say that the decision of the PPDT violated the 1st respondent's right to participate in the nomination process and the 2nd respondent's right to nominate its flag-bearer, but also, by implication, found the 1st respondent guilty of an election offence when there was no evidence to support this finding.

23. Counsel contended that Article 159 of the Constitution could not cure the contradictory remedies that were sought before the PPDT as it was a jurisdictional, as opposed to a procedural, matter. He cited **Raila Odinga v IEBC and others [2013] eKLR** and **LSK v The Centre for Human Rights and Democracy and 12 others Petition No. 14 of 2013**, among other decisions, in support of the proposition that Article 159 of the Constitution was not meant to be a panacea for all procedural shortfalls.

24. Urging us to dismiss the appeal, learned counsel for the 2nd respondent, Mr. K. Mbugua, appearing with Mr. M. Owour, argued that the PPDT has the mandate, under Section 40 of the Political Parties Act to declare a winner in appropriate cases for example where a recount points to the winner. In the present case however, counsel submitted that a recount was not sought; that the learned Judge properly analysed the evidence and correctly found that there was no basis for the PPDT to order the 2nd respondent to issue a nomination certificate to the appellant. He agreed with the judgment of the High Court that with the evidence before it, the PPDT could not issue the orders that it did especially given its finding that the election process was irregular.

25. On the issue regarding burning of ballot papers, Mr. Mbugua submitted that there was nothing sinister regarding the burning; that the 2nd respondent explained that it was compelled to do so as it had no resources to store the ballot papers and schools where the materials were stored were scheduled to open and required the 2nd respondent to clear out. Counsel concluded by saying that the appellant should have pursued the matter with the IEBC as the nomination certificate had already been issued to the 1st respondent.

Analysis

26. Under Section 41(2) of the Political Parties Act, the jurisdiction of this Court on an appeal from the High Court is confined to points of law. That section provides that:

“(2) An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”

27. There are essentially two issues for our determination. The first is whether the High Court erred in holding that the PPDT had no jurisdiction to declare a winner. The second issue is whether there is evidence to support the finding by the Judge that the allegations that ballot papers were burnt to suppress

or conceal malpractices and irregularities was rebutted.

28. We begin with the question whether the PPDT has jurisdiction under Section 40 of the Political Parties Act to declare a winner. In this case, that issue was addressed by the High Court in the context of the specific prayers that were sought and granted by the PPDT. In addition to seeking an order to quash the nomination of the 1st respondent and an order for the repeat of the nomination, the appellant had also sought the following reliefs:

“(e) A declaration of the Claimant as the winner and lawfully nominated contestant for Women Representative for the Nyandarua County for the Jubilee Party.

(f) An order compelling the Respondent to issue the Claimant with the nomination certificate as the winner and lawfully nominated Women Representative, Nyandarua County.

(g) A declaration that the decision endorsing and/or representing Mrs. Faith Wairimu Gitau as the legitimately nominated party representative for the seat of Women Representative Race, Nyandarua County is unreasonable, unlawful, illegal and/or suspect.”

29. The PPDT in its judgment dated 12th May 2017 granted those reliefs as sought. On appeal, the High Court took the view that:

“...the jurisdiction of PPDT is limited to determining whether the nomination process was conducted according to the Constitution, the law and the party constitution and rules and where the law is found to have been breached, the Tribunal’s jurisdiction would have been limited to granting orders in respect of prayers (a) an order quashing the declaration of Appellant as nominated, (b) an order to compel 2nd Respondent to repeat nominations and (e) an order declaring that the decision of NAT was unlawful and unreasonable. It had no power, in my view, to grant prayers (c) an order declaring the 1st Respondent the lawfully nominated and the winner and (d) an order compelling the 2nd Respondent to issue the 1st Respondent with the nomination certificate. This is because the Tribunal can only issue an order to compel the 2nd Respondent to comply with the law by repeating the nominations in accordance with the law. It is my considered opinion that in the instant case the Tribunal arrogated to itself jurisdiction it did not have.”

30. Section 40 of the Act identifies the types or categories of disputes over which the PPDT can exercise jurisdiction. It does not address the question of the nature of reliefs or remedies it can grant. Unlike the express powers conferred upon an election court under Section 80 of the Elections Act, the Act is silent on the powers exercisable by the PPDT. We do not construe that to mean that the PPDT is devoid of power to grant appropriate remedies. In our view where, for instance, a party in proceedings before the PPDT seeks a recount of ballots cast, and the PPDT upon recount of the ballots cast concludes that the winner is apparent, we do not see why the PPDT cannot by order direct the political party to issue the nomination certificate to such person.

31. It is noteworthy that under the nomination rules of the 2nd respondent, the party’s own internal dispute resolution mechanism is clothed, in express terms, with power to declare a winner. Rule 37.4 of those rules provides that:

“Should any Appeal Tribunal hearing an appeal conclusively arrive at a decision where it makes a conclusive determination as regards who the winner of the nomination election is/was, the National Elections Board shall have the mandate to declare such a candidate the winner, subject to the right provided under these Rules for a party in the appeal who was a candidate in the nomination election to lodge a second appeal.”

In our view, the PPDT can in appropriate cases exercise similar powers.

32. In the circumstances of the present case, however, we are not satisfied that the PPDT was in a position to determine the winner based on the material that was before it. The PPDT found that the nomination process was flawed to the extent that the result was affected, despite which it went ahead to declare the appellant as the duly nominated candidate. The appropriate relief in those circumstances would undoubtedly have been an order for the repeat of the nomination exercise.

33. We turn to the question of burning of records. It is not in dispute that the ballot papers were burnt on 30th April 2017, four days after the nomination exercise. By 28th April 2017, the appellant had lodged her complaint with the 2nd respondent's internal dispute resolution mechanism seeking nullification of the nomination of the 1st respondent for the position of Woman Representative for Nyandarua County. Although the appellant did not specifically pray for a recount, she complained that there were photocopied ballot papers that were not genuine that were used in some polling stations. That would have been verified by scrutinizing the ballot papers, which, by the time her complaint was heard by the 2nd respondent's tribunal, had been burnt. It may well be, as submitted by counsel for the 2nd respondent, that the 2nd respondent had resource constraints and challenges in storing the ballot papers. However, it was incumbent upon the 2nd respondent under its nomination rules, to retain all documents relating to a nomination for a period of not less than 6 months. Part XV of the 2nd respondent's Nomination Rules, 2016 provides:

“i. All documents relating to a nomination shall be declared and forwarded by the Presiding Officer to the Party Headquarters and shall then, unless the Party Chairman otherwise directs, be destroyed after a period of not less than six months from the date of such nomination.”

34. In our view the PPDT was therefore right when it stated in its judgment dated 12th May 2017 that:

“...Upon evaluating the evidence, we hold that burning of the votes cast, as an allegation has not been rebutted by the Respondent. There is evidence on record about the burning. The Respondents have engaged in mere denials and not sufficiently countered the allegations. The 1st Respondent bears the onus of promoting democracy in the Party, both under the Constitution, the Political Parties Act, and its own constitution and Rules.

Burning votes cast amounts to nothing but suppression of evidence, especially when the 1st Respondent knew that its own Appeals Tribunal was seized of the appeal by the Complainant.”

35. Given the dictates of the nomination rules to which we have referred requiring that all nomination documents should be kept for at least 6 months after the nomination, the PPDT was entitled to draw the inference that it did that the destruction of records hardly 4 days after the nomination exercise was sinister.

36. Had the learned judge's attention been drawn to the nomination rules, she would no doubt have reached a different conclusion. In our view therefore, the learned Judge of the High Court fell into error in finding fault with the conclusion reached by the PPDT with respect to the destruction of ballot papers.

37. It is for the foregoing reasons that we allowed the appellant's appeal in terms of the judgment of the Court delivered herein on 8th June 2017.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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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