



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 170 OF 2017

BETWEEN

MAXWELL OCHIENG' APPELLANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT 1ST RESPONDENT

GEORGE OMONDI 2ND RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Lesiit, J.) delivered on 2nd June, 2017 in ELECTION PETITION APPEAL NO. 79 OF 2017)

REASONS FOR JUDGMENT

1. On 23rd June, 2017 this Court partially allowed this appeal, set aside the High Court judgment dated 2nd June, 2017 and ordered the 1st respondent to conduct fresh nomination exercise for the position of member of County Assembly, Korogocho Ward, (the Ward) Ruaraka constituency within Nairobi County, in accordance with the 1st respondent's Election and Nomination Rules. Each party was ordered to bear its own costs.

2. In view of the urgency of the appeal, the Court was not able to give reasons for its decision on 23rd June as above stated; it indicated that the reasons would be given on 28th July, 2017. That we hereby do.

BACKGROUND

3. The appellant and the 2nd respondent were contestants in the 1st respondent's party primaries held on 30th April, 2017 for the position of member of County Assembly for the aforesaid ward. The appellant allegedly garnered 635 votes but the Returning Officer declared that he got 600 votes. The 2nd respondent was declared the winner, having garnered 619 votes, but according to the appellant, the 2nd respondent actually got 568 votes. The appellant, being aggrieved by the Returning Officers' declaration of the results as aforesaid, filed a complaint to the 1st respondent's County Appeals Tribunal.

3. The 1st respondent's County Appeals Tribunal, vide its judgment dated 6th May, 2017 allowed the

complaint, revoked the 2nd respondent's nomination certificate, upheld the appellant's nomination and issued him with an interim certificate of nomination. That notwithstanding, the 1st respondent issued the 2nd respondent with the final nomination certificate, thus prompting the appellant to file a complaint before the Political Parties Disputes Tribunal (PPDT).

4. The PPDT allowed the appellant's complaint, holding that it was wrong for the 1st respondent to disobey its own appeals Tribunal's decision. The PPDT further annulled the nomination certificate that had been issued to the 2nd respondent and ordered the 1st respondent to conduct fresh nomination exercise.

APPEAL TO THE HIGH COURT

5. The appellant was dissatisfied with the PPDT's decision and preferred an appeal to the High Court; arguing, inter alia, that the PPDT erred in law in finding that the entire nomination process was opaque, unaccountable and inaccurate; and for ordering a repeat of the nomination exercise.

6. The High Court (Lesiit, J.) identified three issues for determination:

“1. Whether the entire nomination exercise was opaque, unaccountable and inaccurate.

2. Whether the Returning Officer upheld his duty to publicly tally, collate and announce the results.

3. Whether the Returning Officer has powers to alter results received from Presiding Officers.”

7. The appellant's argument regarding the first issue as stated above was that the process of casting ballots for the said nomination was free and fair, it was only the tallying process that was opaque. He alleged that there was inordinate delay in the announcement of the results by the Returning Officer; that the Returning Officer held a private meeting with the 2nd respondent for a period of about 2 hours, during which time the results were altered. Regarding that allegation, the PPDT held:

“We find that the act of locking out the claimant from the room where the Returning Officer and the 2nd Respondent locked themselves in and were later joined by the 2nd Respondent's friend rendered the process opaque, unaccountable and inaccurate.”

8. The appellant contested the final results for Kariobangi Baptist Polling Centre as read out by the Returning Officer. He contended that he garnered 44 votes against the 2nd respondent's 69 votes. On the other hand, the 2nd respondent claimed that he garnered 109 votes and the appellant got nil.

9. In response, the 2nd respondent contended that the appellant had confessed to commission of an irregularity of hiring a van for transportation of the ballot boxes, a duty that ought to have been performed exclusively by the Returning Officer. In his view, the entire nomination process was free, fair and accountable.

10. The High Court held that no evidence was adduced in support of the allegation of the private meeting between the 2nd respondent and the Returning Officer. It concluded that the entire nomination exercise was free and fair.

11. As to whether the Returning Officer upheld his duty to publicly tally, collate and announce the results, the High Court found that there was no alteration on the record; that what the appellant presented as proof of the alterations were results given to him by some unnamed persons and were therefore unreliable.

12. On the third issue, that is, whether the Returning Officer had power to alter results from presiding officers, the High Court did not specifically pronounce itself. Instead, it held that there was no proof of

alternation of the results, either by the presiding officers or the Returning Officer. The Court confirmed the nomination of the 2nd respondent, thus overturning the decision of the PPDT. That is the decision that gave rise to this appeal.

APPEAL TO THIS COURT

13. In his memorandum of appeal, the appellant faulted the learned judge for; *inter alia*; holding that the results as announced by the Returning Officer were accurate; for finding that the 2nd respondent was the lawful winner in the nomination exercise; and for failing to consider the evidence and submissions on record.

14. When the appeal came up for hearing, **Miss Awuor**, holding brief for **Prof. Ojienda, SC**, relied on written submissions, which she briefly highlighted. To illustrate that the tallying of the results was not properly conducted by the Returning Officer, counsel reiterated that there was unlawful alteration of the results for Kariobangi Baptist polling centre, which indicated that the appellant got no votes at all, whereas there was sufficient evidence that he garnered 44 votes against the 2nd respondent's 69 votes, which was changed to read 109 votes.

15. Miss Awuor further submitted that the learned judge disregarded evidence adduced by the appellant by way of affidavits sworn by **Albert Owino Ojing** and **Paul Ochieng Owuoth**, who were both contestants for the same position as the appellant and the 2nd respondent, that indeed the results that were declared by the Returning Officer did not agree with the ones announced by the Presiding Officer at Kariobangi Baptist Polling Centre.

16. Counsel further submitted that there was uncontroverted evidence that there was a private meeting between the Returning Officer and the 2nd respondent before the results were tallied. That in itself created a perception of bias, she added.

17. The appellant's counsel urged the Court to allow the appeal and affirm the 1st respondent the lawful nominee for the position of member of County Assembly, Korogocho Ward.

18. The 1st respondent did not participate in the appeal. The second respondent through M/S Kenyatta Odiwuor & Company Advocates filed his submissions that were briefly highlighted by **Mr. Alex Muango**. Counsel submitted that the appellant did not prove that the nomination exercise was not free and fair or that there was any variation of the results. He cited the Supreme Court decision in **RAILA ODINGA v IEBC & 3 OTHERS [2013] eKLR** on the issue of burden of proof where the Court held that:

"... a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary."

19. Mr. Muango further submitted that some of the issues that were raised by the appellant were matters of fact, which this Court had no jurisdiction to deal with. He cited the provisions of **section 85(1)** of the **Elections Act**. He urged the court to dismiss the appeal.

ANALYSIS

20. We have carefully considered the record of appeal as well as the submissions by counsel. We shall begin by considering the issue of jurisdiction of this Court. Although the 2nd respondent's advocate submitted that under **section 85(1)** of the **Elections Act 2011** this Court is entitled to deal with matters of law only, we must point out that this appeal does not arise from an election petition, whose disputes are

determined in accordance with the provisions of the Elections Act. What gave rise to the appeal is a dispute emanating from party primaries and the relevant statutory provision therefore is the Political Parties Act. **Section 41(2)** of the said Act stipulates that:

“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.”

21. The definition of “**election**” under the **Election Act** is different from that of “**election**” under the **Political Parties Act**, just as the two Acts of Parliament provide for different functions or purposes. The Elections Act is

“An Act of parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes”.

The Act defines “election” to mean “a presidential, parliamentary or county election and includes a by-election.”

22. On the other hand, the Political Parties Act is “An Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes”. The Act defines “election” to mean “the act of selecting by vote, a person or persons from among a number of candidates to fill an office or to membership of any political party and includes a presidential, parliamentary or county election”.

23. Dispute resolution mechanism under each of the two acts is different. However, as regards the jurisdiction of this Court, the two Acts of parliament are more or less the same. **Section 85 A** of the **Elections Act** provides that:

“An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only”

24. We shall therefore determine this appeal on points of law only as per the provisions of **section 41(2)** of the **Political Parties Act**. So what is a point of law as opposed to a point of facts? This question was comprehensively addressed by the Supreme Court in **ZACHARIA OKOTH OBADO v EDWARD AKONG’O OYUGI & 2 OTHERS [2014] eKLR**. The Supreme Court reviewed various decisions from several jurisdictions. The Court cited its earlier decision in **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS [2014] eKLR** where it delivered itself as hereunder:

“.....with specific reference to Section 85A of the Elections Act, it emerges that the phrase “matters of law only”, means a question or an issue involving:

a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;

b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;

c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record,

or that the conclusions were “so perverse”,

or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.”

25. We shall be guided by the aforesaid decision that is binding upon this Court. Looking at the appellant’s memorandum of appeal, it is evident that out of the 8 grounds of appeal, only one of them is premised on a point of law only; all the others are based on points of law and fact. That one ground states as follows:

“(iv) The learned judge erred in law by confirming the 2nd Respondent as the lawful nominee of the 1st Respondent whereas all evidence points to the Appellant being the winner of the nomination exercise.”

As regards the other grounds of appeal, we shall only consider points of law that emerge from the relevant grounds.

26. The first point of law for our consideration is whether the nomination exercise was conducted in a manner that accords with the 1st respondent’s Constitution, Election and Nomination Rules, and whether the exercise espoused values and principles of free and fair elections as stipulated in **Article 81(e)** of the **Constitution of Kenya, 2010**.

27. The 1st respondent’s Nomination Rules guarantee free, fair and credible elections. There was no contention that the casting of ballots and the counting in all the polling stations was done smoothly and without any major incidents. That cannot however be said of the tallying process. There was sufficient evidence of inordinate delay in announcement of the results by the Returning Officer, which, according to the appellant, was preceded by alteration of some of the results that had already been announced at the polling stations, with the result that the 2nd respondent was the winner.

28. The appellant filed a complaint with the 1st respondent’s County Appeals Tribunal, which had opportunity to scrutinize all the relevant records, including the tally sheets. That Tribunal concluded that the appellant had garnered more votes than the 2nd respondent but the results had been altered by the Returning Officer to reflect the 2nd respondent as the winner. Consequently, it revoked the 2nd respondent’s nomination.

29. Regarding the issue of alteration of the final results, the learned judge was not satisfied that the issue had been proved. The learned judge did not, however, consider the affidavits of Albert Owino Ojing and Paul Ochieng Owuoth, who were also contestants for the same position as the appellant and the 2nd respondent. The two witnesses exhibited results received from their respective agents that clearly showed that there had been a variation of the results for Kariobangi Baptist Polling station. Had the Court taken the two affidavits into consideration, we believe it would most likely have arrived at a different conclusion.

30. But the finding that there was a variation of the final results to the detriment of the appellant was not sufficient to enable this Court reach the conclusion that the appellant was the undisputed winner of the party primary for the said ward and thus compel the 1st respondent to issue him with the final nomination certificate, without having to repeat the nomination exercise. For a court to make such an order, there has to be compelling, clear and unequivocal evidence that the actual results reflect the will of the electorate in accordance with the dictates of **Article 38** of the **Constitution of Kenya, 2010**.

31. None of the parties called the Returning Officer as a witness; even the presiding officer at Kariobangi Baptist Polling station whose results were alleged to have been altered was not called to testify. The 1st respondent did not take part in the proceedings and so it did not help the PPDT and the High Court in

determination of the dispute. There were also doubts as to whether Abraham Oyugi Dollah was the duly appointed Returning Officer and whether the certificate of return contained in the record of appeal was the official one because it had neither signatures of the candidates nor their agents.

32. Rule 18.8.ii of the 1st respondent’s **Election and Nomination Rules** requires the Returning Officer, after announcing the results, to **“issue a certificate of return showing the total number of votes garnered by each candidate in every polling station and which shall be signed by either the candidate or their agents**” That was not done.

33. In view of the aforesaid anomalies, this Court deemed it appropriate to set aside the High Court’s judgment and order the 1st respondent to conduct a fresh nomination exercise in accordance with its Election and Nomination Rules. Those then are the reasons for our decision rendered on 23rd June, 2017.

Reasons Dated and delivered at Nairobi this 29th day of September, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR