IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO.172 OF 2017

BETWEEN

YASIR NOOR MOHAMMED NOOR.............................APPELLANT

AND

JUBILEE PARTY OF KENYA...............................1ST RESPONDENT

ASHRAF HASSAN BAYUSUF............................2ND RESPONDENT

(*Being an appeal from the judgment and decree of the High Court at Nairobi (Wakiaga, J.) delivered on 29th May 2017*

in

Election Petition Appeal No. 65 of 2017)

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REASONS FOR THE JUDGMENT OF THE COURT

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

In a judgment delivered on 30th June, 2017, this Court allowed the appellant's appeal from the judgment of the High Court (Wakiaga,J) dated 29th May 2017 and reserved its reasons for that decision. These are our reasons for allowing the appeal.

Briefly the facts are that ***Yasir Noor Mohammed Noor, (****the appellant*) and **Ashraf Hassan Bayusuf** (*2nd respondent),* together with 5 others, are members of the 1st respondent and were aspirants during the nomination for the position of the Member of National Assembly, Nyali Constituency in the ***Jubilee Party's*** (*the 1st respondent*) nominations exercise conducted on 26th April 2017. After the nomination exercise, the 1st respondent was allegedly declared the winner of the nominations with a total vote of 1404, while the appellant having garnered 895 votes was declared to be in third position. The appellant was aggrieved by the outcome of the nominations and appealed to the Jubilee Party Tribunal (JPT). It was his contention that he was not called before the JPT, and as a result appealed to the Political Parties Disputes Tribunal (PPDT) on12th May 2017 where his petition was that the 1st respondent had failed to observe its nomination rules, that require only party members as eligible to vote, by opening the exercise

to non-party members to vote and by failing to conduct nomination in Tumaini Church and Fadhil Adhim Primary School Polling Stations, it has breached, violated and or infringed ***Article 38 of the Constitution***, ***section 13*** of the ***Elections Act*** and ***rule 13*** of the ***Elections (General) Regulations*** and therefore the nomination exercise was not free and fair.

After hearing the parties, the PPDT found that there were election irregularities in the nomination exercise and ordered the conduct of fresh nomination exercise to determine the 1st respondent's nominee for the position of member of the National Assembly of Nyali Constituency.

Dissatisfied with that decision, the 2nd respondent appealed to the High Court on the grounds that he had garnered 1404 votes while the appellant had only garnered 894 votes and that his complaint that voting did not take place in the two polling stations namely; Tumaini Church and Fadhili Adhiu Primary School with 3684 and 1155 registered voters respectively was not sufficient to warrant an order for the repeat of the nominations.

After considering the parties pleadings and submission the High Court in its determination, concluded that the irregularities alleged by the appellant did not substantially affect the outcome of the nominations, and set aside the judgment of the PPDT dated 19th May 2017.

The appellant was thus aggrieved by the High Court's decision and appealed to this Court on the grounds that the High Court erred in failing to evaluate the facts in light of the provisions of ***Article 38 of the Constitution*** thereby occasioning a miscarriage of justice; that had the court taken into account the principles of ***Article 81 (a) and (e) of the Constitution***, it would have found that the 1st respondent's nominations were not conducted by an independent body, were not transparent, and were not administered in an impartial, neutral, efficient, accurate and accountable manner; that the nominations were not conducted in accordance with the provisions of ***section 13 (1)*** of the ***Elections Act*** and ***rule 13*** of the ***Elections (General) Regulations***, and were therefore illegal; that the learned judge wrongly found that the appellant did not pray for a repeat of nominations in all the Polling Stations despite its having been specifically prayed for in the pleadings; that the learned judge misapprehended and misapplied the provisions of ***section 83*** of the ***Elections Act*** in holding that the PPDT did not give an analysis of both the qualitative and quantitative effect of the alleged irregularities and in concluding that the appellant did not suffer over and above all the other contestants.

Appearing for the appellant, learned counsel ***Mr. Y.M. Aboubakar*** relied on the appellant's written submissions filed on 23rd June 2017. Whilst highlighting them, counsel submitted that the nomination irregularities identified were failure to conduct voting at two polling stations, an incomplete register and voting by ineligible persons, which was evident from the proceedings. Counsel faulted the High Court for arriving at the wrong conclusion that the discrepancies in the process did not affected the result of the nomination, despite having agreed with the PPDT that there were irregularities during the conduct of the nomination exercise.

Counsel further argued that under ***Article 38*** of the ***Constitution,*** the appellant was guaranteed to be a candidate for public office through a nomination process that was required to be conducted in accordance with the law; that the nomination irregularities were proved, and amounted to unreasonable restrictions which violated the appellant's rights, and that this was a qualitative issue; that once proved, vitiated the election.

Counsel further submitted that the nomination process was not in accordance with ***Article 81 (a)*** and ***(e)*** of ***the Constitution***, in that they were not transparent, accurate or accountable; that the learned judge relied on ***section 83*** of the ***Elections Act*** to reach a conclusion that the results were not affected. Counsel argued that of the 15 polling stations, two polling stations comprising of a total of over 4000 registered voters did not participate, and the winner won by 50 votes, that this would affect the result of the nominations, as the number of voters who were not allowed to vote far exceeded the margins that led to the declaration of the 2nd respondent as the winner of the nominations.

Mr. Mbichire, learned counsel for 2nd respondent did not file written submissions but orally submitted that, the nomination were held on 26th April 2017 in 13 polling stations; that after tallying the votes the 2nd respondent was declared the winner with 1404 votes; that Sanjiv Aggarwal came second with 1341 votes, and the appellant was third with 894 votes. The appellant was aggrieved by the decision and appealed to the JPT under *Tribunal Case No. 382 of 2017*, which appeal was dismissed for non attendance of the appellant on 10th May 2017; that the appellant filed a fresh complaint with the PPDT, where similar issues were raised. No reference was made to the judgment of the Jubilee Party Tribunal. The decision of the PPDT was the basis of the appeal to the High Court, which decision was overturned by the High Court for violation of the ***section 40 (1) (fa)*** of the ***Political Parties Act*** for failure to invoke 1st respondent's internal dispute resolution mechanism (IDRM).

It was further argued that when the High Court analysed the complaint that nominations were not carried out at the two polling stations, it found that the omission did not have any effect on the outcome of the process, as none of the parties was the beneficiary of the omission.

On his part, ***Mr Omuganda*** learned counsel for the 1st respondent opposed the appeal and submitted that the PPDT did not consider the qualitative and quantitative aspect of the results and did not determine whether the irregularities highlighted affected the outcome of the nominations; that the allegations addressed by the PPDT and the High Court which were matters of fact, and this Court did not have jurisdiction to address such matters. Counsel further argued that having regard to ***section 83*** of ***the Elections Act*** the irregularities did not affect the final outcome, as all aspirants were affected. Counsel cited ***Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 others [2013] eKLR***; for the position that the democratic will of the people should be upheld. Counsel concluded that the appellant had not discharged the burden of proof which was above the balance of probabilities.

We have considered the record and the parties submissions and are of the view that the issues for our determination are whether the appellant ought to have appealed to the JPT; whether the High Court rightly found that the nomination was conducted substantially in accordance with ***Article 38, Article 81 (a)*** and ***(e)*** of the Constitution, ***section 13 (1)*** of the ***Elections Act*** and ***rule 13*** of the ***Elections (General) Regulations 2012***; and whether the learned judge rightly concluded that the PPDT ought to have provided a qualitative and quantitative analysis to determine whether the nomination irregularities affected the results of the nomination and whether the appellant pleaded for the orders for the conduct of a repeat of the nomination process.

In dealing with matters concerning political party, under ***section 41*** the ***Political Parties Act,*** this Court must limit itself specifically to matters of law.

Bearing this in mind, we will begin by determining whether the appellant failed to comply with the provisions of the 1st respondent's dispute resolution process. In this regard the learned judge stated;

> ***"The second Respondent having filed Appeal No. 382 of 2017 with the Jubilee Party National Election Appeal Tribunal was not a bar to him approaching the PPDT directly by virtue of section 40 (1) (fa) however, having filed the said Appeal he could only approach the PPDT on appeal against the decision of the Jubilee Appeal Tribunal."***

Section 40 of the ***Political Parties Act*** is concerned with the jurisdiction of the PPDT and provides;

> "***1) The Tribunal shall determine—***
>
> ***a) disputes between the members of a political party;***
>
> ***b) disputes between a member of a political party and a political party;***
>
> ***c) disputes between political parties;***

d) disputes between an independent candidate and a political party;

e) disputes between coalition partners

f) appeals from decisions of the Registrar under this Act; fa) disputes arising out of party primaries."

In the recent decision of the Court in ***Lilian Gogo vs Joseph Mboya Nyamuthe and 4 others** [2017] eKLR,* the court had occasion to interrogate the import of ***section 40(1) (fa)*** of the ***Political Parties Act***. The court stated;

"In our view, that amendment did not introduce an entirely new category of disputes as was urged by counsel for the 1st respondent. Disputes arising out of party primaries between members of a political party or between a member of a political party and a political party, or between political or between coalition partners were already catered for under paragraphs a,b,c and e of Section 40(1) of the Act. Such disputes are subject to section 40 (2) of the Act and must first be subjected to the internal party dispute resolution mechanism before the PPDT takes cognizance of them.

A common denominator of the categories of disputes that must in the first instance be submitted to the internal political party disputes resolution mechanism is that the disputants would all be subject to the political party and therefore subject to such party's internal party dispute resolution mechanism. It is also instructive that under section 9 of the Act as read with paragraph 23 of the 2nd schedule to the act, it is mandatory statutory requirement that every political party must have provision in its constitution and rules for "internal party dispute resolution mechanisms in accordance with Article 47 and 50 of the Constitution." Also noteworthy is Section 13 (2A) of the Elections Act, Act No. 24 of 2011 that requires a political party to hear and determine "all intra party disputes arising from political party nominations" within thirty days.

There could well be disputes that arise out of party primaries that do not fall within the categories of disputes set out under paragraph a,b,c and e of section 40(1) of the Act in which case such disputes can be taken directly to PPDT."

There is no dispute, in the present case, that the appellant filed an appeal with the JPT. On 10th May 2017, the JPT dismissed the appellant's appeal for non-attendance. The ruling stated in relevant part;

"The Appeal was listed for hearing on various dates and the Complainant (**the appellant**) was notified through a cause list uploaded on the 2nd Respondent's website as well as by Mobile SMS. On the respective hearing dates, the matter was called out severally but the Complainant and the 1st Respondent were absent."

It is instructive that the ruling does not specify the dates when the appeal was called out for hearing. It is also noteworthy that on the date the appeal was dismissed both the appellant and the 1st respondent did not attend. The cause lists and mobile messages were not produced, and there was no material presented to show that the parties were personally served, particularly after they failed to attend the previous hearing dates. Yet the JPT went ahead to dismiss the appellant's appeal contrary to the stipulations of ***Article 50 (1)*** of ***the Constitution***, and the right to be heard.

In our view, it is this failure to follow the due process of according the appellant a fair hearing that lends credence to the appellant's explanation as to the reason for abandoning his appeal at the JPT, and filing an appeal with the PPDT instead. We therefore find that, on account of this shortcoming on the JPT's part and in the circumstances of this case, the appellant was entitled to appeal to the PPDT as the alternative dispute resolution forum under ***section 40 (1) (fa)*** of the ***Political Parties Act***, and the PPDT as a consequence had jurisdiction to hear this appellant's appeal.

The next issue for determination was whether the High Court was right in its determination that the nomination was conducted substantially in accordance with the election laws.

To begin with, in its judgment, the High Court reiterated its obligations as a first appellate court which are to evaluate both fact and law so as to arrive at its own independent conclusion. We have considered the judgment and find that the court below did not evaluate the evidence that was before the PPDT and instead concluded;

> ***"The PPDT in its Judgment challenged herein having found that there were irregularities in the nomination exercise failed to consider whether irregularities were substantive enough so as to affect the outcome of the elections from the tallying thereon as provided by the 2nd Respondent himself and whether the exclusion of the polling stations could have affected the outcomes of the election…"***

In the case of ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR,*** with regard to the duty of a first appellate court this Court stated;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya*** **Ports Authority versus Kuston** **(Kenya) Limited (2009) 2 EA 212** ***wherein the Court of Appeal held,*** *inter alia****, that:-***
>
> > *"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.*"

In view of this oversight, we consider that had the first appellate court evaluated the evidence that was before the PPDT, it would have arrived at a different conclusion.

We say this because, in the appellant's Complaint filed at the PPDT on 12th May 2017 with a Notice of Motion also filed on 12th May 2017, together with an affidavit in support of the motion sworn by the appellant on 11th May 2017, the appellant sought an injunction against the 1st respondent from nominating and or presenting the name of the 2nd respondent in the Independent Electoral and Boundaries Commission (IEBC) as a candidate for Member of National Assembly for Nyali Constituency for the General Elections scheduled for 8th August 2017; an order for the repeat of the nominations and in the alternative an order directing the 1st respondent to nominate the claimant as its candidate for Member of National Assembly for Nyali Constituency.

The appellant's main complaint was that the nominations were to be carried out in 15 polling stations, but in breach of the 1st respondent's Nomination rules and procedures, voting was only carried out in 13 polling stations, and was not conducted at Tumaini Church and Fadhil Adhim Primary School Polling Stations comprising approximately 3684 and 1,155 registered voters respectively according to the 2013 members register. As a result, voters of the two polling stations were disenfranchised, having been deprived of the ability to vote for the candidate of their choice.

Other complaints were that the voting was conducted using an incomplete party register that did not include the names of registered party members including the appellant that person who were ineligible were allowed to vote; that there was also bribery of voters by the 2nd respondent, and finally that the results were not a true reflection of the eligible will of the voters who are members of the 1st respondent in Nyali Constituency.

In the replying affidavit sworn on 18th May 2017, the 2nd respondent deponed that voting was to be conducted at 15 polling stations; that at Khadija Polling station voting was carried out using the voter's identity card, the 1st respondent's membership card, and the members register; that it then emerged that some voters with membership cards were not included on the membership register, and as a consequence it was decided between the 1st respondent and all the aspirants that the membership register should be discarded, and only the identity card and the party membership cards would be utilized.

At Tumaini polling station, it was further deponed, voting did not go on, but that by agreement, it was transferred to Ziwa La Ngombe station, where there were two polling areas, and that at Fadhil Adhim polling station polling did not take place as the ballot boxes were brought without security personnel, and there was unease and tension as a result; that though it was suggested that an additional polling station be set up at Khadija Primary school, this was rejected.

In addressing the election irregularities, it was the PPDT's finding that;

> ***"From the evidence and averments made in the pleadings before us, it is evident that the nomination exercise was marred by irregularities which have been admitted by both the claimant and the 2nd respondent. None of the parties have adduced a provisional nomination certificate or the provisional nomination certificate or the tallying sheets to substantiate their victory."***

The PPDT concluded that;

> ***"The Tribunal finds that the nomination exercise held on 26th April 2017 is incapable of determining the winner. The Tribunal notes that the evidence before it cannot be without recourse and it is inclined to intervene in light of the Tribunal's overall objective to promote political party democracy and adherence to the prescribed standards."***

Article 81 of ***the Constitution*** provides;

> ***The electoral system shall comply with the following principles;-***
>
> ***"a) Freedom of citizens to exercise their political rights under article 38***
>
> ***b) Free and fair elections which are:-i…***
>
> ***ii…***
>
> ***iii. Conducted by and independent body transparent, and iv. Administered in an impartial, neutral, efficient, accurate and accountable manner."***

Article 38 of ***the Constitution*** stipulates;

> ***"Every citizen is free to make political choices which includes the right—***
>
> ***(1)…***
>
> ***(2)…***
>
> ***(3) Every adult citizen has the right without unreasonable restrictions–***
>
> ***(a) to be registered as a voter;***
>
> ***(b) to vote by secret ballot in any election or referendum; and***

(c) be a candidate for public office or office within a political party of which the citizen is a member and, if elected to hold office."

What the first appellate court did not appreciate is that, when the appellant's and 2nd respondent's evidence is considered, it is undisputed that voting took place in 13 out of 15 polling stations, and that voting did not take place at Tumaini Church and Fadhil Adhim Primary School polling stations. Though it was the evidence of the 2nd respondent that voting from Tumaini Polling Station was transferred to Ziwa La Ngombe Polling Station, there is nothing to show that the voters were notified or diverted from Tumaini Church polling station to Ziwa La Ngombe polling station where they would cast their vote.

It is our view that by failing to conduct voting at Tumaini Church and Fadhil Adhim Primary School polling stations without providing an alternative polling station, or taking steps to notify the concerned voters of an alternative polling station where they could cast their votes, we find that the 1st respondent did not adhere to the provisions of ***Article 38 (3) (b)*** of ***the Constitution*** that requires, every adult citizen *"…the right without unreasonable restrictions to vote by secret ballot in any election or referendum."* Such omission resulted in depriving the voters of Tumaini Church and Fadhil Adhim Primary School polling stations of their right to vote by secret ballot for a candidate of their choice in the nomination exercise which was contrary to the provisions of ***Article 38 3 (b)*** of ***the Constitution,*** and in breach of their rights under the election provisions of the Constitution. In our view, this irregularity significantly affected the nomination exercise from a qualitative as well as quantitative perspective.

The next issue that was for the High Court's consideration was whether the election provisions of the law were substantially complied with in view of the irregularities highlighted. In this regard, the High Court observed;

> ***"Having reviewed the evidence tendered before the Jubilee Tribunal and PPDT I come to the conclusion that the irregularities pleaded by the 2nd respondent did not substantially affect the outcome of the nomination…"***

We have already found that the nominations for Member of National Assembly for Nyali Constituency were conducted in 13 out of 15 polling stations. With respect to the two polling stations, the appellant contended that according to the 2013 voters' register, there were approximately 3684 registered voters for Tumaini Church and 1,155 registered voters for Fadhil Adhim Primary School, and therefore as a result of the failure to conduct voting at the two polling stations, over 4000 eligible voters were disenfranchised as they did not cast their votes during the nominations. This evidence was not controverted in any way by either of the respondents.

In applying ***section 83*** of the ***Elections Act*** to the circumstances of this case, the learned judge observed that the 2nd respondent's claim was concerned with two primary schools, and faulted the PPDT for ordering a reelection for the whole constituency, for the reason that it did not provide an analysis of both the qualitative and quantitative effect of the irregularities.

> ***Section 83 of the Elections Act*** provides:
>
> ***"No election shall be declared to be void by reason of a non-compliance with any written law relating to that election, if it appears that the election was conducted in accordance with the principles laid down in that written law, or that the non-compliance did not affect the result of the election".***

In ***Morgan vs. Simpson*** ***[1975] 1 QB 151*** Lord Denning, in construing *section 37 (1)* of the *Representation of People Act 1949* (England) which has similar wording to ***section 83*** said at page 164.

> ***"Collating all these cases together, I suggest that the law can be stated in these propositions:***
>
> ***1. If the election was conducted so badly that it was not substantially in accordance with the law,***

as to elections the election is vitiated, irrespective of whether the result was affected or not ...

2. If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls …

3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated ...".

In the case of ***<u>Gunn vs Sharpe</u> [1974] 1 QB 808*** the facts were that at a local government election, 98 of the 189 ballot papers issued from one polling station were rejected for want of an official mark. The failure to mark the ballot papers was a result of a human error. If the votes on these papers had been counted, two out of three unsuccessful candidates would have had a majority over two of the three candidates elected. In declaring the elections to be void the court there stated;

"The issue before us under section 37 of the Representation of People Act 1949 was whether the election was so conducted as to be substantially in accordance with the law as to elections. The law requires that the electors should be able to record their votes at the polling station where they are required to vote in a way which ensures that the votes they register are effectively cast for the candidate of their choice. We, of course bear in mind that for some reason, none of the 98 voters at polling station 56 seems to have noticed strictly as they should, that they were voting on unmarked papers, but after making allowance for that matter, we think that this case is clearly distinguishable on its facts from *Morgan vs Simpson [1974] QB 344****, and that the errors that were concentrated at polling station 56 compared with the trivial few spread over the remaining stations, were so great as to amount to conduct of the election which was not substantially in accordance with the law."***

According to the members' register of 2013, there were 3684 registered voters for Tumaini Church and 1,155 registered voters for Fadhil Adhim Primary School. This means that over 4000 voters registered members at the two polling stations were not afforded an opportunity to vote.

When the restriction of 4000 members is analysed in relation to the total number of votes cast of 3643, it becomes clear that the number of voters denied an opportunity to vote was equivalent to, or exceeded the number of members who actually voted. From a quantitative perspective, there is no question that the number of votes that were shut out amounted to an irregularity so significant, as to affect the conduct as well as the result of the election.

Therefore, had the High Court properly evaluated the evidence, it would have concluded as did the PPDT, that the failure of voting to take place at the two polling stations of Tumaini Church and Fadhil Adhim Primary School polling stations amounted to an election irregularity, and an unreasonable restriction on the nomination exercise, and further that the number of voters who did not vote was substantial enough to affect the results of the election. As such, the learned judge failed to consider matters he should have considered, and we so find.

On the final issue, the learned judge found that the appellant had not pleaded for a repeat of the nomination process in Nyali constituency, and having failed to do so, the PPDT was wrong to order a repeat for the constituency that was not prayed.

We disagree that the appellant had not prayed for a repeat of the nomination exercise. At prayer (c) of the appellant prayers on the motion and the Statement of Complaint, the appellant prayed for;

"…an order for the repeat of the nominations".

And this is exactly what the PPDT ordered, and rightly so in our view having established that there were election irregularities in the nomination exercise of candidate for Member of National Assembly for Nyali Constituency.

These are our reasons for the judgment delivered on 30th June 2017.

Reasons Dated at Nairobi this 22nd day of September, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL