



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, KIAGE & GATEMBU, JJ.A.

CIVIL APPEAL NO. 178 OF 2013

BETWEEN

PATRICIA CHEROTICH SAWE.....APPELLANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

UNITED REPUBLICAN PARTY (URP).....2ND RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Nairobi (Mumbi Ngugi, Majanja & Korir, JJ.) delivered on 12th day of July 2013

in

H.C. PETITION NO. 149 OF 2013)

JUDGMENT OF THE COURT

The Constitution of Kenya 2010 brought with it a broad spectrum of changes in all aspects of the political and socio-economic lives of citizens of this country. With the Constitution came an overhaul of the electoral laws which were to be applied in the first general elections to be held under the said Constitution on 4th of March 2013. Some of these laws are embodied in the Constitution itself while others are to be found in legislation like the Elections Act and Rules and the Political Parties Act. All these laws were meant to ensure and foster free and fair elections which is a core value in every democracy.

The first elections under the new Constitution were expected to mirror all the core values set out in the Constitution as a reflection of what the Kenyan citizenry had aspired for over the two decades that preceded the promulgation of the said Constitution.

The new constitutional dispensation also brought with it a gamut of dispute resolution mechanisms at every level of the nominations and elections in order to ensure a faster, more expedient and more easily accessible avenue or channel of resolving these disputes that would not be fraught with

legal technicalities as was hitherto the position under the repealed Constitution and other electoral laws.

The Constitution 2010 also created county governments which are provided for under **Article 176**. Under **Article 177(1)**, the membership of the county assembly comprises elected county assembly members and the nominated members.

The latter category was supposed to ensure that no more than two-thirds of the membership of the assembly was of the same gender. The same was also supposed to bring on board members of the marginalized groups which groups include women, the youth and persons living with disabilities. These were supposed to be nominated by their respective political parties as provided for under **Article 90** of the **Constitution and the Political Parties Act**.

The appellant, **Patricia Cherotich Sawe**, contends that pursuant to the above cited provision, her name was entered in the appropriate party list for nominations. She applied under the relevant category and paid the requisite fees but she was ultimately not nominated – hence her grievance.

The appellant stated that she had been shortlisted in the initial (original) list where she was listed as number five. She was nonetheless not nominated. Apparently, her nominating party i.e **United Republican Party** prepared a top-up list in which one **Rose Githenji Kisama** was nominated in the category of the marginalized group. According to the list, she was a female of Maasai ethnicity. In that top-up list, the name of the Appellant does not appear. Apparently she takes issue with the nomination of the said Rose Githenji Kisama who according to her was a Kikuyu and not a Maasai and who she accused of being a member of The National Party (TNA) and not the United Republican Party (URP) which nominated her.

She filed a complaint before the Kenya National Commission on Human Rights which on 8th May 2013 advised her to file her complaint with the Political Parties Disputes Tribunal or engage the National Gender and Equality Commission (NGEC) which is the commission mandated to provide Gender and Equality. She did so. The NGEC went to court on her behalf and that of several other aggrieved persons against the Independent Electoral and Boundaries Commission (IEBC). An out of court settlement was arrived at. One of the orders was that IEBC publishes in the local newspapers the party lists in respect of the members of the county assemblies and that any complaint arising from the said publication be heard by the IEBC tribunal within three days of such publication.

The appellant filed her dispute with the IEBC. She challenged the nomination of Rose Githenji Kisama saying that she was a member of both the TNA and URP. According to the proceedings before the IEBC Tribunal (pg 233 ROA), the representative of URP who appeared before the Tribunal confirmed that Rose Githenji Kisama was a member of URP while at the same time the Representative of TNA stated that Rose Githenji Kisama was not their member.

The tribunal also found as a fact that the appellant's name appeared in the list for the marginalised and not in the gender top-up list and yet she wanted to have a person in the gender top-up list removed. The tribunal rightly in our view found that

“even if Rose was not properly on the list, the complainant who was on the marginalized list would not be entitled to take her place which would go to the next person on the gender top-up list.”

Her complaint was thus dismissed. Interestingly Mr. Ondieki, learned counsel for the Appellant admitted before us that even if Rose Githenji Kisama's name had been removed from the list, the appellant not being the next in the order of priority in the list could not have been nominated.

This notwithstanding the appellant moved to the High Court by way of a petition against the decision of IEBC. The High Court (Mumbi Ngugi, Majanja & Weldon Korir, JJ) dismissed the said petition making a finding that they found no basis for the complaint against the decision of the respondent. The learned Judges also upheld the finding by IEBC to the effect that the appellant had sought nomination to the

marginalised slot in Uasin Gishu county assembly but was not placed on the party list by her party URP.

Undeterred, the appellant moved to this Court by way of this appeal in which she has proffered 22 grounds. We wish to point out however, that some of these grounds relate to the supplementary record of appeal which was expunged from the record. The said supplementary record contained an order and judgment of the Political Parties Disputes Tribunal which was rendered on 18th July 2013 which was after the judgment of the High court had been delivered and indeed after the notice of appeal in this matter had already been filed. We shall therefore disregard the said grounds.

The thrust of the appellant's submission is that the respondents herein failed to consider and give priority to special interest groups, who include the marginalised living in Uasin Gishu county, when preparing the list of nominees to the county assembly – and hence the invitation to this Court to interfere with the said list by directing the 1st respondent to include the appellant's name for nomination.

In his written submission filed in this Court on 14th August 2013, counsel for the first respondent submitted *inter alia* on what they called “substantive points of law”. We wish to single out two such points which in our view call for our clarification and findings.

The first issue is on **Section 13** of the **Elections Act**. According to learned counsel, that provision forbids a political party from substituting a nominated candidate with another after the list has been submitted to the 1st respondent (IEBC). With respect, this was a grave misunderstanding of the law on the part of learned counsel. We say so because **Section 13** of the **Elections Act** applies only to ‘candidates’ nominated to participate in the elections and not those up for party nominations. For purposes of clarity, Section 13 of the Election Act provides:-

13(1) “A political party shall nominate its candidates for an election under this Act at least forty five days before a general election under this Act in accordance with its constitution and nomination.

(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the commission:”

Provided that in the event of death, resignation, or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the commission.

This provision clearly refers to presentation of nomination papers to the commission, and makes no reference to party lists. It is clear in our view that the said rule only applies to candidates being nominated to participate in elections and not persons in the party lists for nominations. A clear reading of the **Section 2** of the **Elections Act** lays this point to rest. Under Section 2 of the said Act, a ‘**Candidate**’ ‘means a person contesting for an elective post’. Section 13 refers to ‘**Candidates**’ and this therefore removes the persons proposed for nomination to none elective posts from the realm of **Section 13** of the **Elections Act**.

The second issue is whether indeed, the nomination in question could only be challenged by way of an election petition since the nominated persons have already been gazetted. On this point, we wish to echo the finding of this Court (Maraga, Mwera & J. Mohammed, JJ.A) in Civil Appeal No. 169 of 2013 in their holding that where the complaint giving rise to the appeal was lodged with the IEBC or any of the other tribunals before the gazetting of the names, then the court has jurisdiction to determine the matter. In this case, the complaint had been lodged with the IEBC long before the gazetting. Indeed, the petition before the High court was determined on 12th July 2013 before the gazetting on 17th July 2013. This matter was therefore properly before the High Court and also before us.

We have carefully considered the record of appeal in its entirety, the able submissions of all learned counsel and the law applicable.

Our finding is that no evidence was presented before the IEBC tribunal or the High Court to demonstrate that the nomination of Rose Githenji Kisama was contrary to the tenets espoused by the Constitution of Kenya, 2010 and the Elections Act. We say so because she was nominated in the top up list to represent the marginalised. We note that she was ‘female’ who are a marginalised group and is also indicated to represent the Maasai ethnic group who would comprise a marginalised group in Uasin Gishu county.

Indeed, the issue as to whether Rose Githenji Kisama was a Maasai or Kikuyu was not raised either before the IEBC or before the High court. Her only complaint before us was that the said Rose Githenji Kisama was a member of TNA and not URP. From the proceedings before the IEBC Tribunal, it is evident that the said issue was considered. Witnesses were called who testified that indeed Rose Githenji Kisama was a member of URP and not TNA. One of the said witnesses was a representative of URP who confirmed that Rose was their member.

The finding of the IEBC Tribunal to the effect that the allegation that Rose Githenji Kisama belonged to URP had not been proved was not set aside by the High court. We can only read concurrence of the High court on that issue.

We are disinclined to depart from the concurrent findings of fact by the IEBC and the High Court as we have not been given sufficient reasons to do so.

In sum therefore, our view of the matter is that the appellant herein has failed to demonstrate that she was wrongfully left out of the nomination list by her political party, or that her party nominated a person who was not indeed their member.

We accordingly find this appeal devoid of merit and dismiss the same with costs to the respondents.

Delivered and dated at Nairobi this 7th day of February, 2014.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

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