



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI  
COMPLAINT NO 228 OF 2017

FRANCIS NDUNGU WANYORO.....COMPLAINANT  
VERSUS  
PIUS MWAURA MBONO.....1<sup>ST</sup> RESPONDENT  
JUBILEE NATIONAL ELECTIONS BOARD..... 2<sup>ND</sup> RESPONDENT  
INDEPENDENT ELECTORAL BOUNDARIES COMMISSION.....AMICUS CURIAE

JUDGMENT

**Introduction**

1. The Claimant participated in the 2<sup>nd</sup> Respondent’s nominations for Member of County Assembly, Zimmerman Ward, within Nairobi County. They contested the 1<sup>st</sup> Respondent’s nominations held on 26<sup>th</sup> April, 2017 which the Claimant claims he won. He was declared winner by the Returning Officer at the official tallying centre which was Garden Estate Primary. He has never received the certificate and moves this Tribunal for relief.

**Claimant’s Case**

2. Having won, the Claimant asserts he awaited his nomination certificate in vain. However, the 2<sup>nd</sup> Defendant’s Appeals Tribunal clandestinely purported to have heard Case Number 438 of 2017 at 10:00PM ex parte and declared the 1<sup>st</sup> Respondent winner. He alleges bias because the appeal was heard without allowing him to respond to any of the complaints leveled against him.
3. In support of his case, the Claimant cites *Republic v Independent Electoral Boundaries Commission [2013] eKLR* for the proposition that no party shall be condemned unheard.
4. He urges the Tribunal to uphold the rules of natural, dismiss the Respondent’s appeal and the applicant be declared winner and issued with the certificate. In

consequence he seeks that the decision of the Jubilee National Election Appeals Tribunal on 9<sup>th</sup> May, 2017 be set aside, the Respondent disqualified and the Complainant declared nominee for member of County Assembly Zimmerman Ward.

### **1<sup>st</sup> Respondent's Case**

5. The 1<sup>st</sup> Respondents filed an affidavit sworn on 12<sup>th</sup> May, 2017. The deponent averred that he and the complainant contested the elections held on 26<sup>th</sup> April, 2017 where he garnered 1,461 votes against the complainant's 1,184 votes. He was however shocked to hear the Returning Officer declare the complainant as winner with 1,451 while the 1<sup>st</sup> Respondent was claimed to have garnered 1,400 votes. He protested and called for retallying and subsequently filed appeal no 438. The appeal was allowed and he was pronounced winner.

### **Issues for determination**

6. The issues for determination are:
  - (a) **whether the nominations were free and fair;**
  - (b) **whether the complainant was heard in response to the allegations against him in appeal number 438 of 2017; and**
  - (c) **what are the appropriate reliefs?**

### **Analysis**

- (a) **Whether the nominations were free or fair**
7. On the first issue, we do not agree with the claimant that the voting and tallying was incident free. There is on record a charge sheet dated 26<sup>th</sup> April, 2017 against one Jesse Muriuki Mureithi for being in unauthorised possession of 26 marked ballot papers contrary to section 5(e) of the Election Offences Act, 2016. The allegation of alterations of the entries in the tally forms was also not rebutted.
8. In a tightly contested election won by a margin of 51 votes, we are satisfied that these are substantial irregularities which could have affected the outcome of the

election. See *Moses Masika Wetangula v Musikari Nazi Kombo* [2014]eKLR. We hold that the nominations were not free or fair.

**(b) Whether the complainant was heard in response to the allegations against him in appeal number 438 of 2017**

9. As to the second issue, we are satisfied from the evidence on record that appeal no 438 of 2017 which upset the Claimant's win was heard without hearing him. Article 47(1) and section 4 of the Fair Administrative Action, 2015 entitles the complainant and other party members to administrative action which is lawful, expeditious, efficient, reasonable and procedurally fair within the political party.
10. At the minimum, procedural fairness requires a party member to be furnished with evidence against him, be afforded a chance to cross examine his accuser, be allowed to give rebutting evidence, and have the chance to address the party organ.
11. Natural justice as a concept forbids one from being a judge in his own cause and demands that one be heard fairly on his defence. The first limb of natural justice forbids a political party from being biased 'no man shall be a judge in his own cause' expressed in Latin as 'nemo iudex in causa sua'. The second limb entitles party members to notice of the charge and an adequate and fair hearing 'no man shall be condemned unheard' expressed in Latin as 'audi alteram partem'. A violation of either limb of the rule voids the administrative decision by the party.
12. The rule of natural justice is a constitutional value protected by Articles 47 and 50 as well as the Act. In *Martin Nyaga Wambora v Speaker of the Senate* [2014] eKLR it was held that Articles 47 and 50(1) had elevated the rules of natural justice and duty to act fairly in administratively, judicially or quasi-judicially into a constitutional entitlement capable of enforcement.
13. We hold that the 2<sup>nd</sup> Respondent heard and determined appeal no 438 of 2017 without giving the complainant a fair hearing. As a result, the decision by the

Jubilee Appeal Tribunal in so far as it overturned the Claimant's win without giving him a chance to be heard, is null and void and of no effect in law. The same is annulled.

**(c) What are the appropriate reliefs in this complaint?**

14. We allow this complaint and make the following orders:

**(a) A declaration be and is hereby issued that the 2<sup>nd</sup> Respondent did not conduct free and fair nominations for member of County Assembly, Zimmerman Ward**

**(b) A declaration be and is hereby issued to the effect that the 2<sup>nd</sup> Respondent's decision of 9<sup>th</sup> May, 2017 in Appeal Number 438 of 2017 in so far as it was reached without giving the complainant a chance to be heard is null, void and of no effect in law.**

**(c) A declaration be and is hereby issued to the effect that the nomination certificate issued to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> is null, void and of no effect in law.**

**(d) An order be and is hereby issued directing the 2<sup>nd</sup> Respondent to conduct a fresh nomination exercise for member of County Assembly, Zimmerman Ward within 48 hours from the pronouncement of this judgment.**

**(e) The 2<sup>nd</sup> Respondent shall bear the Claimant's costs of this complaint.**

Dated at Nairobi this 16<sup>th</sup> day of May 2017

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**Kyalo Mbobu (Chairperson)**

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**James Atema (Member)**

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**Hassan Abdi (Member)**

