



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI
COMPLAINT NO. 292 OF 2017

PIUS MWAURA MBONOCOMPLAINANT
VERSUS
FRANCIS NDUNGU WANYORO1ST RESPONDENT
JUBILEE PARTY 2ND RESPONDENT
INDEPENDENT ELECTORAL BOUNDARIES COMMISSION.....AMICUS CURIAE

JUDGMENT

Introduction

1. The Claimant participated in the 2nd Respondent's nominations for Member of County Assembly, Zimmerman Ward, within Nairobi County. The nominations were held on 26th April, 2017 and the Claimant herein claims he emerged victorious. A previous *Complaint No 228 of 2017 Francis Ndungu Wanyoro v Pius Mwaura Mbono*, with the Claimant as 1st Respondent and the 1st Respondent as Claimant was withdrawn on 16th May, 2017 on the eve of the delivery of judgment.
2. The Claimant has filed a fresh suit in relation to those nominations. He claims that the nominations were affected by various malpractices that affected the entire process making the nominations shambolic as opposed to free and fair.

Claimant's Case

3. The Claimant avers that he won the nominations having garnered 1561 votes against the 1st Respondent's 1184 votes. However, the 2nd Respondents agents illegally altered the results and inflated the 1st Respondent votes to 1451, while the Claimant's votes were deflated to 1400.
4. The Claimants contends that the 1st Respondent's supporters had pre-marked ballot papers and was arrested in possession of some 26 pre-marked ballot

papers. He has been charged in Makadara Chief Magistrates Court Election Offences Case No 4 of 2017. The charge relates to being in unlawful possession of 26 pre-marked ballot papers at Cornerstone polling station and the case is pending in court.

5. It is also alleged that the 1st Respondent's agents altered the results in favour of the 1st Respondent to give the 1st Respondent 1451 votes while reducing the Claimant's votes to 1400. Further, the Claimant asserts, that after the results for Njathaini Polling Station had been tallied by the Presiding Officer, and signed by all agents, the Presiding Officer disappeared from midnight, and re-appeared the following day at 1:00PM. He submitted falsified results. The balloting material used in the elections were destroyed immediately he raised complaints about the malpractices.
6. Both the Claimant and the 1st Respondent filed appeals with the 2nd Respondent's Disputes Tribunal being appeal no 428 of 2017 and 523 of 2017 respectively. The appeals were fixed for hearing on 5th May, 2017, however the 1st Respondent withdrew his appeal number 523 of 2017 and did not appear to defend appeal no 228 of 2017. Oral judgment was delivered on 9th May, 2017 in favour of the Claimant. On the basis of the judgment of 5th May, 2017 the 1st Respondent filed an appeal which was set for judgment on 16th May, 2017, but was withdrawn just before delivery of judgment.
7. Lastly, the Claimant relies on this Tribunal's judgment in *Complaint No 91 of 2017 Lee Muchiri v Jubilee Party & another* in which the Tribunal held that the irregularities disclosed in the complaint were not minor infractions of electoral laws arising from inadvertent human error and ones which did not affect the results of the election. The Tribunal ordered repeat nominations. The affected polling stations in complained of in *Complaint No 91 of 2017* are the same in this

complaint to wit; Njathaini, Roysambu Primary School and Cornerstone Academy polling stations.

8. The Claimant seeks appropriate reliefs from the Tribunal.

1st Respondent's Case

9. The 1st Respondent filed an affidavit sworn on 24th May, 2017. The deponent confirmed that he contested the elections held on 26th April, 2017 which he won with 1,451 votes. He was duly declared winner by the Returning Officer at Garden Estate Primary School. The elections were conducted in accordance with the provisions of the law. To him, the elections were peaceful save for minor disruptions by the 1st respondent's agents.
10. He avers that the pre-marked ballot papers were not marked in his favour and they did not find their way into the ballot box. The results were not affected in any way. Additionally, the disappearance of the election official is a misrepresentation which is not relevant to the dispute.
11. The 1st Respondent further submitted that he lodged an appeal No 523 of 2017 because the Complainant had tried to alter the elections through the Returning Officer. The matter was filed on his behalf by one Peter Kariuki Njiri Advocate who is now acting for the Claimant in this matter, a case of conflict of interest. It was withdrawn by another advocate on account of his suspicions about Mr. Kariuki Njiri.
12. The Jubilee Tribunal confirmed his win in appeal no 438 of 2017 by finding that he had garnered 1451 votes, while the Claimant herein had garnered 1400 votes.

2nd Respondent

13. The 2nd Respondent did not file any response to these proceedings.

Issues for determination

- (a) **Whether the 2nd Respondent conducted free and fair nominations for Zimmerman Ward, Roysambu Constituency**

(b) What are the appropriate reliefs in these proceedings?

Analysis

14. On the first issue, we do not agree with the 1st Respondent that the voting and tallying was incident free. Indeed, there is on record a charge sheet dated 26th 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. He has subsequently been charged in Makadara Chief Magistrates Court Election Offences Case No 4 of 2017 for the same offence. We are persuaded that the election was vitiated by the pre-marking of ballots in favour of some of the contestants in the election.
15. Additionally, the averment that the presiding officer disappeared with the results overnight and declared falsified results on his return was not controverted. Also, the fact that balloting material used in the elections were destroyed immediately the after the Claimant raised complaints points to the *malafides* on the part of the 2nd Respondent's agents. In a tightly contested election won by a margin of 51 votes, we are satisfied that the pre-marking of up to 26 ballots is a substantial irregularity 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.

Reliefs

16. In *Complaint No 40 John Mruttu v Thomas Ludindi Mwadeghu & 2 others* we held that in every matter over which we have jurisdiction, this Tribunal can grant any order that is just and equitable in accordance with section 11(1) of the Fair Administrative Action Act, 2015. The proper discharge of this Tribunal's mandate requires it to grant effective remedies, which means the most appropriate remedy in the circumstances of the case.
17. We allow this complaint and make the following orders:

- (a) A declaration be and is hereby issued that the 2nd Respondent did not conduct free and fair nominations for member of County Assembly, Zimmerman Ward, Roysambu Constituency, Nairobi County.
- (b) A declaration be and is hereby issued to the effect that the nomination certificate issued to the 1st Respondent by the 2nd Respondent is null, void and of no effect in law.
- (c) An order be and is hereby issued directing the 2nd Respondent to conduct the nomination exercise for member of County Assembly, Zimmerman Ward, Roysambu Constituency, Nairobi County within 48 hours from the making of this judgment.
- (d) There shall be no order as to costs in the interest of party unity.

DATED AT NAIROBI THIS 26TH DAY OF MAY 2017

Kyalo Mbobu
Chairperson

James Atema
Member

Hassan Abdi
Member