



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 246 OF 2017

CHURCHILL OCHIENG.....COMPLAINANT

-VERSUS -

STEVE MBOGO 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY..... 2ND RESPONDENT

GITONGA WATHANGA.....3RD RESPONDENT

JUDGMENT

1. Both the Complainant and the 1st Respondent contested in the nomination exercise for Member of Parliament, Starehe Constituency in the Orange Democratic Movement (ODM) Party Primaries held on 30th April, 2017. Following the close of the nomination exercise, the 1st Respondent was declared the winner and issued with the nomination certificate. Aggrieved by this, the Complainant filed an appeal at the ODM National Elections Appeals Tribunal (NAT) on the ground that the nomination exercise was marred by irregularities. In a decision dated 5th May, 2016 NAT dismissed the appeal hence this Complaint.

Complainant case

2. Complainant submits that the ODM party nominations were not free, fair and democratic as provided under Article 38, 81 and 91 of the Constitution, Article 3.6 , 3.7, 4.0, 4.4, 4.7, 4.23, of the ODM Party Constitution. He avers that the

nomination process was marred by irregularities and flawed for the reason that namely; ODM membership register was not used, instead only the national identification card was used to vote; the clerks were not known to the Returning Officer; the observers were not known to the parties; several ballot papers were issued out hurriedly without proper procedures being followed; the presiding officers were bias; voting ink was not used; and that the results were announced by a stranger- a person who had no legal mandate to do so.

3. The Complainant relies on the Returning Officers affidavit and report; witness statements by the interested party, David O. Sagwe an aspirant for candidature Pangani ward; Caroline Atieno Onyango and Khalwale Edwin Shithama both aspirants for candidature Ziwani/Kariakor ward. All these witnesses have corroborated the Complainant's case.
4. In addition it is the Complainant's submission that the certificate issued to the 1st Respondent on 6th May 2017 was signed on the 3rd May 2017 even before the NAT rendered its decision on the 5th May 2017. He argued that this indicate that the sittings of the NAT were a mere formality and the preferred candidate had already been settled on. The nomination certificate was thus declared void.
5. The Complainant sets out and urges this Tribunal to determine whether the ODM Party primaries for Starehe Constituency's member of Parliament were free, fair and democratic; was the 1st Respondent lawfully declared the winner of the said nomination. He Urges the Tribunal to nullify the results and to order for fresh primaries.

1st Respondent Case

6. The 1st Respondent states that he was declared the winner and issued with a provisional nomination certificate by the Returning Officer one Elias Keton. He relies upon a copy of appointment letter issued to the said Elias Keton by the 1st

Respondent. He further submits that the Complainant has fabricated evidence in the alleged statement by one Obiero David Obiero.

7. It is the 1st Respondent submission that the challenges experienced did not affect the results of the elections. To emphasis on this the 1st Respondent relied upon the case of **Raila Odinga & 2 Others V Independent Electoral & Boundaries Commission & 3 Others** [2013] eKLR; and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others** [2014] eKLR. He urged the Tribunal to dismiss the Complaint with costs.

2nd Respondent's Case

8. 2nd Respondent Submission aligned itself with the decision of the NAT. Its submission was that, the Party has exercised its right as directed by the NAT in its decision of 5th May 2017 and in so doing selected a candidate of its choice in furtherance of the political rights protected under Article 38 and 91 of the Constitution. They urge the Tribunal to dismiss the Complaint by upholding the decision of the NAT to issue the 1st Respondent with a nomination certificate.

9. *Analysis*

10. From the foregoing submission the issue arising for determination is *whether the nomination exercises for Starehe Constituency were conducted in accordance with the laid down procedures and rules.*
11. The Complainant's case is that the nomination exercise was marred with irregularities. The Complainant has gone further to elucidate the irregularities alleged to have occurred which include; firstly, that ODM membership register was not used, instead only the national identification card was used to vote; secondly, the clerks were not known to the Returning Officer; thirdly, the observers were not known to the parties; fourthly, several ballot papers were issued out hurriedly without proper procedures being followed; fifthly, the

presiding officers were bias; sixthly, voting ink was not used; and lastly, that the results were announced by a stranger- a person who had no legal mandate to do so.

12. On the issue of the results being declared by a stranger the Complainant submission is that the 1st Respondent was issued with the nomination certificate by one Elias Keton who was not an authorized officer. In response, the 1st Respondent produced a letter of appointment issued to Elias Keton by the 2nd Respondent. This appointment letter has not been questioned. Moreover, the Complainant has not adduced any evidence to the contrary, which then leaves us with one conclusion that Elias Keton was the duly appointed Returning Officer for Starehe Constituency thus authorized to issue the nomination certificate..

13. With regard to the other allegations we find that the Complainant has failed to show the nexus of how these irregularities affected the outcome of the results. We refer to section 83 of the Elections Act which provides that;

No election shall be declared to be void by reason of 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 the Constitution and in that written law or that the non-compliance did not affect the result of the election.

14. In addition we refer to the case of **Raila Odinga & 2 Others V Independent Electoral & Bounderis Commission & 3 Others** [2013] eKLR; and **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others** [2014] eKLR which the Court observed that an election should not be invalidated on the grounds of irregularities unless it is shown that the irregularities were of such magnitude that they affected the election results.

15. In this instance we find that the Complainant has not only proved the said irregularities, but has failed to demonstrate how these irregularities affected the

nomination results of Starehe Constituency. The Complainant ought to have gone further to show how this irregularities led to the curtailment of the rights and will of the people as enshrined in Article 40, 38, 81 and 91 of the Constitution, Article 3.6 , 3.7, 4.0, 4.4, 4.7, 4.23, of the ODM Party Constitution. It is not enough for a party to allege that there were massive irregularities. As a consequence we make the following orders:

(1) The Complaint dated 12th May 2017 is hereby dismissed.

(2) In the interest of the Party's unity, each party shall bear its own costs.

Orders accordingly.

DATED and DELIVERED AT NAIROBI this 17TH DAY OF MAY 2017

- 1. Kyalo Mbobu**
Chairman

- 2. James Atema**
Member

- 3. Hassan Abdi**
Member