



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI

COMPLAINT NO 34 OF 2017

DAVID OGEGA OYUGI COMPLAINANT

VERSUS

J. B. MOMANYI 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 2ND RESPONDENT

JUDGMENT

I. BACKGROUND

1. This complaint, filed in this Tribunal on 26 April, 2017, concerns the Orange Democratic Movement (ODM) party nomination exercise for Bonchari Constituency, Kisii County held on 20 April, 2017. The claimant, a member of the ODM party, was a candidate/aspirant for the party's nomination for the position of Member of Parliament.
2. Aggrieved by the conduct of that nomination exercise, the claimant prays for the following summarized orders:

(a) An order that the nomination exercise by the Orange Democratic Movement for Bonchari Parliamentary Seat conducted on the 20th April 2017 was not in compliance with the law.

- (b) An order that the conduct of the Returning Officer, presiding officers and clerks in participating in the election by campaigning for the 1st respondent was contrary to the law.*
- (c) An order that the nomination exercise was a nullity in its entirety.*
- (d) A finding that the 1st respondent is guilty of material breach of the law and is disqualified from contesting in any election held by the party.*
- (e) An order for fresh nomination exercise for Bonchari Parliamentary seat.*
- (f) An order that the Constituency Elections Board be disbanded and a fresh one constituted.*
- (g) An order that the Returning Officer grossly misconducted himself and he be disqualified from acting in any electoral exercise.*
- (h) Costs.*

3. The claimant lodged an appeal with the party's National Appeals Tribunal (NAT) but his appeal was dismissed, hence this complaint before this Tribunal.
4. This matter was certified urgent on 26 April 2017 and the claimant directed to serve the respondents. On 28 April 2017, the claimant appeared before this Tribunal again under a certificate of urgency and was granted leave to serve the 2nd respondent by way of advertising through one of the leading dailies with nationwide circulation. This matter was heard inter partes today, 3 May 2017. Despite proof of service on the 1st respondent of the petition of the complaint, he did not enter appearance or file any response in this matter.

II. SUBMISSIONS

5. The claimant submitted that on the nomination day, his agents at Suneka polling station were roughed up and thrown out of the polling center by goons hired by his opponent. That the Returning Officers were using the IEBC register instead of the Party register. Further, that the Party register as Suneka polling station was from a different constituency, Kitutu Chache North, Marani Polling station. When the claimant's agents insisted that they should use the Party register, a scuffle ensued between the Returning Officers and his agents. The supporters of the opponents joined in in the scuffle.
6. On hearing this, the claimant send his chief agent to find out what was happening but he too was pushed out of the polling station. Finally, the claimant personally rushed to Suneka polling station for an audience with the Returning Officer who refused him audience. The opponents' agents joined in and the claimant was beaten and injured and had to be taken to hospital where he was treated and had his mouth stitched and later driven back home.
7. Meanwhile, the nomination exercise continued and his opponent, J.B. Momanyi was declared the winner. The gist of his complaint is that the nomination exercise was marred by violence and was not a credible exercise.
8. Through Counsel Mr. Nyangito, photographic evidence was produced to the Tribunal as evidence of the treatment of the injuries occasioned by the violence. Counsel submitted that violence in an election, especially where a candidate is the victim is a very serious offence. More so, the issue that occasioned the violence, in his submission, is a very fundamental aspect as he was asking for the use of the party list and not IEBC register.

9. He further submitted that in dismissing his appeal the party's NAT did not consider the evidence tendered. That the judgement of the NAT does not even address the issue of violence.
10. The 2nd respondent filed a replying affidavit sworn by one Anthony Moturi, the Parliamentary and Legal Affairs Liaison Head of ODM, and was represented by Counsel Mr. Makori. Counsel urged that the ODM party does not countenance violence in its elective programmes. It was submitted that the party's NAT heard both the claimant and the 1st respondent and that the claimant was represented by counsel before the NAT. That after considering the evidence as adduced and the submissions of the parties, the NAT rendered a reasoned decision on 25 April 2017 dismissing the claimant's appeal.
11. Citing the case of *Peter Kimori Maranga & another v Joel Omagwa & 2 others* [2013] eKLR, counsel submitted that there is need for one to demonstrate that the irregularities, where alleged and proved, were of such a nature that they affected the outcome of the elections. In this case, he submitted that the NAT sat, heard the appeal and found that the claimant had not succeeded. That the margin of votes was 3500 against 2995 hence the problem in only one polling station could not have affected the results.

III. ISSUE FOR DETERMINATION

12. The single issue for determination is whether the nomination exercise for Bonchari Constituency Parliamentary seat was credible, free and fair; and conducted in accordance with the Constitution, the relevant statutory provisions and the political party (ODM) Election and Nomination Rules.

IV. ANALYSIS

13. It is trite law that whoever alleges must prove, and that once an allegation has been proved to the requisite threshold, the other party bears the burden of disapproving the said allegation(s). This Tribunal is cognizant of the fact that in election matters, the petitioner/claimant bears the burden of proof and that the standard of proof is higher than on a balance of probabilities but lower than beyond reasonable doubt.
14. The claimant has submitted on the violence that ensued, particularly at Suneka polling station. He submitted that the violence was wide spread as his agents were chased from most polling stations and Suneka was the 'boiling point'. Photographic evidence was produced, which was not challenged by the respondent. This evidence was further buttressed by the several newspapers cuttings, which again were not denied or challenged by the respondent. There are even hospital documentations from Nyangena Hospital, which again were not challenged. Suffices it to say that the evidence by the claimant on the violence that ensued that day has not been rebutted at all.
15. The respondent's submission is that this complaint was heard and determined by its NAT. We have perused the party's NAT decision of 25 April, 2017. While the judgment categorically particularizes the violence 'allegations' of the claimant at Suneka polling station, in its findings, the NAT does not render itself on this issue, which, as a Tribunal, we consider crucial. It is our finding that indeed the case of violence was made and proved to the requisite standard.
16. Violence in elections is a great *disenfranchiser*. This is a very grave election offence especially where it is perpetrated on a candidate and his/her agents. An election conducted with some candidates being maimed and hospitalized, hence removed from the process, cannot be said to be free and fair. It infringes of the core principles of the Constitution in Article 81 for conducting free and fair

elections which are “free from violence, intimidation, improper influence or corruption”. A candidate’s agents not only signify the presence of a candidate in a polling station, but also legitimize the electoral process. Hence where the same are completely locked out of a polling station, that election lacks the legitimacy that comes with transparency in Article 81 of the Constitution.

17. Further, the claimant submitted that the cause of the scuffle was the query by his agents on why the IEBC register was being used instead of the party register. This was a very legitimate concern that ought to have been addressed by the returning officer. Rule 23 of the *Orange Democratic Movement, Election and Nomination Rules*, is categorical that:

23.1 For purposes of conducting elections by universal suffrage, the NEB (National Elections Board) shall ensure that there are registers of all party members in all Wards, Constituencies and Counties as the case may be.

23.2 On the date determined for polling, eligible voters as per the Party register shall be identified by availing the following documents:

- (i) National Identity card, and**
- (ii) Voters’ card or Passports.**

18. Hence, a candidate’s agents having raised such a fundamental issue, the same ought to have been addressed and not have them assaulted and removed from the polling station. Again, while this issue has been emphatically raised by claimant, the respondent has not responded to it. The register of voters is a key component of an election. Without it, no credible election can be said to have been conducted. Hence where the same is questioned and/or missing like in this

case, such an election cannot be said to have been conducted in accordance with the Constitution, the Electoral laws and Rules and a party's Election Rules.

V. RELIEFS

19. We reproduced a summary of the prayers that the claimant urged us to grant. While we find that the nomination exercise was conducted contrary to the law, some of the prayers sought by the claimant are not available for this Tribunal to issue. Consequently, we are inclined to make the following orders which we hereby do:

(a) That the nomination exercise by the Orange Democratic Movement for Bonchari Parliamentary seat, Kisii County, conducted on the 20th April, 2017 was not conducted in compliance with the law in particular with the provisions of Articles 10, 38, 83 and 91 of the Constitution.

(b) That the nomination exercise by the Orange Democratic Movement for Bonchari Parliamentary seat conducted on the 20th April, 2017 is null and void.

(c) That a fresh nomination exercise for Bonchari Parliamentary seat shall be held within the next 48 hours of this Judgment.

(d) The 2nd respondent shall bear the costs of the claimant herein.

20. Orders accordingly.

DATED and DELIVERED AT NAIROBI this 3RD DAY OF MAY 2017

1. Kyalo Mbobu
Chairman

2. **James Atema**
- Member

3. **Hassan Abdi**
- Member