



REPUBLIC OF KENYA
POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 234 OF 2017

GEORGE GITIBA NJENGA.....COMPLAINANT

VERSUS

MUTUNGA MUTUNGI.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

JUDGMENT

Summary of the Case

1. The Claimant and the 1st Respondent were both contestants in the 2nd Respondent's party primaries held on 26th April 2017 for the position of the Member of Parliament, Embakasi South Constituency within Nairobi County. The Constituency has five wards, namely Pipeline, Kware, Kwa Njenga, Imara Daima and Kwa Reuben each with 3, 2, 3, 3 and 3 polling stations respectively. The Claimant claims to have garnered 1,442 votes while the 1st Respondent got 1,237 votes.
2. The Claimant also averred that despite having won with a clear margin, he was informed, on arrival at the tallying centre, that the results for Kwa Reuben and Maendeleo Wards had not been tallied because they had not been brought to the tallying centre and hence was asked by the Returning Officer to wait. However, the Returning Officer still refused to declare the results for Kwa Reuben Ward even after the ballot boxes were brought on grounds that the Presiding Officer was drunk.

3. The Claimant further averred that the tallied results for Maendeleo Ward were contradictory in the sense that the 1st Respondent garnered 98 votes according to the agents but 398 votes according to the Returning Officer.
4. The Claimant appealed to the 2nd Respondent's National Elections Appeals Tribunal but the appeal was dismissed and the 1st Respondent was declared the winner instead. The Claimant has now lodged his complaint with this Tribunal seeking for the following prayers:
 - a) A permanent injunction restraining the Respondents, their agents, associates and or servants from issuing and or accepting any nomination certificate in respect of Embakasi South Constituency pending the determination of this case.
 - b) Any other relief that this honourable Tribunal deems fit to grant.
5. In reply, the 1st Respondent opposed the Claimant's complaint stating that the Claimant case was baseless and without justification since he failed to prove his case and hence prayed for the dismissal of the same forthwith.

Issues for Determination

6. The primary issue for determination is whether the 2nd Respondent's nomination for the position of the Member of Parliament, Embakasi South Constituency was free, fair and credible.

Analysis

7. The requirement for free and fair elections is one of the general principles undergirding Kenya's electoral processes. For an election exercise to be said to have been free and fair, according to *Article 81* of the *Constitution of Kenya, 2010*, the following conditions must be met. They include allowing voting through secret balloting, freedom from violence, intimidation and improper influence or corruption, elections being conducted transparently by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner.

8. These requirements also underlie the citizens' rights and freedoms contained in *Article 38* of the *Constitution of Kenya, 2010*, and as such, are binding on political parties' nomination processes. *Article 38* guarantees the right of every citizen to make political choices, which includes the rights to form and participate in the activities of a political party. In this regard, one has the right to take part in a free, fair and regular elections based on universal suffrage and the free expression of will to vie for any office of any political party to which such a person is a member.
9. To this end, *Article 91 (1) (d)* of the Constitution specifically obligates political parties in Kenya to abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party. To fulfil these constitutional requirements, *section 9* of the *Political Parties Act, 2011* read together with the *Second Schedule* of the same sets out the key issues that must be contained in the constitutions of all duly registered political parties in Kenya.
10. The relevant issue for our purposes in the matter is the rule that a political party constitution must establish guidelines for, among other things, the nomination of candidates for elections.
11. The 2nd Respondent's nomination rules also guarantee the rights and freedoms of their members to free, fair and credible elections. As a political party that is duly registered in Kenya, the 2nd Respondent owed to its members the obligation to conduct a free, fair and credible nomination process. This meant, among other things, that the exercise ought to have been free from violence, intimidation of voters or influence by corruption and accurate recording of the results of votes balloted by the Returning Officer.
12. One Jedidah Jonathan Waciuri who was the overall agent for one David Njuguna Mbugua, also a contestant in the 2nd Respondent's party primaries for Embakasi South Constituency swore an affidavit to confirm that 1st Respondent garnered 98 votes. Mr Jedidah further averred that the 1st Respondent could not have possibly

garnered 398 votes as the figure exceeded the total numbers of votes cast, which were 321.

13. The 1st Respondent, in his replying affidavit, denied the annexures at pages 5, 7,8,10 and 10 of the Claimant's bundles of documents and averred that the 2nd Respondent was a stranger to the same. The said annexures purportedly contained a breakdown of tallied results from 15 polling stations showing the Claimant as having 1299 votes as against the 1st Respondent's 935 votes.
14. The Tribunal nonetheless noted that the annexures were problematic in two major respects making it difficult to vouch for their veracity. The results were not only blurred but the tally sheets did not contain the letterhead of the 2nd Respondent and neither bore the name nor the signature of the Returning Officer. Simply put, we cannot rely on the said annexures to determine the actual winner for the position of the Member of Parliament, Embakasi South Constituency on the 2nd Respondent's party ticket.
15. That said, this Tribunal also noted that neither the 1st nor the 2nd Respondent took steps to produce the tally sheets of the results of the said nomination to assist it determine the actual victor of the process. The 1st Respondent has merely asserted that the Claimant's case was without foundation without specifically rebutting the Claimant's arguments that the results were announced and the winner declared without factoring the results of Kwa Reuben and Maendeleo Wards.
16. The failure to consider the said two Wards, in our view, was such a fundamental error that cannot be ignored by this Tribunal. We have taken note of the Court of Appeal decision in *Moses Masika Wetangula vs. Muskari Kombo & Another Civil Appeal No. 43 of 2013's* case and we stand guided by it in determining this matter. In this case, the court observed as follows:

It is an accepted fact that no human activity can be perfect. The conduct of an election is therefore no exception. That notwithstanding, however,

for an election to be valid, substantial compliance with the law governing that election is mandatory. For instance, no election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. No election can be valid if, whatever method of voting is employed, it is not “simple, accurate, verifiable, secure, accountable and transparent”; as well as if “appropriate structures and mechanisms to eliminate electoral malpractice are [not] put in place”; and the counting and collation of votes and announcement of the results are not open and accurate. What Section 83 of the Elections Act excuses are minor infractions of these principles or requirements that arise from inadvertent, not deliberate or negligent, human activities in the effectuation of these principles but do not affect the result of the election.

17. Our reading of the foregoing has led us to conclusion results of the Kwa Reuben and Maendeleo Wards were not minor infractions. On the contrary, these results were important in determining the 2nd Respondent’s nominee for the position of the Member of Parliament, Embakasi South Constituency. As such, the results ought to have been factored when tallying the final results for the said position especially considering the geographical size of the location in question, the Embakasi South Constituency.
18. Whereas it could true that 1st Respondent was ahead of the Claimant at the time the results were declared, nevertheless we cannot rule with certainty that the untallied votes from the two Wards could not have had any impact on the overall outcome. The only way to find out the truth is by tallying all the untallied votes from these two Wards: Kwa Reuben and Maendeleo Wards.

19. For the reasons advanced above, this Tribunal is persuaded by the Claimant's arguments and accordingly the Claimant's case succeeds.

Orders

20. In the premises, this Tribunal orders as follows:

- a) *That the Claimant's case be and is hereby allowed.*
 - b) *That the 2nd Respondent be and is hereby restrained from issuing the final nomination certificate to any other person for the position of the Member of Parliament Embakasi South Constituency, Nairobi County.*
 - c) *That, in the event that the 2nd Respondent has issued the final nomination certificate to the 1st Respondent or any another individual for the position of the Member of Parliament, Embakasi South Constituency, the same is hereby declared null and void.*
 - d) *That the 2nd Respondent be and is hereby ordered to tally the votes for Kwa Reuben and Maendeleo Wards and factor the same in determining the nominee for the position of the Member of Parliament, Embakasi South Constituency within 24 hours of this judgment.*
 - e) *In the event that the ballot materials are unavailable, there shall be repeat nominations in the two wards within the next 48 hours of the pronouncement of this judgment.*
 - f) *No orders as to cost in order to foster party unity, growth and democracy.*
- Orders accordingly.*

DATED AT NAIROBI THIS 17TH DAY OF MAY 2017

Kyalo Mbobu (Chairman)

James Atema (Member)

Hassan Abdi (Member)