



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI
COMPLAINT NO. 200 OF 2017

JEKCONIA OKUNGU OGUTU.....1ST COMPLAINANT
JULIUS OOKO OKAYO.....2ND COMPLAINANT
VERSUS
ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST RESPONDENT
SIAYA COUNTY RETURNING OFFICER..... 2ND RESPONDENT
CORNEL RASANGA AMOTH.....3RD RESPONDENT
NICHOLAS ODERO GUMBO.....4TH RESPONDENT
CAREY OREGI.....5TH RESPONDENT
WILLIAM ODUOL.....6TH RESPONDENT

JUDGMENT

Introduction and Procedural History

1. Both complainants as well as the 3rd to 6th Respondents took part in the Orange Democratic Movement’s party primaries for the gubernatorial position in Siaya County. The nominations were conducted on 25th April, 2017 and at the end of the exercise Cornel Rasanga Amoth was declared winner. He was issued with a nomination certificate on 29th April, 2017. The 4th Respondent’s appeal to the National Appeals Tribunal was dismissed with an order directing the 1st Respondent to issue the 3rd Respondent with a nomination certificate.
2. The complainants moved this Tribunal by a complaint dated 5th May, 2017 alleging breach of their constitutional rights under Article 38 of the Constitution of Kenya, 2010. However, the 3rd Respondent raised and successfully argued a preliminary objection before a differently constituted bench of this Tribunal. The preliminary objection was raised on the point that this Tribunal lacks the jurisdiction to entertain complaints in respect of violation of constitutional rights

and freedoms – even if the violations arise in the context of political party disputes including party primaries.

3. That bench of the Tribunal arrived at the conclusion that it had no jurisdiction to hear and determine such disputes because the same was specifically reserved for the High Court under Article 165(3). The petition was therefore dismissed for want of jurisdiction on 11th May, 2017.
4. On appeal Serгон J held that the Tribunal misconstrued the provision of section 40(1)(a) of the Political Parties Act, 2011 on the question as to whether the complainant's constitutional rights were affected since the issue was corollary to the core issue of determining the question as to whether the elections/nominations were conducted in accordance with the law, the party constitution and nomination rules.
5. The court held that the Tribunal had wrongly denied itself jurisdiction to determine a matter strictly within its mandate to hear and determine under section 40 of the Political Parties Act, 2011. The learned judge further held that the Appellant's political rights stated and protected under Article 38 of the Constitution of Kenya, 2010 is an issue which the Tribunal should have seized the opportunity and determine under Section 40(1) of the Political Parties Act, 2011.
6. In the end, Serгон J of the High Court remitted the matter back to this Tribunal with the following orders:
 - i. **The judgment of the Political Parties Disputes Tribunal delivered on 11.5.2017 dismissing the appellant's petition is set aside. The same is remitted back to the Political Parties Disputes Tribunal to be heard afresh before a different panel**

**other than M. O. Lwanga, Desma Nungo and Dr.
Adelaide Mbithi.**

**ii. The Tribunal is further directed to hear and
determine the motion dated 9th May, 2017.**

7. At the case conference held on 25th May, 2017 in preparation for the fresh hearing the Tribunal issued directions as to the filing of responses and skeleton arguments. We further directed the 1st Respondent to avail in reply to the case, copies of the final official tally of the Siaya County Gubernatorial nominations held on 25th April, 2017. The 1st Respondent was similarly directed to avail to the Tribunal, the list of party members submitted to both the Independent Electoral and Boundaries Commission (IEBC) and the Registrar of Political Parties at least 120 days to the election under section 28 of the Elections Act, 2011. Judgment was reserved to today 2nd June, 2017.
8. By the time of delivery of this judgment, the 1st Respondent had not filed any response to the case, filed the final tallies or availed the party list of members as directed. The consequence is that the Tribunal is forced to determine the petition without that crucial information which is in the sole custody of the 1st Respondent.

Petitioners' Case

9. The Petitioners contend that on 25th April, 2017 the 1st Respondent organized and conducted nominations for the gubernatorial position for the Siaya County which was to be conducted according to the Constitution of Kenya, the Political Parties Act, the Orange Democratic Movement Constitution and its Election and Nomination Rules.
10. However, the Petitioners submitted that the Nominations as organized and conducted by the 1st Respondent contravened the Constitution, the Political

Parties Act, 2011 and infringed the constitutional rights and legitimate expectations of party members including the petitioners and therefore should not be allowed to stand.

11. It was further submitted that the Petitioners as party members were entitled under Article 38 to participate in the affairs of the party and to vote for their preferred candidates under universal suffrage. Having conscientiously joined the 1st Respondent as party members, the Petitioners legitimately expected to participate in its activities including voting in elections organized by the party.
12. The Petitioners submit that Article 91 of the Constitution every political party is mandated to abide by the democratic principles of good governance and to promote and practice democracy through regular and fair elections. Political parties, it was submitted, must also respect the rights of all persons to participate in the political process.
13. Against this background, it was claimed that the 1st Respondent had fundamentally breached the Constitution in three major ways that rendered the entire process unconstitutional, illegal and a sham. First, there were no party registers leading to the exclusion of party members and voting by non-party members. Secondly, there was clear and blatant disenfranchisement of the members of the party. Third, the process was marred by unabated malpractices which compromised the electoral process and made it incredible. As a result, it could not be said that the elections were free and fair.
14. The Petitioners cited Rule 23.1 of the 1st Respondent's Election and Nomination Rules which is in the following terms:

**For purposes of conducting elections by universal suffrage,
the NEB shall ensure that there are registers of all party**

**members in all wards, Constituencies and Counties as the
case may be.**

15. However, contrary to its own rules and the law the 1st Respondent failed to avail the party register at the polling station as was required and resorted to using the 2013 voters roll used by the Independent Electoral and Boundaries Commission. The effect of this was that only persons captured in the IEBC register, whether party they were party members or not, could participate in the 1st Respondent's nominations. Registered party members who had registered as IEBC voters after 2013 were excluded from participating in the nominations.
16. As a result, it was not only impossible to verify the status of those who voted in the nominations, but also the petitioners legitimate expectation to participate in the nominations was grossly infringed. Specifically, the 1st Petitioner turned up to vote for the candidate of his choice, but was turned away because his name was not on the IEBC 2013 register of voters.
17. It was argued that the unlawful decision to use the IEBC 2013 register of voters instead of the party membership list, had the result of violating the obligation under Article 91(1)(e) to respect the right of all persons to participate in the political process. That aside, this development allowed non-party members to take part in the nominations thereby directly influencing the affairs of members.
18. The outcome of the nominations was affected because whereas the 1st Respondent has about 60,000 registered members within Siaya County, more than 200,000 persons voted in the 1st Respondent's gubernatorial elections. This fact violated the petitioners' rights and the rights of all party members.
19. It was further submitted that the results of the gubernatorial nominations were not verifiable due to the huge variations reflected in the outcome of the elections for comparable positions by ostensibly the same electorate who turned up on the

polling day. Apart from exceeding the total number of registered party members, the total number of votes cast for the gubernatorial position exceeded votes cast for Senator by 90,000 and votes cast for the Women Representative position by some 140,000 votes, respectively.

20. As a result, the outcome of the nominations cannot be in accordance with the will of party members in Siaya County and the results are not credible and should not be allowed to stand.
21. On the second issue relating to electoral malpractices, the Petitioners allege that the nominations were marred by several malpractices which render the nominations unfair, unverifiable and unaccountable contrary to the constitutional as well statutory thresholds, not to mention the 1st Respondent's own rules.
22. The 1st Petitioner has deposed to these allegations in his affidavit dated 5th May, 2017 sworn in support of the allegations. He states that numerous polling stations used plain exercise book pages as ballots thus compromising the credibility of the elections and the legitimacy of the results. Moreover, on the day of the nominations, polling material arrived as late as 8:00pm at Kamin Ogedo Primary School polling station and Kamalumbwe Primary School polling stations. The outcome of the nominations was purportedly declared while some sub-county results were still being counted and tallied. These results were in any event announced by a stranger to the process; who was not the duly appointed County Returning Officer.
23. The exercise of free will in the nominations was also vitiated by electoral violence at Siger Primary School, Karapul Primary School, and Bar Kogonga Primary School polling stations. It was alleged that the 3rd Respondent and his supporters

- clad in t-shirts bearing his image caned up voters who had queued up to vote. The police were forced to intervene.
24. The Petition was further supported by the affidavit of Diana Akinyi Otieno a voter and duly registered party member. She deposed that she witnessed voter bribery at Nyang'anga Primary School polling station and that an attempt was made to influence her as well.
 25. The claims of voter bribery were corroborated by Esther Achieng Otieno who was the 4th Respondent's agent at Nyang'anga Primary School polling station. She deposed in her affidavit that she witnessed the 3rd Respondent give money to his supporters and agents for distribution to voters. She was threatened with violence and was obstructed from effectively observing the polling process to confirm that it was being conducted in a free and fair manner.
 26. Shem Opiyo Waringa deposed to similar events at Nyang'inja Primary School concerning bribery of voters by supporters of the 3rd Respondent.
 27. Edwin Otieno Obara deposed that he was a voter at Malomba Primary School. At 9:00am on the polling day, he heard chants of "*Rasanga tibim! Rasanga Tialala!*" ostensibly in support of the 3rd Respondent. He witnessed the 3rd Respondent remove a bundle of notes from his pocket and hand it over to one of the cheerleaders. Chaos erupted as the crowd hustled over the money. He further testified that polling material arrived past 6:00pm when voters had given up and returned to their homes.
 28. Justus Odima Odimo who participated in the nominations at Karapul Primary School polling station also swore an affidavit. While he was on the queue, goons bedecked in t-shirts bearing the 3rd Respondent's images violently evicted voters from the queues. We however note that the evidence at paragraph 13 of his

affidavit is confusing as to the name of the polling station where the violence occurred.

29. Justus Ouma Onyango swears that he was the 4th Respondent's Chief Agent on the polling day. He was stationed at Alego-Usonga tallying center. However, he visited Agoro Oyombe Primary School, Agoro Tula Primary School, Aluny Primary School as well as Ngiya Primary School polling stations as the agents stationed at those polling stations had complained of delays in the arrival of polling material.
30. He returned to the polling station to await the results. Tallying started at 11:00pm, but was incomplete the following day by 10:00am. A number of polling stations were yet to submit their results and efforts by the 1st Respondent to contact the responsible returning officers were futile. As a result of this development, results had not been announced by midday of 26th April, the day following the nominations. He was roughed up by the 3rd Respondent's officers.

1st and 2nd Respondent's Case

31. By the time of delivery of this judgment, the 1st Respondent had not filed any response to the case or availed the party list of members as directed.

3rd Respondent's Case

32. The 3rd Respondent filed a replying affidavit as well as submissions dated 25th May, 2017 in opposition to the Petition. The 3rd Respondent submitted that he had emerged winner after garnering some 143,446 votes followed by the 4th Respondent with who had 87,467 votes while the 6th and 5th Respondents each emerged 3rd and 4th respectively.
33. Being aggrieved with the outcome of the nominations, the 4th Respondent filed an appeal before the 1st Respondent's National Appeals Tribunal which was

dismissed on 3rd May, 2017. Two days later, the Petitioners filed this petition which was heard and dismissed as earlier adverted to in this judgment.

34. The 3rd Petitioner contended that only the 4th Respondent was a party to the dispute before the NAT. As a result, the Petitioners who had not appeared before the NAT could not rely on that appeal. They had failed to invoke internal dispute resolution mechanisms and the petition was liable for dismissal.
35. Second, the 3rd Respondent submitted that the petition raised constitutional issues of alleged violation of fundamental rights under the Bill of Rights. The violations relate to Article 38 and 90 of the Constitution. As a result, the Tribunal has no jurisdiction as the jurisdiction to enforce the Bill of Rights is conferred upon the High Court by dint of Article 165 as read with Article 22 of the Constitution. As a result, it was submitted that the Tribunal lacked the jurisdiction to hear and determine the claim and it should therefore be dismissed with costs to the 3rd Respondent.
36. Concerning the allegation that the nomination process in Siaya County did not meet the constitutional threshold, it was submitted that whereas the Petitioners contended that the entire exercise was flawed, they had not sought nullification of Senatorial, National Assembly, Woman Representative and County Assembly results. To the 3rd Respondent, there could be no two ways about the matter. Either all the results in respects of all the positions should be nullified or all in the alternative all of them should be upheld.
37. The 3rd Respondent further submitted that the allegations in the petition were similar to the allegations raised by the 4th Respondent before the NAT. Similarly, it was submitted that the Petitioners had not proved that they were members of the 1st Respondent. A political party is a member's club and only members could have and exercise rights conferred on them by the party. Besides that, the

petitioners had not proved that they were registered voters in Siaya County. They had not produced copies of their national Identity Card to prove that they hailed from or had relations with Siaya County.

38. The net result was that there was no iota of evidence before the Tribunal about the claims. The burden of proof rests with the person who alleges it was incumbent on the petitioners to prove that they were party members and voters from Siaya County.
39. Additionally, the Petitioners had not provided evidence of disenfranchisement of members. They had failed to avail a list of members who had been precluded from voting or that of non-party members who had voted. Further, it was submitted that the allegations of over voting were wild because they had not been substantiated or supported with evidence.
40. Concerning late delivery of materials at Memba Primary School, Kamin Ogedo Primary School, St Lazarus Primary School, Kamalumbé Primary School and Ndori Dispensary polling stations, it was alleged that whereas the nomination exercise experienced minor logistical challenges the same did not affect the nomination exercise or its results. These logistical challenges, it was submitted, affected all the candidates who participated in the nominations equally.

4th, 5th and 6th Respondents' Case

41. The 4th to 6th Respondents did not file responses to the Petition.

Issues for Determination

42. From the rival the pleadings and submissions from the parties in dispute these are the issues for determination by this Tribunal:

(a) Does this Tribunal have the jurisdiction to hear and determine this dispute?

- (b) Does the Tribunal have the jurisdiction to apply or interpret the Constitution in the limited context of political party disputes?
- (c) Did the 1st Respondent conduct free and fair nominations for the position of Governor, Siaya County?
- (d) What are the appropriate reliefs in this complaint?

Determination of Issues

- (a) Does this Tribunal have the jurisdiction to hear and determine this dispute?
43. Jurisdiction is what legitimizes a court or Tribunal's adjudicatory powers over any political party dispute before it. It is what breathes life, not just into the disputes before the Tribunal turning them into justiciable claims, but also validates the orders issued by the Tribunal in the final determination of the rights and interests of the parties to the dispute before the Tribunal. Accordingly, we must first satisfy ourselves that we have the jurisdiction to this complaint or we would be bound to down our tools. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*.
44. The 3rd Respondent contended that the Tribunal lacks jurisdiction over the claim since the petitioners had not appealed to the 1st Respondent's National Appeals Tribunal. It was contended that since only the 4th Respondent was a party to the dispute before the NAT, the Petitioners could not rely on that appeal. They had failed to invoke internal dispute resolution mechanisms and the petition was liable for dismissal. In response, the Petitioners averred that section 40(1)(fa) does not require the petitioners to first attempt internal dispute resolution mechanisms. In any case such attempts would be futile inter alia in view of the

timelines and the fact that the 4th Respondent had submitted that same dispute to the 1st Respondent.

45. We hold that the jurisdictional argument is a mere ploy to dislodge the Claimant from this Tribunal's seat of justice. There is no mandatory requirement for one to exhaust internal dispute resolution in disputes between independent candidates and political parties, appeals from decisions of the Registrar and disputes over party primaries. We held as follows in *Complaint No 250 of 2017 Jamleck Kamau & 4 others v Jubilee Party & 3 others*:

We assert that this Tribunal has both original and appellate jurisdiction over disputes from party primaries. Consequently, the Tribunal's jurisdiction is not in any way affected, by the validity or invalidity of any proceedings before the party's internal dispute resolution mechanism. We further hold that the proviso in section 40(2) of the Act only covers the classes of disputes in section 40(1)(a), (b), (c) or (e). The proviso does not extend to disputes between independent candidates and political parties, appeals from decisions of the Registrar and disputes over party primaries.

46. Parliament does not waste words. It was aware of the existence of section 40(2) of the Act when it amended section 40(1) to include sub-section (fa). Parliament did not extend the proviso in section 40(2) to cover disputes arising from party primaries. That's a burden this Tribunal would be loathe to extend to litigants who are properly before it.
47. Besides that, assuming that there was a need to attempt internal dispute resolution mechanisms, we cannot buy the 3rd Respondent's argument that it is

necessary for the individual litigant as opposed to the material dispute to be subjected to internal party dispute resolution processes. As we see it, section 40(2) refers to “dispute”, and not “parties to a dispute”. As a result, once a dispute has been referred to an internal party processes, any party, interested party or other person affected by that dispute may henceforth invoke the jurisdiction of this Tribunal. There is no need for the particular litigant to have personally appeared before the internal party dispute resolution mechanism.

48. It was further contended without evidence that the Petitioners before this Tribunal were contrary to their uncontroverted affidavit evidence, not party members. The 1st Respondent did not file its list of party members as directed to enable the Tribunal inter alia ascertain the membership of the Petitioners. The assertion by the 3rd Respondent is a mere denial.

(b) Does this Tribunal have the jurisdiction to apply or interpret the Constitution in disputes which are properly before it?

49. The 3rd Respondent submitted that the petition raised constitutional issues of alleged violation of fundamental rights and freedoms under Article 38 as well as the obligations of political parties under Article 90 of the Constitution. As a result, it was contended that the Tribunal has no jurisdiction as jurisdiction to enforce the Bill of Rights is conferred upon the High Court by dint of Article 165 as read with Article 22 of the Constitution. It is possible to tell from the text of the Constitution itself whether or not this Tribunal has the jurisdiction or duty to enforce the Bill of Rights in the limited context of political party disputes under section 40 of the Act.

50. To begin with, Article 3 of the Constitution imposes an obligation on every person to respect, uphold and defend the Constitution. Prima facie, in any matter over which it has jurisdiction this Tribunal has the duty uphold the Constitution.
51. Besides that, Article 4(2) of the Constitution creates Kenya as a *multiparty* democratic state based on the supremacy of the Constitution and founded upon the 'national values and principles of governance' in Article 10. The national values, relevant to this dispute, include the rule of law, democracy and participation of the people in addition to human rights and good governance. In turn, these national values and principles of governance in Article 10 bind all persons including *this Tribunal* whenever it applies or interprets the Constitution or any law including the Elections Act, 2011 and the Political Parties Act, 2011.
52. Further, Article 19(1) proclaims the Bill of Rights as the integral foundation of Kenya's democratic state and framework for all economic, social and cultural policies. The Bill of Rights, under Article 20(1), applies to *all law* and binds all state organs and all persons. This injunction, needless to say, extends to the Political Parties Act, 2011 as well as this Tribunal.
53. Be that as it may, Article 20(4) expressly evinces the possibility of constitutional interpretation by *tribunals* when it provides:
- (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-
 - (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) the spirit, purport and objects of the Bill of Rights
 - (5) In applying any right under Article 43, if the State claims that it does not have the resources to implement

**the right, a court or tribunal or other authority shall be
guided by the following principles...**

54. Article 24(3) similarly foresees the question of limitation of rights arising before a tribunal. It states that the State or person seeking to justify a limitation shall demonstrate to the court, *tribunal* or other authority that the requirements of Article 24 have been satisfied.
55. Moreover, as a state organ established by authority of Article 169(1)(d) of the Constitution, this Tribunal is obligated by Article 21(1) to *observe, respect, protect, promote* and *fulfill* the rights and fundamental freedoms in the Bill of Rights. The obligations to *observe, protect, promote* and *fulfill* are all positive obligations imposing a positive duty to act appropriately on this Tribunal.
56. As a matter of fact, Article 22(2) requires Parliament to confer original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
57. Similarly, in relation to the right to fair administrative action, Article 47(3) provides:
- Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –**
- (a) provide for the review of administrative action by a court or if appropriate, an independent and impartial tribunal; and**
- (b) promote efficient administration.**
58. Parliament has since enacted the Fair Administrative Action Act, 2015 whose section 7(1) provides that any person who is aggrieved by an administrative decision may apply for review of the decision *inter alia* to a *tribunal* in exercise of its jurisdiction conferred in that regard under any written law.

59. Concerning the Tribunal's exercise of sovereign power and the Constitution's recognition of the role of this and other independent tribunals in the dispute resolution scheme, Odunga J of the High Court has recently held in *Charles Otieno Opiyo v Orange Democratic Movement Party [2017] eKLR* at para 38 as follows:

It may be argued that the existence of alternative remedies does not oust the jurisdiction of the Court under Article 165(3)(a) and that that jurisdiction cannot be restricted or limited. On that issue, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, sovereign power under the Constitution is delegated to *inter alia* the Judiciary and independent tribunals. The Constitution therefore clearly recognizes the role of independent tribunals in dispute resolution scheme. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly, I agree with the decision in *Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887* that where an obligation is

created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement.

60. We note that this Tribunal is the first port of call for all political party disputes and that invariably all disputes brought before it are for the enforcement of Articles 38, 47 and 91 of the Constitution. It would be an empty exercise of jurisdiction for us to hold that we can sever disputes before us and determine all aspects of the dispute except denials, violations or infringements of, or threats to, rights or fundamental freedoms in the Bill of Rights. The 3rd Respondent did not tell us how a petitioner would surmount the doctrine of *res judicata* in having the severed or residual part of his dispute, relating to the enforcement of the Bill of Rights, heard by the High Court. We were not informed how such twin-pronged litigation of political party disputes would be financed by the Kenyan tax payers.
61. Such a piecemeal approach to adjudication of political party disputes would be contrary to the sovereignty of the people which is delegated to the judiciary and to this and other independent tribunals under Article 1(3) of the Constitution. This Tribunal would be misusing the judicial authority conferred on it by the people of Kenya under Article 159 of the Constitution if it adopted the approach suggested by the 3rd Respondent.
62. We hold that contrary to the 3rd Respondent's submissions, the proper discharge of this Tribunal's mandate to apply and interpret the Constitution requires it to enforce the Bill of Rights in the limited context of disputes falling under section 40(1) of the Political Parties Act, 2011.
63. Needless to say, the High Court retains supervisory jurisdiction over this Tribunal under Article 165(6) and (7) and it can call for the record of any proceedings and make appropriate orders for the fair administration of justice.

We do not see any inconsistency in this Tribunal applying and interpreting the Constitution in resolving the disputes before it, and the High Court's exercise of its jurisdiction under Article 165 of the Constitution.

(c) Did the 1st Respondent conduct free and fair nominations for the position of Governor, Siaya County?

64. As submitted by the petitioners, the 1st Respondent has a constitutional duty to ensure that its elections are simple, accurate, verifiable, secure, accountable and transparent. What emerges in this petition, however, is that the elections conducted by the 1st Respondent for Governor, Siaya County on 25th April, 2017 do not come close to meeting the constitutional standard. These nominations were marred by several malpractices which render the nominations unfair, unverifiable and unaccountable contrary to the constitutional as well statutory thresholds, not to mention the 1st Respondent's own rules.
65. We are bound by the verdict of the Court of Appeal in *Moses Masika Wetang'ula v Musikari Nazi Kombo* [2014] eKLR at 33 where it was held that:

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.

66. Whereas electoral results must be *accurate, verifiable, secure, accountable and transparent* until this moment, no official tallies or returns from the 1st Respondent’s nominations have been availed to this Tribunal. The directions given by this Tribunal on 25th May, 2017 directing the 1st Respondent to file those before this Tribunal did not yield much.
67. This omission in our view, fortifies the petitioner’s claim that results were declared prematurely and by a stranger to the electoral process thus leading to the unavailability of the official documents used in that process. Not even the 3rd Respondent could state the name of the Returning Officer who allegedly declared him as having been elected.
68. In contrast, the party’s own rules forbid such a course of action. Rule 18.7 of the party’s Elections and Nomination Rules is in the following salient terms:

The Constituency Returning Officer shall submit forthwith vote tally to the County Returning Officer who shall make the final tally with respect to nomination for

Members of Senate, Governor and County Women
Representatives before making public the result of party
nominations for county elections

69. We are satisfied from the evidence on record that the 3rd Respondent was declared as having been elected before tallying had been completed. We do not think that the declaration of the 3rd Respondent as having been elected while tallying had not been completed is a minor infraction of electoral laws arising from inadvertent human error and one which does not affect the result of the election. We find that this declaration was either grossly negligent or a deliberate design to disenfranchise voters and deny them the chance to vote for their preferred candidate for the position of Governor, Siaya County.
70. We are also satisfied that the 1st Respondent did not use the party list submitted to the Commission under section 28 of the Elections Act, 2011 in conducting the nominations. This Tribunal has previously recognized the statutory underpinning of the party membership list in *Complaint No 250 of 2017 Jamleck Kamau & 4 others v Jubilee Party & 3 others* at para 27

We note that the requirement for submission of party list or party membership list has statutory underpinning, both under section 7 of the Political Parties Act, 2011 and under section 28 of the Elections Act, 2011. We also note that under section 34(d) of Political Parties Act, 2011, the functions of the Registrar of Political Parties is to verify and make publicly available the list of all members of political parties. To “verify” according to Black’s Law Dictionary, means to “confirm or substantiate by oath; to show to be true”.

71. In *Complaint No 218B Benard Muia Tom Kiala v Wiper Democratic Movement Kenya* we held as follows:

The party list is the narrow gate that grants access to participation in political party affairs. It gains even greater significance in relation to party primaries where it serves as the party's register of votes. A political party primary or other political party election conducted in disregard of the party membership list is prima facie a sham and is liable to be quashed by the Tribunal when so moved.

72. We are satisfied that the nominations were unlawfully conducted without any reference to the party list. This infraction permitted non-party members to vote, while excluding party members from the exercise. The result is that there were huge variations between the votes cast for Governor and the other two county positions of Women Representative and Senator. We hold that party members in Siaya were disenfranchised by the failure to use the party list. Nominations are exclusive party-member only affairs. Only those whose names appear in the party list submitted to the Commission under section 28 of the Elections Act, 2011 are eligible to vote.

73. The 1st Respondent who was in charge of the election and who has custody of the electoral material used in the nomination process did not avail evidence to rebut the claims that pages torn from exercise books were used as ballot papers in the nomination exercise. That would be a sad scenario for a political party of the 1st Respondent's standing and stature. In *Complaint No 48 John Mruttu v Thomas Ludindi Mwadeghu & 2 others* we held as follows:

Political parties not only enjoy a constitutional status, but also get funds from the public purse and their members.

They owe it to their members to invest in proper systems and employ competent personnel who can conduct primaries efficiently and fairly while allowing adequate time for the party to resolve any disputes arising from those primaries.

74. We have deliberately avoided commenting on the claims of voter bribery and electoral violence in order not to prejudice any subsequent action by relevant agencies. These findings lead us to the inevitable conclusion that the 1st Respondent did not conduct free and fair nominations for the gubernatorial position in Siaya County.

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

75. In *Complaint No 48 John Mruttu v Thomas Ludindi Mwadeghu & 2 others* we held that in every matter over which the Tribunal has jurisdiction, the 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 every case.
76. We remain aware of the need to cultivate a political party culture which resonates with Article 91 of the Constitution and establishes political parties as proper agencies of the democratic process bound by the national values and principles of governance. All these are relevant factors which we are duty bound to take into account while crafting the right remedies to the Claimant's wrongs.
77. The justice of this case requires us to make the following orders:
- (a) A declaration be and is hereby issued that the 1st Respondent did not conduct free or fair nominations for the position of Governor, Siaya County on 25th April, 2017.**

- (b) A declaration be and is hereby issued that the nomination certificate dated 29th April, 2017 issued by the 1st Respondent to the 3rd Respondent is null and void and of no effect in law.
- (c) An order be and is hereby issued directing the 1st Respondent to conduct a fresh nomination exercise for the position of Governor, Siaya County within 72 hours following the pronouncement of this judgment.
- (d) The 1st Respondent is further directed to forthwith submit the name of the duly nominated candidate to the IEBC.
- (e) A copy of this judgment be transmitted to the IEBC forthwith. For the avoidance of doubt, in the event that the 3rd Respondent's name has already been submitted to the IEBC, the same not to be gazetted pending the implementation of this judgment.
- (f) In the interest of party unity, each party to this dispute shall bear their own costs of the petition.

Dated at Nairobi this 2nd day of June 2017

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Kyalo Mbobu (Chairperson)

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James Atema (Member)

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Paul Ngotho (Member)