



REPUBLIC OF KENYA
POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 226 OF 2017

MARY SENETA.....COMPLAINANT
VERSUS
JUBILEE PARTY NATIONAL APPEALS TRIBUNAL.....1ST RESPONDENT
PERIS PERI TOBIKO.....2ND RESPONDENT
JUBILEE PARTY.....3RD RESPONDENT

JUDGMENT

Summary of the Case

1. The Claimant and the 2nd Respondent were both contestants in the 3rd Respondent's party primaries held on 25th April 2017 for the position of the Member of Parliament, Kajiado East Constituency within Kajiado County. The Claimant garnered 5,499 votes while the 3rd Respondent got 8,833 votes. This was according to the tally sheet of unnamed Constituency Returning Officer.
2. The Claimant disputed the results stating that the Constituency Returning Officer announced the results without factoring in the results for St. Monica and G.K Prison Centre. An appeal to the 1st Respondent, which appeal was dismissed for lack of merit. The Claimant has now lodged her complaint with this Tribunal seeking for the following prayers:
 - a) An order nullifying the nomination certificate issued to the 2nd Respondent for the position of the Member of Parliament, Kajiado East Constituency.

- b) An order for the re-tallying of all form 3 in all the polling stations for the position of the Member of Parliament, Kajiado East Constituency.
 - c) A declaration that the Claimant as the valid 3rd Respondent's nominee for the position of the Member of Parliament, Kajiado East Constituency.
3. In reply, the 2nd Respondent opposed the Claimant's complaint stating that the problem was with the results of G.K Prison and not St. Monica polling station since the results of the former were not availed by the presiding officers. The 2nd Respondent explained that St. Monica polling station had two streams where the Claimant garnered 222 and 240 votes while the 2nd Respondent got 288 and 246. The 2nd Respondent therefore implored this Tribunal to dismiss the Claimant's complaint forthwith.

Issues for Determination

4. The primary issue for determination is whether the 3rd Respondent's nominations for the position of the Member of Parliament, Kajiado East Constituency was free, fair and credible.

Analysis

5. 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.
6. 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.

7. 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.
8. 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.
9. The 3rd 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 3rd 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.
10. The 3rd Respondent's Regional Coordinator for Kajiado County swore affidavit stating that St Monica polling station had two streams each with its own presiding officer. However, only one of the presiding officers turned up with the results; the other one could not be traced and attempts to reach him on call were

all in vain. The Regional Coordinator also stated that the results for G.K Prison were never tallied.

11. Other individuals also swore affidavits citing incidences of irregularities with the nomination process. These were mismatch of photos of aspirants but which were resolved by their respective agents, a presiding officer was forced to go into hiding after receiving threats against his life and reported the same to the Kitengela Police Station. The 2nd Respondent's opened the ballot boxes and handed over the ballot papers to one of the presiding officers, intimidation and harassment by rowdy supporters of the aspirants.
12. As a Tribunal, we have noted that in spite of the above complaints, there was no evidence to show that the results, as recorded in the tally sheets, were tampered with. The only problem, which both the Claimant and 2nd Respondent acknowledged, was with respect to St Monica and G.K Prison polling stations. As observed, only one of the presiding officers of St. Monica polling station turned up with the results; the other one could not be traced and the results for G.K Prison were also not tallied.
13. Despite this vital reality, the Claimant has prayed for an order requiring the re-tallying of all the Form 3s in all the polling stations for the position of the Member of Parliament, Kajiado East Constituency. This, in our view, is not tenable since the problem did not affect the entire Constituency but two polling stations, which the Claimant also recognised. The total votes garnered by the Claimant and the 2nd Respondent from one of the streams of the St. Monica polling station were 462 and 534 votes, respectively.
14. In the case of *Moses Masika Wetangula vs. Muskari Kombo & Another Civil Appeal No. 43 of 2013* 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.

15. Our reading of the foregoing has led us to conclusion that results of the G.K Prison polling as well as those of St Monica streams were not minor infractions. On the contrary, they were important in determining the 3rd Respondent’s nominee for the position of the Member of Parliament, Kajiado East Constituency and hence, ought to have been factored when tallying the final results for the said position.
16. Indeed, the 2nd Respondent was ahead of the Claimant with over 3,400 votes, nonetheless we cannot rule with certainty that the untallied votes cannot have impact on the overall outcome. The only way to find out the truth is by tallying all the untallied votes from these two stations: G.K Prison and St Monica polling stations.

17. For the reasons advanced above, this Tribunal is not persuaded to grant Claimant's prayers (b) and (c). The Claimant's case therefore partially succeeds.

Orders

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

- a) That the Claimant's case in respect of prayer (a) be and is hereby allowed.*
- b) That the 3rd Respondent be and is hereby ordered to retally votes for St. Monica and G.K Prison, Kitengela polling stations for the position of the Member of Parliament, Kajiado East Constituency within the next 24 hours of this judgment.*
- c) That, in the event that the 3rd Respondent has issued the final nomination certificate to the 2nd Respondent or any another individual for the position of the Member of Parliament, Kajiado East Constituency, the same is hereby declared null and void.*
- d) In the event that the ballot papers and related materials could have been destroyed, then an order be and is hereby issued for the 3rd Respondent to repeat the nominations in the two polling stations, namely St. Monica and G.K Prison, Kitengela, Kajiado East Constituency, Kajiado County.*
- e) No orders as to cost in order to foster party unity, growth and democracy. Orders accordingly.*

DATED AT NAIROBI THIS 16TH DAY OF MAY 2017

Kyalo Mbobu (Chairman)

James Atema (Member).....

Hassan Abdi (Member).....

