



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI

COMPLAINT NO. 210 OF 2017

WANJIKU MUHIA COMPLAINANT

VERSUS

JUBILEE PARTY 1ST RESPONDENT

FAITH WAIRIMU GITAU 2ND RESPONDENT

JUDGMENT

Summary of the case

1. This complaint emanates from the Jubilee Party nomination primaries for the position of Women Representative, Nyandarua County. According to the final results announced by the 1st Respondent, the Complainant emerged second. However, she contends that the election was shrewd in mystery and suspicion and was not free and fair. That the nominations were conducted on the 26th April, 2017, but secretly proceeded on 27th April, 2017. She stated that she lodged a complaint with the 1st Respondent but it was dismissed without perusing the evidence on record hence subverting the Constitution and the sovereign will of people of Nyandarua County.
2. She prays for the following orders:

- (a) *An order quashing the declaration, representation and or endorsement of Mrs. Faith Wairimu Gitau as the legitimately nominated party representative for the seat of Nyandarua County.*
- (b) *An order compelling the Respondent to repeat the nominations of the disputed women representative race, Nyandarua County.*
- (c) *A declaration of the claimant as the winner and lawfully nominated contestant for Women Representative for the Nyandarua County for the Jubilee party.*
- (d) *An order compelling the Respondent to issue the claimant with the nomination certificate as the winner and lawfully nominated women representative race, Nyandarua County.*
- (e) *A declaration that the decision endorsing and/or representing Mrs. Faith Wairimu Gitau as the legitimately nominated party representative for seat of Women Representative race, Nyandarua County is unreasonable, unlawful, illegal and/or suspect.*

Submissions

3. To support her case, the Complainant has produced witness statements on oath by Ann Wanjiku Kamau, John Kiarie Muthoni and Dennis Njau Wambui, who state on oath that the voting continued past scheduled time and other malpractices. She urges that the 1st Respondent's Reply having been sworn by its advocate on record, Mr. Ombasa, is inadmissible as evidence as it is irregular. She cited the case of *Kisya Investments Ltd & another v Kenya Finance Corporation Ltd*, Civil Suit No 3504 of 1993, in arguing that an advocate cannot be both counsel and witness.
4. It is her case that nominations were not free and fair and the process was marred by irregularities. She tendered evidence submitting that the 1st Respondent burnt

votes cast in Nyandarua County on 30th April 2017 despite the pendency of her appeal with the 1st respondent, which was slated for hearing on 3rd May, 2017.

5. The 1st Respondent through its legal counsel filed a reply dated 11th May 2017. It acknowledges that a complaint was filed on 27th April, 2017 claiming election malpractices in the nominations exercise held in Nyandarua County. However, it is submitted that before the delivery of the ruling, the Complainant has rushed to this Tribunal. It is consequently submitted that under section 40(2) of the Political Parties Act, we have no jurisdiction. It was also submitted that party's Appeals Tribunal found no malpractices to render the entire process being declared a nullity, hence, the party was justified in upholding Faith Wairimu's as the bona-fide winner. The 1st Respondent referred to the case of *Raila Odinga vs IEBC and Others*, and urged that electoral malpractices must be so pronounced so that the only remedy available is to cancel the results. He urged us to uphold the decision of Jubilee Party decision in *Appeal No. 180 of 2017*.
6. The 2nd Respondent filed a defence on 11th May 2017. She submits that results were declared at Ol-Kalou Catholic Hall as follows: *Faith Wairimu Gitau, 106,004; Wanjiku Muhia 75, 296; Esther Wanjiku Muhoho, 8, 019 and Jane Gathoni Kiambati 2, 538*. She submits that the nomination primaries were free, fair and accountable and that she won by a margin of 31, 000 votes. Hence prays that the Complaint be dismissed.

Issues for determination

7. The single issue for determination in this matter is whether the declaration of the 2nd Respondent as the winner of the Jubilee party nomination primaries Women Representative, Nyandarua County, should be upheld.

Determination

8. We have perused the record before us and noted the submissions of the parties. As a Tribunal, we take judicial notice that we are bound by decisions of superior Courts. As a consequence, the *Kisya* case cited by the Complaint is binding to us. We have observed that while Mr. Ombasa deposed to the facts in the reply, he appeared before us as an advocate on record for the 1st Respondent. We find that this was irregular and the said reply is hereby struck out.
9. Be that as it may, upon evaluating the evidence, we hold that burning of the votes cast, as an allegation has not been rebutted by the Respondent. There is evidence on record about the burning. The Respondents have engaged in mere denials and not sufficiently countered the allegations. The 1st Respondent bears the onus of promoting democracy in the Party, both under the Constitution, the Political Parties Act, and its own constitution and Rules.
10. Burning votes cast amounts to nothing but suppression of evidence, especially when the 1st Respondent knew that its own Appeals Tribunal was seized of the appeal by the Complainant. As a Tribunal we read nothing short of malice and collusion between the 1st and 2nd Respondents in the burning of votes cast. It was an act at suppressing the evidence of the truth. The idea being to hide the truth in case the Complainant was to get an Order for recount or verification of votes cast.
11. We also note that the Returning Officer has not been brought as a witness by the 1st Respondent or even sworn an affidavit on what happened. An umpire in an election should be neutral and be ready to come forward and give the Tribunal the true picture of what happened. Having found the Reply of 1st Respondent irregular, we find that the Party, 1st Respondent, despite having notice of this

matter, has blatantly suppressed the truth and failed to file a response. The Complainant went at length to produce evidence including witness statements which to a large extent have not that has not been rebutted.

12. While the 1st Respondent urges us to uphold the decision of its Appeals Tribunal, what is attached is clearly a draft unsigned judgment, a fact which the 1st Respondent acknowledges. How can a court rely on a draft unsigned judgment? The least we say on this matter the better, save to say that the same has no legal effect in this matter.

13. No one should be allowed to benefit from an illegality. Having found that there is apparent collusion between the Respondents at suppression of the truth, the interests of justice demands that the people of Nyandarua County should not be subjected to another nomination exercise where these two respondents may again be in the same corner.

14. As a consequence, we make the following orders:

- (i) *The Complaint dated 9th May 2017 is hereby allowed.*
- (ii) *The declaration of the 2nd Respondent, Faith Wanjiru Gitau, as the legitimately nominated party representative for the seat of Women Representative, Nyandarua County is hereby declared null and void.*
- (iii) *The nomination certificate issued by the 1st Respondent to the 2nd Respondent, Faith Wanjiru Gitau, as the legitimately nominated party representative for the seat of Women Representative, Nyandarua County is hereby revoked.*

- (iv) The Claimant, Wanjiku Muhia, is hereby declared as the duly nominated Jubilee Party representative for the seat of Women Representative, Nyandarua County.*
- (v) The 1st Respondent is hereby directed to issue the Claimant, Wanjiku Muhia, with the nomination certificate as the duly nominated Jubilee Party representative for the seat of Women Representative, Nyandarua County within the next 12 hours of this Judgment.*
- (vi) The 1st Respondent shall bear the costs of the Claimant in this matter.*
- (vii) Other parties to bear their own costs.*

15. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2017

Kyalo Mbobu

Chairman

James Atema

Member

Hassan Abdi

Member