



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 45 OF 2017

WILLIAM CHEPKUT.....CLAIMANT

-VERSUS -

JUBILEE PARTY 1ST RESPONDENT

SAMUEL CHEPKONGA 2ND RESPONDENT

JUDGMENT

BACKGROUND

1. Both the Claimant and the 2nd Respondent were participants, as candidates, in the nomination process of Member of Parliament for Ainabkoi Constituency for Jubilee Party held on 25th April, 2012. At the conclusion of the exercise, the Claimant was declared the winner having garnered 13,685 votes against the 2nd Respondent's 13,556 votes.
2. This declaration aggrieved the 2nd Respondent who on the 27th April 2017, moved the Jubilee Party National Elections Appeals Tribunal (NAT) challenging the decision of the Returning Officer. The Appeals Tribunal considered the matters and delivered its decision on 1st May 2017 wherein it found that there were irregularities at Munyaka primary school polling

station and directed that a fresh nomination exercise be conducted on or before 3rd May 2017.

3. This decision of the NAT aggrieved the Claimant who proceeded to file this complaint seeking the following orders, that:

a) The Ruling of the 1st Respondent delivered on 1st May 2017 be set aside.

b) The Complainant be declared as the duly nominated candidate to vie for the position of Member of National Assembly, Ainabkoi Constituency under the Jubilee Party ticket

c) The 2nd Respondent be directed to issue a certificate to the Complainant and the duly nominated candidate to vie for the position of Member of National Assembly Ainabkoi, Constituency under the Jubilee Party ticket.

d) The Costs of this complaint and the complaint before the 1st Respondent (Appeal No. 11 of 2017) be granted to the Complainant herein.

e) Any other order that this Honourable Tribunal deem fit and just in the circumstances.

4. On 2nd May, 2017 Ms. Oruko, Counsel for the Claimant moved this Tribunal by way of Notice of Motion under Certificate of Urgency, seeking *inter alia* an order barring the Jubilee party from proceeding with the nomination exercise at Munyaka primary polling station. This Tribunal certified the matter urgent, and in the interest of justice of the matter,

granted an order temporarily barring Jubilee party from proceeding with the nomination in respect of Munyaka primary school polling station pending the hearing and determination of this complaint. This matter was heard inter partes before this Tribunal on 3rd May, 2017.

SUBMISSIONS

5. The crux of the Claimant's case is that NAT erred in its decision of 1st May 2017 when it ordered a repeat of the nomination exercise for Munyaka. NAT made a finding that the nomination at Munyaka polling station was in breach of Rule 25.1 of the party's Nomination Rules, hence cancelled the results. It held that the closure of the polling station at 3.30 am on 26th April, 2017, having been opened at 3pm the previous day amounted to an election irregularity.
6. It was submitted that the NAT in its decision failed to take into account the full text and meaning of Rule 25(1) of the Jubilee Party Nomination Rules. According to the complainant, Rule 25(1) allows for the extension of voting time where firstly, the polling station opens after 6am upon consultation with candidates and the Election Board; and secondly, where there are people in the queue past 5 pm. He contends that the Rules do not prohibit extension of time beyond one day and thus this Tribunal should consider what reasonable extension is. She referred to affidavits on record in submitting that there were voters at the polling station at 2 am. She referred to the affidavit of Nancy Bungey, the presiding officer.

7. The decision of the NAT was also faulted for holding that the 2nd respondent was not consulted on the extension of the voting to 3.30 a.m on April, 2016. It was submitted that all aspirants were consulted before the extension was done. Hence NAT erred in its holding that the extension was in breach of Rule 25.1 of the Rules as there was no consultation.
8. Thirdly, NAT's decision was impugned for its biasness. In this regard, it was submitted that the tribunal was biased and inconsistent in how it addressed Munyaka polling station. It was submitted that while it had held that the late closure of Munyaka polling station amounted to an irregularity and nullified the results, in the '*Buzeki* appeal' (*Ruling of the Jubilee Party National Elections Appeals Tribunal in Appeal No. 13 of 2017: Zedekiah Kiprop Buzeki Bundotich vs Jackson Mandago Kiplagat & Another*), the same tribunal held that the late closure of the polling station was not a non-compliance with the law. Counsel cited the case of *Abdikam Osman Mohamed & another v IEBC & 2 others* [2013] eKLR, where it was held that spilling over the elections to another day is not an irregularity. In that case, there had been violence on the polling day and the station was closed at 10.40 pm and reopened the following day until 1pm. Counsel reiterated that the holding in that case was upheld by the Supreme Court in the case of *Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others* [2014] eKLR.
9. For these reasons, the claimant prayed that the NAT decision be set aside and that he be declared the winner and nominated candidate of the

position of Member of the National Assembly, Ainabkoi Constituency under the Jubilee party.

10. The 2nd respondent supports the decision of the NAT as being founded on facts, law and equity. Through his counsel, Mr. Katwa Kigen, he urged the Tribunal to be cautious not to look at new materials not before the NAT as this was an appeal. In this regard, he submitted that all the four affidavits on record introduced the issue of consultation while in fact, Mr. Chepkonga was never consulted. Counsel also argued that even the Claimant himself does not concede that he was consulted and that the affidavits on consultations were sworn by two 'busy bodies' that had zero votes from Munyaka polling station.
11. Agreeing that it was common ground that the polling station opened in the afternoon and closed at 3.30am, it was submitted that the nominations at Munyaka Primary School was contaminated by multiplicity of votes cast by voters. That this point was conceded by the Jubilee Uasin Gishu Nomination Co-ordinator. He submitted that the exercise was flawed for various reasons such as: multiplicity of voters voting, most of the voters were men hence disenfranchising women who for their security at night kept off the polling station.
12. Counsel sought to distinguish the decision in *Abdikam Osman Mohammed* submitting that in this case the elections were postponed to the following day at 10pm when the polling station was closed. It was then opened the following day and closed at 1pm. However, in Munyaka, there was no postponement of election but voting carried on until 3.30 am the

following day. That the Munyaka election was designed to be conducted at night while elections generally are designed to be conducted during the day. Further, that in the *Abdikam Osman Mohammed* case, it was held that a reasonable explanation ought to be given for such an extension. In the Munyaka case, it was submitted that no explanation was given.

13. Counsel also distinguished the *Buzeki* case arguing that in that case, the issue was the opening of the polling station late while in this case, the issue is the opening of the polling station upto 3.30 am. He urged the Tribunal to consider that in this case, the thinness of the margin of votes was grave and affects the credibility of the process; unlike in the *Buzeki* case where given the margin, even with all the votes of Munyaka, Hon. Mandago will still win. Hence counsel urged the Tribunal to allow the fresh nomination as it is the fairest thing to all the parties concerned: even the electorate would get a chance to elect a representative off their own choice.

14. The 1st respondent opposed the claimant's case by filing ground of objections in which they support the decision of the NAT. Through Counsel Mr. Ombasa, it was submitted that the tribunal's decision was not only based on the issue of consultation but others factors too such as multiplicity of votes and other irregularities were considered.

ISSUES FOR DETERMINATION

15. The main issue for determination in this case is whether the nomination exercise at Munyaka primary polling station was conducted in accordance with the law and whether it affected the results.

ANALYSIS

16. The resolution of this complaint before this Tribunal turns on the events that happened at Munyaka polling stations between 25th and 26th April, 2017. It is common ground that this polling station opened at 3pm on the afternoon of 25th April, 2017 and closed at 3.30 am on the morning of 26th April, 2017. The significance of this polling station cannot be underestimated as it is also agreed that it was the ‘game changer’ in this election.
17. This issue formed the crux of the appeal before the Jubilee Party National Elections Appeals Tribunal. As to whether the nominations were marred with electoral irregularities, it was held:
- “By their own admission the parties herein have all cited electoral irregularities and malpractices in the nomination process. It is noteworthy that parties unanimously cited Munyuka polling station as the one that was substantially flawed.”**
18. On the basis of this finding, the NAT found that the extension of the voting in Munyaka to 3.30am breached section 25.1 of the party’s Nomination Rules and relying on the cases of *Morgan and others v Simpson and another* [1974] 3 ALL E.R. 722 and *Mbowe v Eliufoo* [1967] EA 240, 242

held that the margin of 129 votes was quite narrow, the process was not transparent, free and fair and in effect affected the results.

19. The claimant argued that there was nothing wrong with the opening of the polling station until 3.30am and cited section 25.1 of the Rules. Section 25.1 provides:

“Nomination polling shall be carried out between 6.00 a.m. and 5.00pm at each Polling Centre. Provided, however, that:-

- i. the Presiding Officer may, where the polling station has opened in good time, extend nomination by no more than one (1) hour for reasons to be recorded in writing and announced to the assembly of voters, and**
- ii. in the event that a polling station has opened later than 6.00 a.m the Presiding Officer may upon consultations with the candidates and the Elections Board extend the closing time by a reasonable time beyond 5.00 pm.”**

20. We are in agreement with counsel for the Claimant in her interpretation of section 25.1 of the Nomination Rules. It is clear that part (i) refers to cases where the polling station was opened promptly but due to some factors that the presiding officer considers, he may extend the opening of the polling station. However, it is crucial that the reasons for that extension have to be recorded in writing and announced to the voters gathered (assembly of voters). This limb is not in issue before us.

21. The second limb is where the station opens later than 6.00 am. In this case, before an extension is allowed: there must be consultations between the presiding officer, the candidates and the Elections Board; and the extension should be for a reasonable time beyond 5p.m. This limb is the one applicable to the case before us.
22. Generally speaking, we are in agreement with Counsel for the 2nd respondent that elections are designed to be conducted during the day. Even where voting is extended into the night, that is the exception and not the norm. Hence in our opinion, such an extension into the night (beyond 5p.m) cannot be said to be reasonable where it is cumulatively longer than the stipulated time. It cannot be reasonable to say that the extension can go on upto 3.30am in the morning. Several factors come into play in such a scenario. There are issues of security of both the voters and the votes. Long night working hours are also susceptible to other factors such as human fatigue on the part of the election officers and such a long extension will negatively on the election.
23. The second factor is consultation. On this, there is no consensus whether there was consultation before the extension. The 2nd respondent avers that he was never consulted. Sitting on appeal of the NAT decision, this Tribunal has no otherwise but to consider what the NAT factually considered. In its decision of 1st May, 2017 it never addressed the issue of consultation. As such we are unable to make a decision whether indeed there was consultation.

24. All parties agree on the malpractices that happened in this matter. What is contested is whether they impacted the results. We have considered the various case law cited by both parties. We have also considered the narrow margin of 129 votes and we are in agreement that the elections irregularities at Munyuka primary school, polling station, did gravely impact the results. The extension of the voting to 3.30am on 26th April, 2017 was contrary to the party's Nomination Rules and contrary to the general Electoral laws on conducting of elections. This night voting rendered the exercise void due to the numerous irregularities, which irregularities impacted the final results.

25. Consequently we are inclined to dismiss the claim before us which we hereby do. As a consequence, we render the following orders:

- 1) *The Complaint dated 2nd May, 2017 is hereby dismissed.*
- 2) *For avoidance of doubt, the decision of the Jubilee Party National Elections Appeals Tribunal dated 1st May, 2017 is hereby affirmed with the consequence that the 1st respondent shall hold fresh nomination to be conducted in Munyuka Primary School polling station within the next 48 hours of this judgment.*
- 3) *In the interest of party unity, each party to bear its own costs in this matter.*

26. Orders accordingly.

DATED AT NAIROBI THIS 4TH DAY OF May 2017.

1. Hon. Kyalo Mbobu (Chairman)
2. Hon. James Atema (Member)
3. Hon. Hassan Abdi (Member)