



REPUBLIC OF KENYA



Obino v Independent Electoral and Boundaries Commission & 2 others (Election Appeal E002 of 2023) [2023] KEHC 21062 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 21062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
ELECTION APPEAL E002 OF 2023**

JN KAMAU, J

JUNE 30, 2023

BETWEEN

HON CLARE MORAA OBINO APPELLANT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

JUBILEE PARTY OF KENYA 2ND RESPONDENT

HON REDEMPTA VERA ONKUNDI MOTOA 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon C.A Ocharo (SPM) delivered at Kisii in Chief Magistrate's Court Election Petition No E005 of 2022 on 16th December 2022)

JUDGMENT

Introduction

1. In her decision of 16th December 2022, the Learned Trial Magistrate, Hon C. A. Ocharo, Senior Principal Magistrate, entered Judgment in favour of the 3rd Respondent herein as against the Appellant and the 1st and 2nd Respondents and ordered as follows:-
 - a. A declaration that the gazettment of the Appellant in the Kenya Gazette Notice dated 9th September, 2022 in Volume CXXIV-No 186 as a nominated member of the County Assembly is invalid and be cancelled.
 - b. The 2nd Respondent be and is hereby directed to within 3 days from the date hereof submit a fresh list as per the order of the Political Parties Disputes Tribunal in Complaint No E035 of 2022 delivered on 8th August 2022.



- c. The 1st Respondent shall within 7 days of receipt of the submitted list as per order (2) above publish the party list submitted in accordance with the relevant provisions of *the Constitution*.
 - d. A declaration be and is hereby made that the nomination of the Appellant as Member of the County Assembly in Kisii County was irregular, unlawful, null and invalid.
 - e. The 1st and 2nd Respondents and the Appellant bear the costs of this Petition which is ordered at Kshs 150,000/=.
 - f. There being no cause of action disclosed against the 4th Respondent, the Petition is struck out against the 4th Respondent with no orders as to costs.
 - g. By this order a certificate do issue to the Clerk of the County Assembly Kisii pursuant to Section 86(1) of the Election Act, 2011.
2. Being aggrieved by the said decision, on 12th January 2023, the Appellant filed a Memorandum of Appeal dated 11th January 2023. She relied on sixteen (16) grounds of appeal.
 3. Her Written Submissions were dated 23rd February 2023 and filed on 27th February 2023. The 1st Respondent's Written Submissions were dated 13th March 2023 and filed on 28th March 2023 while those of the 3rd Respondent were dated 2nd March 2023 and filed on 7th March 2023.
 4. The 2nd Respondent filed its Written Submissions dated 8th March 2023 on 27th March 2023, however, the 3rd Respondent protested the same vide letter dated and filed on 6th June 2023 on grounds that the 2nd Respondent did not participate in the adjudication of the Petition at the Trial Court hence had no right of audience during the appeal and further that it was duly served with the pleadings but ignored the process.
 5. While the 2nd Respondent did not participate during trial, nothing stopped it from participating in the proceedings at this appellate stage as it was still listed as a respondent. Shutting it out would in fact be contrary to the provisions of Article 50(1) of *the Constitution* of Kenya, 2010 that provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
 6. On 5th April 2023, it filed an Affidavit of Service that was sworn by Okundi Abel Makori on 4th April 2023 evidencing that it emailed the parties herein with its Written Submissions on 13th March 2023. However, it was not permitted to raise matters of fact as that would prejudice the other parties as they would not have the opportunity to rebut and/or controvert the same at this appellate stage. The Judgment herein was therefore based on the respective parties Written Submissions only.

Legal Analysis

7. Section 75 of the *Elections Act*, 2011, grants this court the appellate jurisdiction over decisions of the magistrates' courts on disputes relating to elections to county assemblies. The aforesaid Section provides as follows:-

“An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be –

- a. filed within 30 days of the decision of the magistrate's court; and
- b. heard and determined within 6 months from the date of filing of the appeal.”



8. It was clear from the above statutory provision that an appeal to the High Court from an Election Court had to be restricted to matters of law only.
9. Be that as it may, this court had due regard to the decision of the Supreme Court in the case of Zacharia Obado vs Edward Akongo Oyugi & 2 Others [2014] eKLR, where it was stated that where the point for determination on appeal was a mixed point of law and fact and where the finding of fact by the trial court was unsupported by the evidence or was unreasonable or perverse in nature, then such constituted a point of law.
10. Accordingly, this court did not have the latitude or the luxury of re-evaluating, re-examining and re-assessing the evidence so as to reach its own independent conclusion, as would be the case in other ordinary civil appeals on first appeal. However, it was alive to the fact that points of law may inescapably be difficult to discern from factual and evidential determination. It is in that regard that circumspection became necessary as the line between the facts, evidence and the law may be blurred.
11. This court was therefore obligated to determine the question of the interpretation and application of electoral principles and laws or whether on the evidence on record, the Appellant was lawfully nominated.
12. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issues that had been placed before it for consideration were as follows:-
 - a. Whether or not the Appellant was a member of the 2nd Respondent;
 - b. Whether or not the nomination of the Appellant was lawful;
 - c. Who is to bear the cost of this Appeal
13. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Proof Of Membership With The 2nd Respondent

14. The Appellant submitted that in her Affidavit dated 3rd October 2022 that was in response to the Petition filed by the 3rd Respondent, she had annexed a membership application form for the gender top up list which had her membership number (being JP86243791) which she argued was prima facie evidence of her membership to the 2nd Respondent. She asserted that the 3rd Respondent's membership number was JP8725038 as per the record and that therefore it was wrong to conclude that she was not a member of the 2nd Respondent yet both she and the 3rd Respondent had membership numbers of the 2nd Respondent.
15. She contended that there was no objection raised as to the validity or otherwise of her membership number which in any institution signifies legitimacy of membership. She pointed out that the only question that would arise was whether she was a member of two (2) political parties as barred by Section 14 (4) of the *Political Parties Act*, 2011. She asserted that she resigned from the Orange Democratic Movement (hereinafter referred to as "ODM") Party and thereafter joined the 2nd Respondent in line with Section 14(1) of the *Political Parties Act*, 2011 and Article 38 of *the Constitution* of Kenya 2010, a fact which she added was confirmed by the Trial Court.
16. It was her case that the allegations of her drawing salary for a nominated seat under the ODM Party were illogical and misleading and that no evidence was tendered to the Trial Court to prove such an allegation. She added that there was also no evidence exhibiting campaign material to connect her to campaigns for the ODM Party hence such an allegation could only fail.



17. In this regard, she placed reliance on the case of Peter Gatawa Munyonga & 9 Others vs Moses Ndung'u Mwangi & Another [2017] eKLR where it was held that the petitioners had failed to enjoin the Jubilee party to the proceedings to provide evidence that the 1st respondent therein did not resign and was still its member.
18. She contended that the 3rd Respondent never enjoined the ODM party in the proceedings of the Trial Court so as to confirm her assertions that she was a member of the party by then. She added that she could not have forwarded her name to the 1st Respondent for gazettelement and that the only conclusion was that she was a bona fide member of the 2nd Respondent since there was no evidence to the contrary.
19. On its part, the 1st Respondent asserted that it was the political parties that enjoyed the freedom to conduct membership drives, registration of members, overseeing party activities and nomination of party members to the National Assembly and the County Assemblies. It was emphatic that it only had a supervisory role in the nomination exercise as conducted by political and that it did not in any way actively participate in the nomination exercise as conducted by political parties.
20. In this respect it placed reliance on the case of Moses Mwicigi & 14 Others vs IEBC [2015] eKLR where it was held that nowhere did the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party as such a role has been left entirely to the political parties.
21. It further asserted that the mandate of consideration and nomination of individuals to the National Assembly and County Assemblies was solely within the prerogative of political parties as was held in the case of Lydia Nyaguthi Githendu vs IEBC & 17 Others [2015] eKLR.
22. It was categorical that it was not a custodian of the membership lists of any party and did not play any role in the determination of the life membership of an individual in a party. To buttress its point, it relied on the case of Linet Kemunto Nyakeriga & Another vs Ben Njoroge & 2 Others [2014] eKLR where it was held that IEBC could only regulate the process by which parties nominate their candidates as required by the Elections Act but that that did not in any way give it the mandate to participate in the actual nomination in view of the fact that it would be the arbiter in the event of any dispute arising from nomination exercise.
23. It was emphatic that it only dealt with certified party membership lists as presented by individual parties participating in the general elections. It further invoked Section 35 A of the Elections Act and contended that the submission of a nomination list by a political party which had not been certified by the Registrar was a solid ground for rejection on its part. It confirmed that the second list that the 2nd Respondent presented was duly certified by the Registrar thus achieved the threshold envisioned under Section 35 A of the Election Act.
24. On her part, the 3rd Respondent submitted that at all material times relevant to this case, the Appellant was a Member of ODM and a Nominated MCA and that the Trial Court properly directed its mind that the Political Parties Disputes Tribunal had invalidated the nomination of the Appellant because it found it irregular and directed that her name be included in the list within forty eight (48) hours.
25. It was her contention that the membership of the Appellant to the 2nd Respondent was in dispute and that the 2nd Respondent could have clarified the issue and settled it once and for all but it opted to stay mute during the proceedings and therefore never added value in the adjudication of the issue of membership. She asserted that the law was a modicum of order and it was easily ascertainable. She invoked Section 14(4) of the Political Parties Act 2011 which prohibits members from being members of two (2) political parties at the same time.



26. She argued that the Appellant manipulated the process having realised that her chances for re-nomination in ODM were minimal thus violated the express provisions of Article 10(2) of *the Constitution* which ordains that the integrity of the process must be safeguarded.
27. It is now settled that the burden of proving the allegations made in an election petition lies with the Petitioner. In the case of *Raila Odinga & 5 Others vs IEBC & 3 Others* [2013] eKLR, the Supreme Court of Kenya held that a before the respondents could be invited to bear the evidential burden, the petitioner was under obligation to discharge the initial burden of proof and that the threshold of proof was above the balance of probability but not as high as beyond reasonable doubt.
28. In any election petition, the petitioner must therefore present cogent evidence before the court in support of any allegation made with regard to any purported breaches of law by the Respondents and prove the allegations therein on a standard that was higher than that of a balance of probabilities that was applicable in civil cases but lower than that of beyond reasonable doubt that was applicable in criminal cases.
29. During the trial in the matter in the lower court, the 3rd Respondent asserted that the Appellant was not a member of the 2nd Respondent but was still a member of the ODM Party. The Appellant did not deny having been a member of the ODM Party but stated that she had since resigned from the said Party and applied for membership with the 2nd Respondent.
30. The Trial Court found and held that the Appellant resigned as a member of the ODM Party but had not satisfied the requirements of joining the 2nd Respondent as a member.
31. Notably, Section 14 of the *Political Parties Act* provides as follows:-
 1. A member of a political party who intends to resign from the political party shall give a written notice prior to his resignation to-
 - a. the political party;
 - b. the clerk of the relevant House of Parliament, if the member is a member of Parliament; or
 - c. the clerk of a county assembly, if the member is a member of a county assembly.
 2. The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.
 3. The political party of which the person is a member, the member, or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within seven days of the resignation.
 - 3A. Upon receiving the notification under subsection (3), the Registrar shall cause the name of such member to be removed from the membership list of that political party.
4. A person shall not be a member of more than one political party at the same time.
32. Section 17(1)(a) of the *Political Parties Act* No. 11 of 2011 provides that:-

“A political party shall maintain at its head office and at each of its county office in the prescribed form, an accurate and authentic record of a register of its members in a form prescribed in the Second Schedule.”



33. According to the Second Schedule of the *Political Parties Act*, being a political party, the 2nd Respondent was expected to have in its possession the accurate and authentic register of its members. The register which was expected to contain membership of the party including identification details, region, ethnicity, gender and county would have been cogent and conclusive evidence of the fact that the Appellant was not its member.
34. Nothing would have been easier than for the 2nd Respondent to have availed an accurate and authentic register of all its members or clarified if the membership number the Appellant indicated was hers belonged to another person. This court was alive to the fact that the 2nd Respondent never participated in the proceedings at the Trial Court. As stated earlier, the burden of proof rested on the 3rd Respondent. It was her duty to show to the required standard that the Appellant was not a member of the party and therefore not eligible for nomination by the party, the Appellant having asserted that she was a member of the 2nd Respondent as Member No JP86243791.
35. Notably, the 3rd Respondent adduced evidence to show that the Appellant applied for membership with the 2nd Respondent on 24th May 2022 and was assigned membership number.
36. The part for official use only in the application form was blank. There was no indication in that the same had been verified or approved and the Compliance Certificate issued. Save for the Appellant's date, the said application form was not dated. There was also no indication that the Appellant had attached certified copies of the documents that were set out in the Check list in Section C of the said application form. This led this court to question whether or not the formalisation of the Appellant as a member of the 2nd Respondent was duly completed as required by the law.
37. The Appellant failed to produce any document to show that the 2nd Respondent actually received her application for membership form or her application for party nomination list. An application for membership form per se could not be conclusive proof of life membership of a political party. This court found and held that the 3rd Respondent laid evidence that required the evidential burden to shift to the Appellant to prove that she was indeed a certified member of the 2nd Respondent.
38. The 3rd Respondent's evidence was therefore un rebutted and this court was thus persuaded that she had proven that indeed the Appellant was not a member of the 2nd Respondent and in this regard came to the firm conclusion that the Trial Court applied the interpretation of Section 14 of the *Political Parties Act* and properly. Having failed to provide the proof during of the Appellant's membership, the 2nd Respondent's submissions that the Appellant was its member could not therefore assist her at this stage as it was estopped from adducing evidence.

ii. Nomination

39. The Appellant submitted that subject to the orders that were issued by the Political Parties Disputes Tribunal (hereinafter referred to as the "PPDT") on 8th August 2022, the 2nd Respondent issued a forwarding letter to the 1st Respondent with the name of the 3rd Respondent at No 3 as was directed by the PPDT. She invoked Section 34 of the Election Act 2011 and argued that in light of the aforesaid provisions and in line with the constitutional mandate, the 1st Respondent was bound by the fresh list submitted by the 2nd Respondent without any modifications since the list was as directed by the PPDT. She added that that was to be effected in line with the order of priority as provided for under law since the 2nd Respondent was allocated two (2) seats.
40. She pointed out that vide Gazette Notice dated 9th September 2022 in Volume CXXIV No 186 and in line with the provisions of *the Constitution* and the Election Act, the 1st Respondent gazetted her



name as a nominated member of the Kisii County Assembly. She asserted that the names appearing in the Kenya Gazette Notice dated 9th September 2022 in respect to Kisii County and in particular for Jubilee Party were the same names that were submitted by the 2nd Respondent in the letter dated 8th September 2022 and in order of priority.

41. It was her contention that the assertions that the list was not amended were misleading before the court and that the Trial Court erred in law and fact by failing to appreciate this evidence on the part of compliance by the 2nd Respondent. She asserted that there was no objection as to the validity of the aforesaid letter and that the orders of the PPDT were couched in such a manner that they did not order her name to be struck off the list. She added that a look at the resubmitted list confirmed that the 2nd Respondent reconstituted its gender top up list and most significantly placed the names of the 3rd Respondent at number 3.
42. She placed reliance on the case of Aden Noor Ali vs IEBC & 2 Others [2018] eKLR where it was held that the order did not specify that the reconstituted party list should exclude the 3rd respondent therein. It was her contention that the 2nd Respondent did not only reconstitute the list but that the same was amended subject to the verdict issued by the PPDT on 8th August 2022.
43. She urged this court to take judicial notice of the fact that the documents produced by the 3rd Respondent herein were equally on the same capacity as her document and therefore there was no legal basis thereof for admitting 3rd Respondent's evidence and controvert her evidence which had equally been made by authorised person.
44. To buttress her point, she relied on the case Aden Noor Ali vs IEBC & 2 Others (Supra) wherein the court admitted such evidence in finding out that the orders of the PPDT were complied with. She added that the political party in that case did not take part in the proceedings but that that did not hinder the Court of Appeal from making a just determination out of unambiguous circumstances.
45. She further submitted that apart from *the Constitution* and statutes, election regime in Kenya was also governed by rules and regulations. She invoked Regulations 21(1) and (2) (sic) and argued that she had adduced evidence of such a list that was submitted through a forwarding letter dated 8th September 2022 and signed by authorised persons hence the list was fully compliant with the law and procedure.
46. She added that the list could only be forwarded by a Political Party and the role of the 1st Respondent was restricted to ensuring it was in compliance with the law. She cited the case of Lydia Mathia vs Nasula Lesuuda & Another [2013] eKLR where it was held that the power over who gets the reserved seats resided with the parties themselves and no other authority. She was emphatic that it was therefore apparent that her nomination was legal and lawful.
47. It was her further contention that the 3rd Respondent misdirected and misguided the Trial Court in arriving at the decision. She faulted the Trial Court for not considering the evidence she adduced. She urged the court to allow her appeal, set aside the Judgment and Decree of the Trial Court dated 16th December 2022 and uphold the election by nomination and her gazette as a member of County Assembly of Kisii.
48. On its part, the 1st Respondent submitted that the Trial Court gravely misdirected itself on matters of law by finding that it had a statutory duty to ensure compliance of orders which it was never a party to and that it failed to in its statutory duty to proceed to gazette the 3rd Respondent as a validly nominated Member of the County Assembly of Kisii. It was his case that it strictly abided by its Constitutional and statutory obligations giving rise to the Gazette Notice dated 9th September 2022 in volume CXXIV-NO 186.



49. It invoked Article 90 (2) of *the Constitution* of Kenya 2010 and asserted that the said provision granted it the sole responsibility of supervising the allocation of special seats and that that was buttressed by the *Elections Act*. It further invoked Section 34 and 35 of the *Elections Act* No 24 of 2011 and reiterated that it did not play an active role in nomination exercise as conducted by individual political parties. In this regard, it placed reliance on the case of *Peninah Nandako Kiliswa vs IEBC & 2 Others* [2014] eKLR where it was held that it was the responsibility of the political party to determine which of its members was in the party list and the order of priority subject to compliance with necessary legal requirements.
50. It argued that the Trial Court misdirected itself in finding that it was its duty to follow up on the orders given by the Political Parties Disputes Tribunal on 8th August 2022 as it was not a party before the PPDT and the orders given were not in any way directed to it but strictly to the party.
51. It pointed out that it proceeded to diligently review the 2nd Respondent's list of individuals for nomination to the National Assembly and County Assembly as presented and that at the point of gazette, it had not received any separate list from the 2nd Respondent and thus proceeded to gazette the names presented. It added that as long as a list presented for nomination of individuals to the National Assembly and County Assembly had been duly certified by the Registrar, it had no business whatsoever to interrogate the validity of the party membership of such nominated individuals.
52. It was its case that the issue of whether or not the Appellant was a member of the 2nd Respondent could only be addressed by a separate entity, being the Registrar of Political Parties and/or the PPDT. It asserted that it was evident that it was being faulted for diligently abiding by the well-established Constitution and statutory obligations. It was emphatic that it strictly followed all the laid down procedure pursuant to the publication of Gazette Notice 9th September 2022 in volume CXXIV-NO 186. He urged the court to set aside the adverse findings against it by the Trial both on substance and on costs and it be awarded costs of this appeal and the costs of the proceedings at the Trial Court.
53. On her part, the 3rd Respondent submitted that her submissions were premised on the preamble Articles 10, 38, 47(1) and (2), 177(1)(b)(c) of *the Constitution*, Section 3 & 5 of the Fair Administrative Act, Section 33(4) and (5) of the Election Act 2011 and Section (sic) of the County Government Act. She prayed that the Judgment and Decree of Hon C.A Ocharo dated 16th December 2022 be upheld because it was premised on sound Constitutional and legal principles.
54. She contended that the 1st Respondent never complied with those legitimate lawful orders by the PPDT. She pointed out that there were sufficient evidence showing that the 1st Respondent was duly served with the said orders on 7th September 2022. She asserted that that rendered the 1st Respondent's actions null, void and invalid in accordance to Article 2(4) of *the Constitution*.
55. She contended that 2nd Respondent never defended the Petition in the Trial Court and that the Appellant could not purport to give explanations and could not change horse midstream and argue that the orders issued by PPDT in Complaint No E035 of 2022 were complied with. She pointed out that the Trial Court properly directed its mind to the process which she found irregular, illegal, null and invalid and she could not be faulted for coming to the impugned conclusion.
56. She asserted that the Petition was a legitimate adjudication filed under Article 10, 50(1), 38 and 87 of *the Constitution* and it was a gross misapprehension to say it was camouflaged as an appeal from the decision of PPDT. She contended that the person who was put as number 3 on the list was one Redempta Monchari Ngorwe who had no nexus with her as the PPDT had directed that she be placed number 3 on the list. She was emphatic that the orders of the PPDT were never complied with rendering the nomination of the Appellant a nullity. She added that the list of gender top up was guided



- by Zebra principle and that she was No 3 in the list but because of the Zebra principle, she naturally moved to No 2.
57. She blamed the 1st and the 2nd Respondent for not complying with the orders issued by PPDT and having violated the regulations, the Election Act 2011 and Article 2(4) of *the Constitution* the impugned Gazette Notice invalid.
58. She placed reliance on the case of Alice Wahito Mwangi Ndengwa & Others vs IEBC & Another (eKLR citation not given) without mentioning the particular holding she relied upon therein. She was emphatic that the 2nd Respondent never reconstituted the list and further failed to resubmit the list within forty eight (48) hours as directed by the PPDT thus rendering its actions a nullity. She asserted that the evidence she adduced was tangible, cogent and consistent and was corroborated by the Gubernatorial Candidate for Kisii County and the Women Representative Candidate for the 2nd Respondent.
59. It was her contention that her rights under Article 10, 38, 47 of *the Constitution* were violated and that the nomination of the Appellant was illegal, null and void. She cited Articles 38, 86(a) and 88(e)(5) of *the Constitution* and argued that it was evident that the process through which the Appellant was nominated was full of breaches of the entire electoral process because it was full of irregularities and malpractices and was tainted by lack of integrity and transparency. She reiterated that the Trial Court properly nullified the nomination of the Appellant. She urged the court to uphold the Trial Court's findings and confirm the nullification of the nomination of the Appellant as Member of County Assembly Kisii.
60. The subject of nomination of Members to the County Assemblies has its origin in *the Constitution* of Kenya 2010. Article 177 of *the Constitution* (Membership of a County Assembly) provides as follows: -
1. A county assembly consists of
 - a. members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
 - b. the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
 - c. the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
 - d. the Speaker, who is an ex officio member.
 2. The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.
 3. The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward.
 4. A county assembly is elected for a term of five years.
61. This legal provision is the source of the political parties' mandate to nominate members to the County Assembly. The purpose of the said provision is to guarantee that no more than two-thirds of the memberships of any Assembly is comprised of the same gender and to further safeguard and ensure the representation from the marginalised groups including persons living with disabilities and the youth.



62 The members contemplated under Article 177(1)(b) and (c) of *the Constitution* of Kenya are nominated by political parties proportionate to the number of seats garnered in (a) above. Those members can only be 'drawn' from a list which is prepared by a political party and presented to IEBC which list is eventually published in the Kenya Gazette by IEBC. That list is what is referred to as 'a Party List'.

63 Article 90 of *the Constitution* provides for party lists seats in the following manner:-

1. Elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.
2. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that-
 - a. each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation.
 - b. except in the case of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and
 - c. except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.
3. The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

64 The above provision clearly spells out specific duties on IEBC relating to the conduct and supervision of elections for seats for nomination purposes. In undertaking the said duty IEBC stands further guided by the *Elections Act* under Sections 34, 35 and 36 thereof. For purposes of this case, this court only reproduced the relevant provisions in the said sections of the Act which include: -

34

- (6) The party lists submitted to the Commission under this section shall be in accordance with *the Constitution* or nomination rules of the political party concerned.
- (6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and -
 - a. issue the political party with a certificate of compliance; or
 - b. require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.
- 6B. For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.
7. The party lists submitted to the Commission shall be valid for the term of Parliament.



8. A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.
 9. The party list shall not contain a name of a candidate nominated for an election.
 10. A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the County Assembly, as the case may be, for which the candidates are elected.
35. A political party shall submit its party list to the Commission at least forty-five days before the date of the general election.
- 36.
- (1) A party list submitted by a political party under-
 - (e) Article 177 (1) (b) of *the Constitution* shall include a list of the number of candidates reflecting the number of wards in the county;
 - (f) Article 177 (1) (c) of *the Constitution* shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group
 - (2) A party list submitted under subsection (1) (a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.
 - (3) The party list referred to under subsection (1) (f) shall priorities a person with disability, the youth and any other candidate representing a marginalized group.
 - (4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.
 - (7) For purposes of Article 177 (1) (b) of *the Constitution*, the Commission shall draw from the list under subsection (1) (e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.
 - (8) For purposes of Article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.
 - (9) The allocation of seats by the Commission under Article 177(1) (b) and (c) of *the Constitution* shall be proportional to the number of seats won by the party under Article 177 (1) (a) of *the Constitution*.
- 37.
- (1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.



- (2) Notwithstanding the provision of Section 34 (10), if there are no more candidates on the same party list, the Commission shall require the concerned political party to nominate another candidate within twenty -one days.
- (3) A vacancy in any seat in a political party list shall not be filled three months immediately before a general election.
- (4) Where a political party fails to comply with the provisions of subsection (2) the Commission shall not allocate the seat for the remainder of the term of Parliament or the County Assembly.”

65. It was not in dispute that the Initial Party List was successfully challenged by the 3rd Respondent before the PPDT in Complaint No E035 of 2022. Notably, a reading of the record shows that on 11th August 2022, the PPDT while determining the aforesaid complaint ordered that the 2nd Respondent to submit a fresh list to the 1st Respondent within forty eight (48) hours including the name of the 3rd Respondent as Number 3 on the list.
66. It was the evidence of the 3rd Respondent at the Trial Court that the 2nd Respondent were served with the said orders but ignored the same and the 1st Respondent proceeded to gazette the list as it was thereby removing her from the aforesaid No 3 and she was placed at No 27 in the list. The Appellant alleged that the 3rd Respondent’s name was third in the list but the list clearly showed that she was at No 27. On its part, the 1st Respondent’s evidence was that once the 2nd Respondent re-submitted the list it proceeded to gazette as required by law.
67. The 3rd Respondent adduced in evidence the initial list which bore the stamp of the 2nd Respondent and was received by the 2nd Respondent on 15th June 2022. The same had her name listed at No 3 but did not bear the Appellant’s name. There was no explanation given and/or adduced at the Trial Court as to the drastic change of removal of the 3rd Respondent’s name from No 3 to No 27 and the subsequent inclusion of the Appellant’s name.
68. The 2nd Respondent did not participate during trial to explain how the 3rd Respondent’s name was removed from the list that was submitted to the 1st Respondent for gazette. Bearing in mind that the court had found that the Appellant did not prove that she was a member of the 2nd Respondent, this court was persuaded to find and hold that the 3rd Respondent was actually disadvantaged in the circumstances and her removal from No 3 was unfair and unjust.
69. However, if the Appellant had proven that she was a member of the 2nd Respondent and her name had been nominated for top up together with the 3rd Respondent herein, the court would have had no role in determining who would be in the party list as that was primarily a party affair and for which the court could only come in if there was a violation of the law.
70. Hence, in view of the fact that the decision of PPDT had not been set aside, the declaration by the Trial Court that the Appellant’s nomination as the representative of the 2nd Respondent was invalid was correct and could not be faulted as it reflected the true position of the law.
71. Going further, this court had due regard to the case of *The National Gender and Equality Commission vs. The Independent Electoral and Boundaries Commission & Another* [2013] eKLR where it was held that whereas the role of IEBC did not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties, in considering the lists, it was required to satisfy itself that the lists met the constitutional and statutory criteria.



72. It must always be remembered that in election matters, reasonable compliance as opposed to strict or absolute compliance with the procedures set out in the legislation is the standard when considering procedural matters. The requirement for the gender top up criteria was meant to ensure the attainment of the principle in Article 175(c) of *the Constitution* to the effect that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.
73. It was therefore clear that the role of the 1st Respondent was limited to ensuring that the party list complied with *the Constitution* of Kenya, the laws and the regulations but did not extend to directing the manner in which the lists were prepared as those were matters that were within the jurisdiction of the parties.
74. This court found the 1st Respondent's submissions regarding its role in the nomination process to have been the correct position of the law. However, in view of the fact that it did not file an appeal, this court found that its hands were tied as far as pronouncing itself on costs that were awarded against it in the lower court and delving into the question of whether or not the finding against it on by the Trial Court had any legal basis in greater detail as it was not an issue that had been placed before this court for determination.

Disposition

75. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal that was lodged on 12th January 2023 was not merited and the same be and is hereby dismissed. The Appellant shall bear the 3rd Respondent's costs of this appeal.
76. It is so ordered.

DATED AND DELIVERED AT KISII THIS 30TH DAY OF JUNE 2023

J. KAMAU

JUDGE

