

PAPUA NEW GUINEA
IN THE NATIONAL COURT OF JUSTICE

EP 26 OF 2017

IN THE MATTER OF A DISPUTED RETURN
FOR THE MAPRIK OPEN ELECTORATE IN
THE 2017 GENERAL ELECTION

BETWEEN:

VINCENT ALOIS YANGWARI
Petitioner

AND:

JOHN SIMON
First Respondent

AND:

THE ELECTORAL COMMISSION
OF PAPUA NEW GUINEA
Second Respondent

Waigani: Hartshorn J.
2018: January 22nd, 29th

Election Petition - Objections to competency

Cases cited:

Delba Biri v. Bill Ninkama [1982] PNGLR 342
Albert Karo v. Lady Kidu [1997] PNGLR 28
Malcolm Smith Kela v. Peti Lafanama [1997] PNGLR 151
Greg Mongi v. Bernard Vogae & Anor (1997) N1635
Baki Reipa v. Yuntivi Bao (1999) SC606
Biri v. Ninkama [1982] PNGLR 342
Holloway v. Ivarato [1988] PNGLR 99
Agonia v. Karo [1992] PNGLR 463
Paru Aihi v. Moi Avei (2004) N2523
Mathias Karani v. Yawi Silupa (2003) N2385
Ludger Mond v. Jeffrey Nape (2003) N2318
Gabriel Dusava v. Peter Waranaka (2008) N3367
Sir Arnold Amet v. Peter Yama (2010) SC1064.
Paru Aihi v. Moi Avei (No 2) (2003) SC720
Kikala v. Electoral Commission of Papua New Guinea (2013) N4960
Sandy Talita v. Peter Ipatas (2016) SC1603
Bob Danaya v. Ati Wobiro (2016) N6250

Counsel:

Mr. A. Kumbari and Mr. S Dadada for the Petitioner
Mr. T. Waisi for the First Respondent
Mr. S. Ranewa for the Second Respondent

29th January 2018:

1. **HARTSHORN J:** This is a decision on two objections to the competency of the petition of Vincent Alois Yangwari (**petitioner**).
2. The petitioner disputes the election of the first respondent, John Simon as the Member for Parliament for the Maprik Open Electorate in East Sepik Province, in the 2017 General Election, on the grounds of bribery, illegal practices and what is referred to as treating.
3. Both respondents contend that the petition is in breach of s. 208(a) and s.215 *Organic Law on National and Local Level Government Elections*

(Organic Law). The Electoral Commission, the second respondent, supported by the first respondent also argued that the petition is in breach of s. 208(d) *Organic Law*. I consider this ground of objection first as if it is successful it will be determinative: *Delba Biri v. Bill Ninkama* [1982] PNGLR 342.

s. 208(d) *Organic Law*

Grounds

4. The second respondent submits that the petition does not comply with s.208(d) as the two witnesses who attested to the petition failed to provide proper addresses and occupations. This is because the addresses stated are in each case the name of a village only, and "P.O. Maprik, East Sepik Province". The occupations are stated as "Ward Member/Councillor", and "Businessman".

5. Section 208 *Organic Law* is as follows:

"208. Requisites of petition.

A petition shall—

- (a) set out the facts relied on to invalidate the election or return; and**
- (b) specify the relief to which the petitioner claims to be entitled; and**
- (c) be signed by a candidate at the election in dispute or by a person who was qualified to vote at the election; and**
- (d) be attested by two witnesses whose occupations and addresses are stated; and**
- (e) be filed in the Registry of the National Court at Port Moresby or at the court house in any Provincial headquarters within 40 days after the declaration of the result of the election in accordance with Section 175(1)(a)."**

6. Form 1 *Election Petition Rules 2017* is the prescribed form of an election petition. The form provides for the attestation by two witnesses as follows:

"IN THE PRESENCE OF:

FIRST ATTESTING WITNESS:

I, (insert name of first attesting witness),
 (insert occupation of first attesting witness), of (insert address
 of first attesting witness: state address precisely by section and lot number or where no
 section and lot number by street name or in the case of a village or settlement, state name
 of place precisely by referring to province, district and nearest town), WHOSE

SIGNATURE APPEARS BELOW, ATTEST THAT I HAVE WITNESSED THE SIGNING OF THE PETITION BY THE PETITIONER.

.....
(signature of first attesting witness)

SECOND ATTESTING WITNESS:

I, (insert name of second attesting witness),
..... (insert occupation of second attesting witness), of
..... (insert address of second attesting witness: state address
precisely by section and lot number or where no section and lot number by street name or
in the case of a village or settlement, state name of place precisely by referring to
province, district and nearest town), WHOSE SIGNATURE APPEARS BELOW,
ATTEST THAT I HAVE WITNESSED THE SIGNING OF THE PETITION BY THE
PETITIONER.

.....
(signature of second attesting witness)"

7. In the petition the witnesses have attested the petition as follows:

1. Name: MICHEAL KANDI

Residential Address: Klabu Village
Postal Address: P.O. MAPRIK, East Sepik Province
Occupation: Ward Member/Councillor

Signature: (signed)

2. Name: LEXY LIM

Residential Address: Yangisaku Village
Postal Address: P.O. MAPRIK, East Sepik Province
Occupation: Businessman

Signature: (signed)

Consideration

8. In this instance, I am of the view that the requirements of the *Election Petition Rules 2017* have not been complied with as the residential address for both witnesses are merely the names of villages. The, “name(s) of place” have not been stated precisely as the province, district and nearest town to the villages have not been stated. The reference to Maprik, East Sepik Province in the postal address cannot be taken to refer to the residential address. It may be that the witnesses have their residential and postal addresses in different provinces because of amongst others, the remoteness of the area, the proximity of the border of one province to another and to a Post Office, and their places of employment or business being in a different province to their places of residence.

9. As to whether s. 208(d) *Organic Law* has been complied with, I reproduce the following passage from the Supreme Court decision of *Sandy Talita v. Peter Ipatas* (2016) SC1603 at [18 and 19]:

“18. Section 208(d) of the Organic Law requires attesting witnesses to an election petition to state their names, their occupations in the context of what they do for a living and their addresses being their postal or residential addresses. That is the first requirement. The second aspect is whether the details provided are sufficient. The attesting witnesses are obliged to provide succinct and clear information and descriptions on those requirements as their personal circumstances may permit. If a villager, the name of his village and District within the electorate would be sufficient. Where a town address is given, a postal address is sufficient. If a residential address is given, it is useful to state the section and allotment numbers and suburb or settlement. The essence of requiring precise details of occupation and address is so that the attesting witness can be able to be easily located. It also makes the petition genuine.

19. Where the names or description of addresses or occupations are unclear, incomplete, inadequate, or given by some other description, or are confusing or falsified, the proof of attestation may be rejected. Consequently, the petition will be ruled invalid. This is a matter of court discretion to be exercised on a quick perusal and assessment of the information then available. See, Paru Aihi v Sir Moi Avei, (2003) SC720; Delba Biri v Bill Ninkama [1982] PNGLR 342; Raymond Agonia v Albert Karo [1992] PNGLR 463; Malcolm Smith-Kela v Peti Lafanama [1997] PNGLR 151; Albert Karo v Lady Kidu (1997) N1626.”

10. In regard to the occupations that are stated, in *Paru Aihi v. Moi Avei* (No 2) (2003) SC720, the majority said that:

“The term “occupation” simply means one’s trade, profession, business or calling; things or activities one does for a living.”

11. A politician and a leader were stated, amongst others, as examples of "one's" occupation. Given this description, it is conceivable that Ward Member, Councillor and Businessman could each refer to a person's occupation. Consequently, the respondents' submissions concerning the stated occupations of the witnesses in the petition are rejected.

12. In this instance as mentioned, the residential addresses for both witnesses merely state their village names. The name of the District is not stated, and so, given the statement in *Talita v. Ipatas (supra)*, that is not sufficient for the purposes of s.208(d). I repeat as I stated earlier concerning the reference to Maprik, East Sepik Province in the postal addresses not being able to be taken as referring to the residential addresses.

13. As to the postal addresses that both witnesses have stated, it is P.O. MAPRIK, East Sepik Province. No box or box numbers are stated. Counsel for the petitioner informed the court from the bar table that there are no Post Office box numbers. There is no evidence of this. I note however, that it is for the petitioner to assert the competence of the attesting witness: *Talita v. Ipatas (supra)* [43], and as to the competency of the petition. Prima facie, the postal address is not complete. The petitioner should have put on evidence concerning this postal address being correct, but has not done so.

14. I note also that s. 208(d) *Organic Law* should be looked at as a whole: Injia J (as he then was) in *Albert Karo v. Lady Kidu* [1997] PNGLR 28, and that the combined effect of the name, occupation and postal address stated in the petition should be considered. I reproduce the following passage from *Malcolm Smith Kela v. Peti Lafanama* [1997] PNGLR 151, in which Injia J (as he then was) said:

"..... the Petition should be dismissed for failing to comply with the address requirement in s. 208 (d). The name of the post office where those box numbers are situated is not provided. No residential address is provided. The work place addresses where the two witnesses work as a Mechanic and Administration Clerk respectively are not provided. In my view, the addresses provided in the petition on their own are totally inadequate to identify and locate the witnesses. Further, the combined effect of the name, occupation and postal address stated in the petition takes us no further. An address of the kind given in this petition serves no useful purpose to this Court and the parties to the Petition. The "address" requirement in OLNE s. 208 (d) must be compiled (sic) with on the face of the Petition. An error or defect on the face of the Petition which amounts to a failure to

comply with OLNE, s. 208 cannot be rectified from assertions by counsels or parties from the bar table.”

15. Here, for both witnesses, their residential addresses are not complete, their postal addresses are not complete and their work place addresses are not given.

16. As stated in *Talita v. Ipatas (supra)* at [18], “*The essence of requiring proper details of occupation and address is so that the attesting witness can be able to be easily located. It also makes the petition genuine.*”

17. On the information stated in the petition for the attesting witnesses, even if considered altogether, it cannot be said in my view, that either or both of the witnesses are able to be easily located.

18. I am satisfied that the petition does not comply with the requirement of s.208(d) *Organic Law* in that it fails to properly provide for the addresses of the two witnesses, having regard to the various Supreme and National Court authorities on the subject to which I have made reference.

19. Consequently as the *Election Petition Rules 2017* have not been complied with and as s. 208(d) *Organic Law* has not been complied with, pursuant to s. 210 *Organic Law* which provides that:

“Proceedings shall not be heard on a petition unless the requirements of Sections 208 and 209 are complied with.”

this petition shall not be heard and should be dismissed.

20. If however, the petition is not dismissed on the above basis, then the next objections that I consider are that the petition is in breach of s. 208(a) *Organic Law*.

21. The facts that are required to be pleaded in a petition have been determined by various National and Supreme Court cases. These include: *Biri v. Ninkama* [1982] PNGLR 342, *Holloway v. Ivarato* [1988] PNGLR 99, *Agonia v. Karo* [1992] PNGLR 463, *Albert Karo v. Lady Carol Kidu* [1997] PNGLR 28, *Paru Aihi v. Moi Avei (No 2)* (2003) SC720, *Paru Aihi v. Moi Avei* (2004) N2523, *Gabriel Dusava v. Peter Waranaka* (2008) N3367 and *Sir Arnold Amet v. Peter Yama* (2010) SC1064.

Requirement to comply with s. 208 (a) Organic Law

22. Section 210 *Organic Law* provides that a proceeding on an election petition shall not be heard "...unless the requirements of sections 208 and 209 are complied with." Sections 208 and 210 *Organic Law* have been considered by the Supreme Court in *Biri v. Ninkama (supra)* and *Holloway v. Ivarato (supra)*.

23. The Supreme Court in *Holloway v. Ivarato (supra)* said:

"The grounds on which an election may be declared invalid are separate from the facts which constitute those grounds. The requirement of s 208 (a) of the Organic Law is to set out the facts which constitute the grounds upon which an election or return may be declared invalid. Setting out grounds without more does not satisfy the requirements of s 208 (a) of the Organic Law. The facts set out under s 208 (a) of the Organic Law would necessarily indicate the ground upon which a petitioner relies. The facts which must be set out under s 208 (a) of the Organic Law are material or relevant facts which would constitute a ground or grounds upon which an election or return may be invalidated.

In setting out the facts, they must be sufficient so as to indicate or constitute a ground upon which an election may be invalidated. What are sufficient facts depends on the facts alleged and the grounds those facts seek to establish. Anything falling short of that would defeat the whole purpose of pleading, that is, to indicate clearly the issues upon which the opposing party may prepare his case and to enable the court to be clear about the issues involved."

24. The above cases and principles contained therein were followed by the Supreme Court in *Sir Arnold Amet v. Peter Yama (2010) SC1064*.

Bribery

25. As to establishing a ground of bribery, in *Agonia v. Karo (supra)*, Sheehan J. considered the applicable principles and said:

"In the case of bribery, as well as the specifics of the particular allegation, such as names, numbers, dates, place, there must be (an) allegation that this money, that property, or that gift was offered by the successful candidate, and that the reason that it was given or offered was to get a named person to vote, or not to vote, or to interfere unlawfully, as the case may be, in the free voting of an election."

26. In *Karo v. Kidu (supra)*, Injia J. (as he then was) said:

“In my view, factors relating to matters requiring proof prescribed by the Organic Law on National Elections cannot be left to inference in a Petition. They must be specifically pleaded, not left to inference. It is a requirement of s. 215(3) to specifically plead whether the bribery and undue influence, in the present case by the first Respondent’s Committee members, was committed with or without the authority or knowledge of the First Respondent.”

Grounds

27. Both respondents object to paragraphs 1.1 to 1.10 of the petition and those parts of paragraphs 8 and 9 that attempt to plead bribery as amongst others:

- a) The petitioner has not adequately set out the specific particulars and material and relevant facts that he relies upon, for the alleged acts of bribery or inducement with succinct clarity, and has not stated relevant facts that constitute the elements of bribery;
- b) The petition fails to sufficiently specify the bribery offence alleged with the facts constituting the elements of the bribery offence. Also the pleading does not create a nexus between the first respondent and his servants or agents as there is no allegation of procuring or counselling by the first respondent. An example of this is that the facts and grounds pleaded do not state that on a certain date and time, at a certain place, the first respondent gave money, gifts or goods to his agents to bribe the voters for him;
- c) The allegations of bribery as pleaded in the petition are generalised and are devoid of certainty as to the critical elements such as when the act of bribery took place, the identity of the servant or agent of the first respondent and a description of the actual act of bribery. There are no facts pleaded as to the alleged acts being committed with the knowledge and authority of the first respondent. There are no specific pleadings of the particulars of the dates, times and places when the alleged bribery occurred and no specific pleadings of the names of the voters who were allegedly bribed to vote for the first respondent. Further, there are no pleadings that an elector was bribed as distinct from an eligible voter or voter.

28. The petitioner submits that amongst others, that the petition does contain sufficient facts and particulars to establish the elements of the grounds of bribery by the first respondent and his servants and agents.

Consideration

29. After having perused paragraphs 1.1 to 1.10 of the petition and after considering the submissions and case authorities, I am of the view that there are insufficient facts pleaded for the acts or conduct specified to constitute bribery. What is pleaded is too vague and general, the names of persons described as eligible voters, voters or scrutineers alleged to have been given money or who were allegedly procured or made offers are not disclosed, there is no specific pleading to the effect that an elector was bribed as distinct from an eligible voter or voter, and so essential elements of bribery have not been pleaded. I refer to *Mathias Karani v. Yawi Silupa* (2003) N2385; *Louma v. Tomuresia* (2012) N4920 and *Bob Danaya v. Ati Wobiro* (2016) N6250 in this regard. In *Mathias Karani v. Yawa Silupa (supra)*, Sawong J stated the following about an “elector” as an element of the offence of bribery under s. 103 *Criminal Code*:

“The law in respect of an allegation of bribery or undue influence in an election petition for the purpose of s. 208(a) is basically that the facts set out should support the elements of the offence of bribery, as it is constituted by s. 103 of the Criminal Code. Anything short of that will offend against s. 208(a) and therefore will be fatal. See Bourne v Voeto [1977] PNGLR, Palme v Mel [1988] 808, Agonia v Karo [1992] PNGLR 463, Charles Luta Miru v David Basua and Others [1997] N1628, Ludger Mond v Jeffery Nape (14 January 2003), Miria Ikupu v Sir Mekere Morauta (19 December 2002) EP 05/02, Moses Murray v Sir Michael Somare & Others EP 36/2002, Francis Ali v Frank Oru & Others (EP 37/02).

In Ikupu v Morauta and Murray v Somare (supra), the allegations in the petitions were grounded on bribery. But in either case the petitioner failed to plead one essential element of the offence of bribery - that an elector was bribed. The petition referred to “eligible voter” or named a person without saying whether he was an “elector”. In either case the Court struck down all the allegations for that reason.”

Consequently paragraphs 1.1 to 1.10 and those parts of paragraphs 8 and 9 that attempt to plead bribery, should be struck out.

Illegal practices

30. As to allegations other than bribery and undue influence, in *Greg Mongi v. Bernard Vogae & Anor* (1997) N1635, Injia J. (as he then was) said:

“Figures are material in demonstrating the likelihood of the result being affected on the face of the petition. Also, it is necessary to plead how the errors or omission on the part

of election officials are material as such that the result of the election was likely to be affected.”

31. In *Ludger Mond v. Jeffrey Nape* (2003) N2318, Kandakasi J said:

“It is clear from this that if a petition alleges an illegal practice or conduct other than bribery or undue influence of a winner of an election, the petitioner must plead that the conduct was likely to affect the election result and show that. To do that, it is necessary in my view, to plead the relevant number of votes secured by the winner and the runner-up to determine whether or not the result was or would have been affected. This is in addition to pleading the facts constituting the conduct in question. A failure to do so would amount to a failure to meet the strict requirements under s.208 (a) and form the foundation for evidence to be led for a relief under s. 215 (3) (b). This is necessary because without the pleadings, no evidence can be led. After all, pleadings drive the evidence.”

32. In *Amet v. Yama (supra)* Davani J said at paragraph 118:

“In relation to s.215 (3)(b) of the OLNGL, the following are the material relevant facts that must be pleaded;

- a) The Petitioner must plead that the illegal practice or conduct by the winning candidate was likely to affect the election results and show that. To do that, it is necessary to plead relevant number of votes secured by the winner and the runner-up to determine whether or not the result was or would have been affected.*
- b) And a further requirement is that the pleading must also include that it is just that the candidate should be declared not to be duly elected or that the election should be declared void. If it was pleaded, that evidence can be led to support the pleadings.”*

Grounds

33. Both respondents object to paragraphs 2.2 to 2.8, 6 and 7 of the petition and those parts of paragraphs 8 and 9 that attempt to plead illegal practices as amongst others:

- a) The grounds in the petition concerning illegal practices are too general and do not state specific material facts that support each and every ground;
- b) relevant material facts have not been pleaded as to the voting that occurred in the election;
- c) it is not pleaded that the result of the election was likely to be affected by the alleged illegal practices.

34. The petitioner in essence, repeated the submissions that were made in respect to the objections to the allegations of bribery and submitted that the matters pleaded in paragraphs 1.9 and 1.10 of the petition are sufficient to establish the elements of illegal practices.

Consideration

35. First, from a perusal of the petition, under the heading, "Allegation of Illegal Practices", the petition refers to illegal practices pursuant to s. 215(1) *Organic Law* and then s. 101 and 102 *Criminal Code Act*. Section 101 is concerned with treating and s. 102 is concerned with undue influence. Section 215(1) *Organic Law* is not concerned with illegal practices or treating. It is concerned with bribery or undue influence. Section 215(3) (a) and (b) *Organic Law* are concerned with illegal practices. Given that the petition has pleaded Allegations of Bribery in paragraphs 1.1 to 1.10 with reference to s. 215(1) *Organic Law* amongst others, I assume, although this court should not have to, that the reference to s. 215(1) *Organic Law* under the headings, "Illegal Practices", is a mistake and the reference should be s. 215(3) (a) and/or (b). I will proceed on the basis.

36. In regard to whether sufficient facts are pleaded concerning the voting that has occurred in a subject election, in *Kikala v. Electoral Commission of Papua New Guinea* (2013) N4960, Makail J considers the cases in detail on this point and states at paragraph 63:

"I accept the respondents' submission that in order to arrive at the winning margin, the total number of allowable ballot papers after the final exclusion has to be pleaded including the absolute majority required to win and from there the winning margin can be stated or pleaded. If these very relevant facts are not pleaded, how can the Court make a finding that as a result of these election irregularities, the election was likely to be affected or indeed was affected? Furthermore, how can the Court make the finding that the number of votes affected by the alleged illegal practice or errors and omissions is less than or more than the winning margin when what the winning margin is has not been properly pleaded? I am satisfied the facts setting out the errors and omissions by the first respondent in relation to the winning margin are insufficient. This ground is struck out."

37. I respectfully agree with his Honour's comments. Here as the winning margin, absolute majority and total number of allowable ballot papers that remained in count after the final exclusion before declaration have not been pleaded, the court is unable to properly determine whether the result of the election was likely to be or was affected, as it is required to do pursuant to

s.215 (3) (a) and (b) *Organic Law*. Consequently the pleadings relating to illegal practices should be struck out.

Whether election likely to be or was affected

38. A further ground upon which the respondents rely to object to the competency of the pleadings concerning illegal practices, is that nowhere in the petition has the petitioner pleaded that the result of the election was likely to be affected in respect of illegal practices. The respondents' submit that it is necessary for there to be such a pleading pursuant to s.215 (3) (a) and (b) *Organic Law*.

39. The petitioner submits that where illegal practices are pleaded, it must show that the election result was likely to be effected. I refer to *Amet v. Yama (supra)* in which Davani J. stated as to s.215 (3) (b) that a petitioner must plead that the illegal practice or conduct was likely to affect the election result and show that. I also refer to *Mathias Karani v. Yawa Silupa* (2003) N2385 in this regard.

40. From a perusal of the petition, the petitioner has not specifically pleaded that the illegal practice was likely to affect the result of the election. As to showing in the petition that the illegal practice was likely to affect the result of the election, from a perusal of the petition, it is not shown how this was likely to occur.

41. I note in this regard the statement of Davani J. in *Amet v. Yama (supra)* referred to earlier that it is not for the court to draw conclusions on the petition. I also refer to the Supreme Court case of *Baki Reipa v. Yuntivi Bao* (1999) SC606 where the majority said that it is clear from the legislation that the court cannot make assessments of possible scenarios of where the votes may have gone.

42. I am not satisfied that the petitioner has pleaded or shown that the illegal practices alleged were likely to affect the election result. Consequently, the pleadings relating to illegal practices being paragraphs 2.2 to 2.8, and 6 and 7 which referred to a progressive score of the first respondent, the votes that the petitioner received and the alleged difference, and those parts of paragraphs 8 and 9 that attempt to plead illegal practices, should be struck out.

43. Consequently for all of the above reasons the entire petition should be dismissed.

Orders

44.

- a) The petition is dismissed.
- b) The petitioner shall pay the respondents' costs of and incidental to the petition.
- c) The security deposit shall be shared by the respondents' in payment of their costs.

*Lawyers for the Petitioner**Kumbari & Associate Lawyers**Lawyers for the First Respondent**Waisi Lawyers**Lawyers for the Second Respondent**Kawat Lawyers*