

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]  
EP NO. 31 OF 2017

BETWEEN

**PAIYO BALE**  
*(Petitioner)*

AND

**HON. JAMES DONALD**  
*(First Respondent)*

AND

**ELECTORAL COMMISSION**  
*(Second Respondent)*

Kiunga: Makail, J  
2018: 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 9<sup>th</sup> February

***ELECTION PETITION – Trial – Grounds of – Errors or omissions and illegal practices at counting – Disputed ballot-boxes – Objection taken at scrutiny – Decision made to exclude ballot-boxes from scrutiny – Decision reversed – Disputed ballot-boxes admitted to scrutiny – Reasons for exclusion of ballot-boxes from scrutiny – Alleged tampering of – Polling conducted outside gazetted polling locations in another electorate – Legality of decision***

– *Whether result of the election was likely to be affected* – *Organic Law on National and Local-level Government Elections – Sections 43, 153A, 215 & 218*

**Cases cited:**

*Paias Wingti v. Kala Rawali & Electoral Commission* (2008) N3286

*Philemon Embel v. Jeffrey Komal & Electoral Commission* (2015) N5947

*Samson Malcolm Kuli v. Electoral Commission & Anton Francis Yagama* (2013) N5275

**Counsel:**

*Mr. J. Lome with P. Kome*, for Petitioner

*Mr. D. Igolena*, for First Respondent

*Mr. S. Ranewa*, for Second Respondent

**JUDGMENT**

**9<sup>th</sup> February, 2018**

1. **MAKAIL, J:** The petitioner, Mr. Paiyo Bale finished third with 4,351 votes, another candidate, Mr. Sam Bob Auwi finished second with 5,788 votes and the first respondent, Mr. James Donald finished first with 8,204 votes. On 28<sup>th</sup> July 2017, Mr. Donald was declared candidate elected and member for North Fly Open electorate in Western Province. The total number of vote difference between the first runner-up, Mr. Auwi and Mr. Donald was 2,416 votes.

2. By this petition, Mr. Bale disputes the election of Mr. Donald. He alleges that two out of four disputed ballot-boxes for Nomad LLG were wrongly admitted to scrutiny and ballot-papers were counted, hence illegal. As a result, at the final count, Mr. Donald scored the highest number of votes and won.

3. The four ballot-boxes are from Polling Teams 26, 27, 28 and 29 in Nomad LLG. Ballot-boxes from Teams 26 and 27 were admitted and ballot-papers were counted. Although ballot-boxes from Teams 28 and 29 were admitted, ballot-papers were not counted because they were found to be tampered with. It is alleged that they were marked for Middle Fly Open electorate but were crossed out with a pen and marked out for North Fly Open electorate.

4. The relief he seeks, in summary, are, a declaration that polling in Nomad LLG by Teams 26, 27, 28 and 29 for North Fly Open electorate is illegal and a declaration that the decision of the acting Returning Officer to reverse the decision of the Returning Officer and count the ballot-boxes is illegal, null, void and of no effect.

5. Further, an order that the declaration and election of Mr. Donald as member for North Fly Open electorate is null and void and an order for recount of ballot-papers for North Fly Open electorate excluding ballot-papers from ballot-boxes for Teams 26, 27, 28 and 29 from Nomad LLG. Alternatively, an order for a by-election for North Fly Open electorate, costs, and a refund of security deposit of K5,000.00.

## Grounds of Petition

6 Mr. Bale relies on the following grounds to contend that the decision to admit to scrutiny ballot-boxes from Teams 26 to 29 was illegal:

- 6.1. Their lids were supposed to have five metal tags but instead had a combination of plastic and metal tags.
- 6.2. Their metal seal tags were not properly and firmly tighten or fasten;
- 6.3. Their plastic tags were not strong and permanent like metal tags or pad-locks, hence the integrity of the ballot-boxes was compromised;
- 6.4 An objection was taken by Mr. Bale and other candidates to exclude them from being admitted to scrutiny.
- 6.5. A decision was made by the Returning Officer to exclude them from scrutiny.
- 6.6. The next day, a decision was made to appoint the Assistant Returning Officer as acting Returning Officer contrary to Section 21 of the *Organic Law on National and Local-level Government Elections* ("*Organic Law*").
- 6.7. It was also illegal because the Election Manager or Election Steering Committee had no power to appoint the acting Returning

Officer.

6.8. A decision was made by the acting Returning Officer to reverse the earlier decision and admit them to scrutiny.

6.9. When ballot-papers were open for counting, they were found to be for the Middle Fly Open electorate.

6.10. Ballot-papers from Nomad LLG are not to be counted because

Nomad LLG is in Middle Fly Open electorate and not North Fly electorate.

6.11. The decision to count the ballot-papers from Nomad LLG was contrary to the decision of the second respondent that the Nomad LLG is in Middle Fly Open electorate.

6.12. The decision of the second respondent was based on the decision of the Electoral Boundaries Commission whose decision was that, Nomad LLG was in Middle Fly Open electorate.

7. After a no case application by the respondents, Mr. Bale abandoned the allegations constituting the ground on objection taken by him and other candidates to exclude the ballot-boxes from being admitted to scrutiny. This ground will not be considered.

8. The allegations constituting the ground on tampering of the ballot-boxes were dismissed for want of pleading of facts under Section 208(a) of the

*Organic Law on National and Local-level Government Elections* (“*Organic Law*”) and/or lack of evidence.

9. The remaining allegations constituting the grounds on illegal appointment of new Returning Officer, reversal of decision to exclude the ballot-boxes and to count the ballot-papers and polling in Nomad LLG being outside the North Fly Open electorate were upheld and allowed.

### **Petitioner’s Evidence**

10. Mr Bale gave evidence by sworn affidavit and was cross-examined. In addition, he called three witnesses. They are his campaign manager and election coordinator, Mr. Jimmy Smik, one of his campaign officials, Mr. Michael Gen Lam and Kiunga Police Station Commander, Mr. Anthony Toroipo. They swore affidavits and were cross-examined by counsel for the respondents.

11. Mr Bale’s evidence is that, on 21<sup>st</sup> April 2017 he nominated for North Fly Open electorate. There were a total of 52 candidates. Nomad LLG is part of Middle Fly Open electorate. As a result, he did not extend his campaign that far.

12. The votes he collected from Nomad LLG were from his relatives and close friends but no explanation was given by the electoral officials in Kiunga as to why they did not comply with the second respondent’s gazetted demarcation of electoral boundaries.

13. Secondly, the Returning Officer Mr. David Soni had made a decision not to count the disputed ballot-boxes. The new Returning Officer Mr. George Papin reversed that decision and allowed the disputed ballot-boxes to be counted and the ballot-papers were counted.

14. Thirdly, the disputed ballot-boxes were tampered with. The serial numbers were inconsistent.

15. Mr. Jimmy Smik's evidence starts with the pre-polling preparation, opening and inspection of two sealed containers (one blue in colour and the other, red in colour) containing election materials were opened at Kiunga Police Station on 12<sup>th</sup> June.

16. From 12<sup>th</sup> to 25<sup>th</sup> June, appointment of polling officials and training of presiding officers and after that, eight weeks of campaign.

17. Ballot-papers were packed in ballot-boxes and sent out to the gazetted polling locations with polling teams. They were:

17.1. Kiunga Urban LLG with six polling teams.

17.2. Kiunga Rural LLG with seven polling teams.

17.3. Ningerum LLG with thirteen polling teams.

17.4. Starmountain LLG with eight polling teams.

17.5. Olsobip LLG with nine polling teams.

18. Nomad LLG is geographically in the middle of North Fly Open electorate and Middle Fly Open electorate. Administratively, provision of government services is shared between these two electorates.

19. He produces two gazettal notices published on 21<sup>st</sup> April. One for the North Fly Open electorate and the other for Middle Fly Open electorate which lists the dates of polling; names of polling teams and polling locations.

20. The gazettal notice for North Fly Open electorate does not show Nomad LLG as being one of the LLGs for North Fly Open electorate and Polling Teams 26, 27, 28 and 29. On the other hand, the gazettal notice for Middle Fly Open electorate shows that Nomad LLG is one of the LLGs for Middle Fly Open electorate and Polling Teams 26, 27, 28 and 29.

21. The election officials including the Returning Officer and Election Steering Committee did not take hind of the gazettal notices. They divided the wards with 24 to North Fly Open electorate and 17 to Middle Fly Open electorate.

22. As a result, Polling Teams from 26 to 29 were allocated and conducted polling for North Fly Open while Polling Teams from 30 to 33 were assigned to and conducted polling for Middle Fly Open electorate.

23. On 12<sup>th</sup> July, ballot-boxes for Polling Teams 26 to 29 including four ballot-boxes for Western Provincial Electorate arrived at Kiunga airport and were transported to Kiunga Police Station where a physical inspection was conducted in the presence of the scrutineers' of candidates by the Returning Officer, Election Manager and other election officials.

24. On 20<sup>th</sup> July, at the counting centre at the Defence Force FOB, Mr. Bale and other candidates objected to the admission of these ballot-boxes to scrutiny by way of a letter dated 17<sup>th</sup> July.



25. He produces a copy of the said letter which amongst other things, identifies the discrepancies during inspection of the ballot-boxes and urges the Election Manager to give them opportunity to object to the ballot-boxes as provided for under Section 153A of the *Organic Law* and that the Returning Officer exclude the ballot-boxes from being admitted to scrutiny.

26. On 21<sup>st</sup> July, the Returning Officer made a decision to exclude the ballot-boxes from scrutiny and informed the scrutineers of the candidates. The reason was that the ballot-boxes were tampered with and their integrity questionable. He did not provide a written decision to the parties.

27. On the morning of 21<sup>st</sup> July Mr. Donald and a group of people turned up at the counting centre and demanded that the Election Manager to reverse the decision and count the ballot-boxes.

28. The Returning Officer had yet to arrive at the counting centre and security personnel were dispatched to fetch him but to no avail. A meeting was held by the Election Manager with counting officials and a new Returning Officer was appointed.

29. The new Returning Officer announced by reversing the decision to exclude the ballot-boxes from being admitted to scrutiny and to count the ballot-papers. He gave no reason for the change. Ballot-boxes for Polling Teams 26 and 27 were counted but 28 and 29 were not counted because they were tampered with. The ballot-papers were for Middle Fly Open electorate because they had printed on them "MIDDLE FLY ELECTORATE" but had them crossed out with a pen and marked to "NORTH FLY ELECTORATE".

30. On 27<sup>th</sup> July, after completion of primary count, purity check was conducted. Amongst the candidates, before ballot-papers in ballot-boxes 26 and 27 were counted:

- James Donald – 3,024.
- Paiyo Bale – 2,882.
- Sam Bob Auwi – 2,852.
- Samson Suale Diolobe – 774.

31. Votes collected by these first four candidates when ballot-boxes 26 and 27 were counted:

- James Donald – 704.
- Paiyo Bale – 209.
- Sam Bob Auwi – 26.
- Samson Suale Diolobe – 1,586.

32. Adding the votes at the primary counts:

- James Donald – 3,728.
- Paiyo Bale – 3,088.
- Sam Bob Auwi – 2,877.
- Samson Suale Diolobe – 2,360.

33. The allowable ballot-papers remaining were 27,711. The absolute majority + 1 on the primary count of  $27,711/2$  was 13,856. None of the candidates scored the absolute majority and elimination proceeded.

34. The final result was Mr. Donald scoring 8,204 votes, Mr. Auwi scored 5,788 votes and Mr. Bale 4,351 votes.

35. As to Mr. Lam, his evidence corroborates Mr. Smik's evidence. As to Mr. Toroipo, his evidence relates to assisting election officials collecting the ballot-boxes from Kiunga airport and transporting them to Kiunga police station on 12<sup>th</sup> July. He also corroborates the evidence of Mr. Smik and Mr. Lam in relation to the discrepancies in the serial numbers and seal tags of the ballot-boxes.

### **First Respondent's Evidence**

36. Mr. Donald also gave evidence by sworn affidavit. He was not cross-examined. He too called witnesses, three in total, who swore affidavits and were cross-examined by counsel for Mr. Bale and counsel for the Electoral Commission. They are John Henry, Samson Suale Dialobe and Dume Wo'o.

37. Mr. Donald's evidence is that he and his scrutineers and scrutineers of other candidates were not aware of any objection to the ballot-boxes for Polling Teams 26 to 29 from Nomad LLG. When they became aware that the ballot-boxes were excluded from being admitted to scrutiny, they protested and petitioned the Returning Officer to admit and count the ballot-boxes.

38. About 7 o'clock in the morning of 22<sup>nd</sup> July, they went to the counting centre to present the petition to the Returning Officer but he was not present. Security personnel were dispatched to fetch him but could not locate him. After several attempts, the Election Manager consulted the Electoral Commission head office to appoint a new Returning Officer.

39. Mr. George Papin was subsequently appointed new Returning Officer and he went on to announce that he was allowing the ballot-boxes to be admitted to scrutiny.

40. Mr. Donald goes on to say that ballot-papers from ballot-boxes 26 and 27 were counted while those from ballot-boxes 28 and 29 were excluded because they contained ballot-papers from North Fly Open electorate and Middle Fly Open electorate.

41. On 28<sup>th</sup> July, he was declared the successful candidate and member for North Fly Open electorate.

42. Mr. John Henry is one of the scrutineers of Mr. Donald, whose evidence is consistent with the evidence of Mr. Donald and Mr. Bale's witnesses, Mr. Smik and Mr. Lam in relation to the gathering of candidates and scrutineers at the counting centre on the morning of 22<sup>nd</sup> July, absence and unsuccessful attempts to locate the Returning Officer, delivery of a petition to the Election Manager, appointment of Mr. Papin as new Returning Officer and reversal of the decision by Mr. Papin to exclude the ballot-boxes from being admitted to scrutiny and to admit and count the ballot-papers.

43. Ballot-boxes 26 and 27 were opened and ballot-papers were counted. Ballot-boxes 28 and 29 were opened but ballot-papers were not counted because they were allegedly tampered with.

44. Mr. Samson Suale Dialobe is one of the candidates of North Fly Open electorate. His evidence is that, he is from Biami in the Nomad LLG. Administratively, places like Biami, Pari and others are in Middle Fly Open

electorate but politically, people have always been under North Fly Open electorate. He produces a letter to him from the Assistant Returning Officer of Nomad LLG dated 22<sup>nd</sup> August to verify the assertion he makes about the Nomad LLG.

45. Overall, his evidence is consistent with the evidence of Mr Donald, Mr. Henry and Mr. Bale's witnesses, Mr. Smik and Mr. Lam in relation to the gathering of candidates and scrutineers at the counting centre on the morning of 22<sup>nd</sup> July, absence and unsuccessful attempts to locate the Returning Officer, delivery of a petition to the Election Manager, appointment of Mr. Papin as new Returning Officer and reversal of the decision by Mr. Papin to exclude the ballot-boxes from being admitted to scrutiny and to admit and count the ballot-papers.

46. Finally, he produces copy of a letter from the Electoral Commissioner to the Returning Officer dated 21<sup>st</sup> July which advised the Returning Officer and his officers to complete counting of all ballot-boxes without further delay. This letter was given to him by the General Secretary of the political party which he is aligned to.

47. Mr. Dume Wo'o, 54 years old from Miamrea village is is a career public servant since 1982 and is the current District Administrator of North Fly District.

48. He was Returning Officer for North Fly Open electorate in 2007 and 2012 General elections and according to him Nomad LLG is geographically located between Middle Fly Open and North Fly Open electorates. He also confirms that in 2017 General election, polling in Nomad LLG was split into

two, one comprising of 21 wards in North Fly Open electorate and two comprising of 16 wards in Middle Fly Open electorate.

49. Since Independence, the Electoral Commission has accepted the 23 villages where Polling Teams 26, 27, 28 and 29 conducted polling as under North Fly Open electorate and allowed people to vote in the North Fly Open electorate.

### **Second Respondent's Evidence**

50. The witnesses for the Electoral Commission are David Soni, George Papin, and Max Paul. They swore affidavits and except for Max Paul, the other two were cross-examined by counsel for Mr. Bale and counsel for Electoral Commission.

51. Mr. Soni was appointed Returning Officer for North Fly Open electorate. His evidence is consistent with the other witnesses that on 21<sup>st</sup> July, four ballot-boxes from Nomad LLG were excluded from counting. He says that it was based on advice he received from lawyers and Election Manager. Anyone unhappy with the decision can take it up in Court.

52. After the announcement, five different groups of people confronted him, at his house, verbally abused and threatened him and his family at different times in the night until the next day, 22<sup>nd</sup> July. In fear of his and family's lives, they fled Kiunga but not before he sent a hand written note to the Election Manager informing him of the threats and to request the Electoral Commissioner or his delegate to appoint an acting Returning Officer to complete counting.

53. He later found out that Mr. Papin was appointed Returning Officer in his place, oversaw the completion of counting and announced Mr. Donald as candidate elected.

54. Mr. Papin's evidence is that after Mr. Soni was absent on the morning of 22<sup>nd</sup> July, a group of candidates including Mr. Donald turned up at the counting centre and petitioned the Returning Officer to count the ballot-boxes, receipt of Soni's note of threats to him (Mr. Soni), and an urgent meeting was held between the Election Manager and Provincial Election Steering Committee to appoint of replacement of Mr. Soni, he was recommended to be appointed Returning Officer.

55. On 24<sup>th</sup> July, he was appointed Returning Officer. He produces a copy of the notice of appointment under the hand of the Electoral Commissioner dated 24<sup>th</sup> July. The four ballot-boxes were admitted to scrutiny but ballot-papers for only two of them were counted while those in the other two were not. They contained ballot-papers which had hand written North Fly written over Middle Fly.

56. He does not say when the ballot-boxes were admitted to scrutiny but on being cross-examined, he says that it was on 22<sup>nd</sup> July. Further, his evidence is consistent with and affirms the other defence witnesses' evidence that although Nomad LLG is gazetted under Middle Fly Open electorate, politically, part of it is administered by North Fly Open electorate.

57. In all past General elections, people in Nomad LLG voted in North Fly Open electorate. Thus, it is not a new thing or first time for people to vote in North Fly Open electorate in 2017 General election.

58. The evidence of Mr. Paul in his affidavit reaffirms the evidence of Mr. Soni, Mr. Papin and other witnesses of Mr. Soni's absence on 22<sup>nd</sup> July due to threats to him (Mr. Soni) and appointment of Mr. Papin as Mr. Soni's replacement, reversal of the earlier decision by Mr. Soni and to admit and count the ballot-papers in those ballot-boxes.

59. He consulted the Operations Manager for Southern Region to prepare the instrument of appointment for Mr. Papin and was done. The decision to count these ballot-boxes was based on reports of scrutineers from Nomad LLG and the Electoral Commissioner.

60. It is his further evidence that as the date for the return of Writs was on 24<sup>th</sup> July, the election officials were pressed for time to complete counting. Thus, he consulted the Electoral Commissioner by mobile telephone and was informed to count the ballot-boxes on the condition that ballot-papers must not be damaged and voters had cast their votes without any discrepancies.

### **Assessment of Evidence**

61. Each party had a case theory. The petitioner's case is based on the theory that two out of the four ballot-boxes from Nomad LLG were admitted to scrutiny and ballot-papers counted. This is contrary to the decision of the Returning Officer who made a decision to exclude them from being admitted to scrutiny hence, illegal. Any subsequent decision to reverse it is also illegal and by such decision, the result of the election was likely to be affected.

62. The defence case theory is the opposite of the petitioner's case, that is, the ballot-boxes were lawfully admitted to scrutiny because Nomad LLG where



they originated from is in North Fly Open electorate or if Nomad LLG is in Middle Fly Open electorate, people had always voted in the North Fly Open electorate in past General elections.

63. However, cross-examination of Mr. Bale and his witnesses by counsel for the respondents was a rehearsal and reaffirmation of their evidence in chief with nothing serious to contest, resulting in time wastage and advancing the defence case no further. The intense cross-examination also did not suggest that Mr. Bale and his witnesses lacked credibility and that their evidence should not be believed.

64. As it is being alleged that the errors or omissions and illegal practices affected the result of the election, evidence of the numbers of votes scored by each candidate at the progressive and final counts, preferably those who finished in the top four is crucial and must be led to establish if the result was likely to be affected.

65. Mr. Smik gives this evidence, in particular, the total votes scored by Mr. Bale and Mr. Donald at primary count and final count. This evidence is not challenged in any sharp or form by the respondents' counsel. Even the Electoral Commission produced no evidence of Tally Sheets in Form 66A and Form 66B to show a different result to those provided by Mr. Smik at the progressive and final counts. In retrospect, the petitioner's challenge to the defence case and cross-examination of its witnesses is wanting.

66. The end result, both sides' evidence is largely uncontested and consistent with each other right through-out the trial, with one or two slight variation in terms of events that occurred between pre-election preparation and declaration

of Mr. Donald as member-elect for North Fly Open electorate.

67. The variables are in relation to Mr. Soni not being the decision-maker or part of the decision but merely an informant as opposed to being the actual decision-maker, secondly, Mr. Bale maintaining that Mr. Papin was appointed on 24<sup>th</sup> July while defence contending that it was on 22<sup>nd</sup> July and the appointment was formalised by notice on 24<sup>th</sup> July. Thirdly, the Election Manager and election officials moved swiftly to have Mr. Papin appointed when it was too early in the day while the defence contending that reasonable amount of time was given for Mr. Soni to turn up before steps were taken to replace him.

### **Finding of Fact**

68. It is for these reasons that the Court makes these findings:

- 12<sup>th</sup> June was pre-polling preparation, opening and inspection of two sealed containers (one blue in colour and the other, red in colour) containing election materials was held at Kiunga Police Station.
- From 12<sup>th</sup> to 25<sup>th</sup> June, appointment of polling officials and training of presiding officers and after that, eight weeks of campaign.
- Ballot-papers were packed in ballot-boxes and sent out to the gazetted polling locations with polling teams. They were:
  - Kiunga Urban LLG with six polling teams.
  - Kiunga Rural LLG with seven polling teams.

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- Ningerum LLG with thirteen polling teams.
  - Starmountain LLG with eight polling teams.
  - Olsobip LLG with nine polling teams.
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- Nomad LLG is geographically in the middle of North Fly Open electorate and Middle Fly Open electorate. Administratively, provision of government services is shared between these two electorates.
  - Two gazettal notices published on 21<sup>st</sup> April, one for the North Fly Open electorate and the other for Middle Fly Open electorate lists the dates of polling, names of polling teams and polling locations.
  - Nomad LLG and Polling Teams 26, 27, 28 and 29 are not listed in the gazettal notice for North Fly Open electorate. On the other hand, they are listed on the gazettal notice for Middle Fly Open electorate.
  - The election officials including the Returning Officer and Election Steering Committee did not take hind of the gazettal notices. They divided the wards with 24 to North Fly Open electorate and 17 to Middle Fly Open electorate.
  - This is because in all past General elections, people in Nomad LLG voted in North Fly Open electorate and it is not a new thing or first time people voted in North Fly Open electorate in 2017 General election.

- As a result, Polling Teams from 26 to 29 were allocated and conducted polling for North Fly Open while Polling Teams from 30 to 33 were assigned to and conducted polling for Middle Fly Open electorate.
- On 12<sup>th</sup> July, ballot-boxes for Polling Teams 26 to 29 including four ballot-boxes for Western Provincial Electorate arrived at Kiunga airport and were transported to Kiunga Police Station where a physical inspection was conducted in the presence of the scrutineers of candidates by the Returning Officer, Election Manager and other election officials.
- On 20<sup>th</sup> July, at the counting centre at the Defence Force FOB, Mr. Bale and other candidates objected to the admission of these ballot-boxes to scrutiny by way of a letter dated 17<sup>th</sup> July.
- The said letter, amongst other things, identifies the discrepancies during inspection of the ballot-boxes and urges the Election Manager to give them opportunity to object to the ballot-boxes as provided for under Section 153A of the *Organic Law* and that the Returning Officer to exclude the ballot-boxes from being admitted to scrutiny.
- The ground on Nomad LLG not being in North Fly Open electorate is not one of the reasons for objecting to the ballot-boxes from being admitted to scrutiny.
- On 21<sup>st</sup> July, the Returning Officer Mr. Soni made an announcement to the scrutineers of candidates that the ballot-boxes will not be admitted to scrutiny. The reason was that the ballot-boxes were tampered with

and their integrity questionable. He did not provide a written decision to the parties.

- On the morning of 21<sup>st</sup> July Mr. Donald and a group of people turned up at the counting centre and demanded the Election Manager to reverse the decision and count the ballot-boxes.
- Mr. Soni had yet to arrive at the counting centre and security personnel were dispatched to fetch him but to no avail. The reason for his absence or no show at work was that, he and his family were threatened by five different groups of people at their residential home between late hours of 21<sup>st</sup> July and early hours of 22<sup>nd</sup> July in relation to his decision not to admit the ballot-boxes to scrutiny.
- A meeting was held between the Election Manager and Election Steering Committee officials and Mr. Papin was recommended for appointment as new Returning Officer. The Election Manager consulted the Operations Manager for Southern Region by telephone to arrange for an instrument of appointment for Mr. Papin as new Returning Officer.
- A notice of appointment dated 24<sup>th</sup> July was forwarded to the Election Manager.
- On 22<sup>nd</sup> July, Mr. Papin took over supervision of scrutiny and announced by reversing the decision to exclude the ballot-boxes from being admitted to scrutiny and to count the ballot-papers. The announcement was made based on the advice of the lawyers and Election Manager, following reports from scrutineers of Nomad LLG

and the Electoral Commissioner. He gave no reason for the change.

- Ballot-papers for ballot-boxes for Polling Teams 26 and 27 were counted but 28 and 29 were not because they were tampered with.
- The act of tampering was that, the ballot-papers printed as “MIDDLE FLY ELECTORATE” were crossed out with a pen and marked out “NORTH FLY ELECTORATE”.
- On 27<sup>th</sup> July, after completion of primary count, purity check was conducted. Amongst the candidates, before ballot-papers in ballot-boxes 26 and 27 were counted:
  - James Donald – 3,024.
  - Paiyo Bale – 2,882.
  - Sam Bob Auwi – 2,852.
  - Samson Suale Diolobe – 774.
- Votes collected by these first four candidates when ballot-boxes 26 and 27 were counted:
  - James Donald – 704.
  - Paiyo Bale – 209.
  - Sam Bob Auwi – 26.
  - Samson Suale Diolobe – 1,586.
- Adding the votes at the primary counts:

- James Donald – 3,728.
  - Paiyo Bale – 3,088.
  - Sam Bob Auwi – 2,877.
  - Samson Suale Diolobe – 2,360.
- The allowable ballot-papers remaining were 27,711. The absolute majority + 1 on the primary count of  $27,711/2$  was 13,856. None of the candidates scored the absolute majority and elimination proceeded.
  - The final result was Mr. Donald scoring 8,204 votes, Mr. Auwi scored 5,788 votes and Mr. Bale 4,351 votes.

### **Petitioner's Submissions**

69. Counsel for Mr. Bale submits that a series of events or acts when considered independently established that the Electoral Commission and its officials made errors or failed to carry out their mandated duties that resulted in the election favouring Mr. Donald. Further, that they committed illegal acts which resulted in the outcome favouring Mr. Donald.

70. First is in relation to the decision by Mr. Soni not to admit the ballot-  
was correct and compliant of the law under Section 43 of the *Organic Law*.

71. Second the appointment of Mr Panin as new Returning Officer was

he took over from Mr. Soni and made the announcement that he was reversing Mr. Soni's decision and to admit the ballot-boxes to scrutiny on 22<sup>nd</sup> July.

72. In addition, there was no vacancy in the position of Returning Officer because Mr. Soni was yet to turn up for work on the morning of 22<sup>nd</sup> July. Thus, there was no emergency in order for a new Returning Officer to be appointed under Section 21 of the *Organic Law*.

73. Third, the decision by Mr. Papin to admit the ballot-boxes, out of which ballot-papers for ballot-boxes 26 and 27 were counted was contrary to the scheduled polling locations in the gazettal notices published on 21<sup>st</sup> April. The decision deprived the people of Nomad LLG their constitutional rights to elect a member of their choice for Middle Fly Open electorate under Section 50 of the *Constitution*.

74. Finally, Mr. Papin lacked the requisite authority to reverse the decision of Mr. Soni because pursuant to Section 153A of the *Organic Law*, a decision of a Returning Officer to admit or exclude a ballot-box from scrutiny is final and may not be challenged other than by way of a petition. Counsel relies on *Paia Wingti v. Kala Rawali & Electoral Commission* (2008) N3286 and *Philemon Embel v. Jeffrey Komal & Electoral Commission* (2015) N5947. See also *Damson Malcolm Kuli v. Electoral Commission & Anton Francis Yagama*

#### **RESPONDENTS' SUBMISSIONS**

15. Counsel for Mr. Donald and counsel for the Electoral Commission submit



and count the ballot-papers illegal. This is because it has been a long standing practice since independence that people of Nomad LLG had always voted for North Fly Open electorate.

76. This practice is based on the geographical location of Nomad LLG where it is in close proximity to North Fly Open electorate than Middle Fly Open electorate. Given this, administratively and politically, part of Nomad is administered under North Fly Open electorate in terms of service delivery.

77. Both counsel add that what the people of Nomad LLG did (voting in North Fly Open electorate) was only in compliance with what the Electoral Commission had "sanctioned and accepted" since independence.

78. Counsel for the Electoral Commission further submits that Mr. Bale did not object to the ballot-boxes when they were distributed by the election officials at pre-election preparation and further, that the objection to Nomad LLG ballot-boxes was not one of the grounds of objection to their admission to scrutiny at counting.

79. In relation to the ground on illegal appointment of Mr. Papin as Returning Officer, both counsel submit that reasonable amount of time was given for Mr. Soni to turn up before steps were taken to replace him. Mr. Papin was appointed by the Electoral Commissioner and the notice of appointment dated 24<sup>th</sup> July is proof of that.

80. The notice of appointment is issued pursuant to Section 21 of the *Organic Law* and that the failure to publish the notice in the National Gazette is not a ground for invalidating an election. It is for these reasons that the submission

by Mr. Bale's counsel that the Election Manager or Election Steering Committee who appointed Mr. Papin lacked authority is misconceived.

81. Finally, as to the ground on illegal decision to reverse the decision to exclude the ballot-boxes from scrutiny, both counsels submit that Mr. Soni was not the decision-maker in the first instance or privy to the decision to exclude the ballot-boxes from scrutiny.

82. On the contrary, it was a decision made by the Election Manager and State lawyers and on 21<sup>st</sup> July, it was conveyed by Mr. Soni to the candidates, scrutineers and others. This is further confirmed by the letter of objection being directed to the Election Manager and not Returning Officer.

83. It follows that after another petition (objection) from other candidates was received, it was open to Mr. Papin as the new Returning Officer to decide the admission of the ballot-boxes to scrutiny. He consulted the Election Manager who in turn consulted the Electoral Commissioner. The latter's advice was to count the ballot-boxes and a decision was, accordingly, made. What Mr. Papin did was in accordance with the duties of a Returning Officer as delegate of the Electoral Commissioner under Section 18 of the *Organic Law*. This ground is misconceived and should be dismissed.

### **Application of Law to Facts**

84. A petitioner who grounds a petition on an illegal practice other than bribery or undue influence or attempted bribery or attempted undue influence must not only prove the illegal practice but also that the result of the election was likely to be affected. These are the requirements under Section 215 of the

*Organic Law.*

85. Similarly, a petitioner who grounds a petition under Section 218 of the *Organic Law*, must not only prove an error or omission but also that the error or omission affected the result of the election.

86. It is for these reasons that I reject the submission by Mr. Bale's counsel that it is sufficient to prove one ground of the petition to sustain the petition. It follows that even if it were found that Mr. Papin was illegally appointed as Returning Officer or it was illegal to reverse Mr. Soni's decision to exclude the ballot-boxes from scrutiny, Mr. Bale must prove the result of the election was likely to be affected.

87. The same principle applies in the case of proving errors or omissions being committed in the appointment of the Returning Officer or admission of the ballot-boxes to scrutiny.

88. In my view, the root cause of the dispute is the admission of the ballot-boxes 26 and 27 and the counting of ballot-papers. Ballot-boxes 28 and 29 were not counted so they are not being disputed. The critical issue is whether the admission of ballot-boxes 26 and 27 was legal. The question of legality is dependent on whether their admission constituted an error or omission or illegal act and is open to the Court to find.

89. The uncontested evidence based on the two gazettal notices of 21<sup>st</sup> April is that Nomad LLG is in Middle Fly Open electorate. Polling Teams 26 and 27 out of which ballot-boxes 26 and 27 originated are under Nomad LLG.

90. Section 43 of the *Organic Law* provides:

“43. *Polling places.*

(1) *The Electoral Commission may, by notice published in the National Gazette or in a newspaper circulating in the electorate—*

*(a) appoint such number of polling places for each electorate as it thinks necessary and practicable; and*

*(b)*

*(b) abolish a polling place.*

(2) *No polling place shall be abolished after the issue of the writ and before the time appointed for its return.”*

91. In my view, the gazettal notices override any long standing practice that has been in place since independence and put it beyond argument that Polling Teams 26 and 27 should have conducted polling in Middle Fly Open electorate and not North Fly Open electorate. To conduct polling for North Fly Open electorate is in breach of the prescribed polling locations in the gazettal notice for Middle Fly Open electorate under Section 43 of the *Organic Law*.

92. If the argument of long standing practice were to be considered on its merits, the respondents did not raise the defence of estoppel although they seemed to vaguely suggest that Mr. Bale and the people of Nomad should not complain about the voting in North Fly Open electorate because they have “sanctioned and accepted” what the Electoral Commission had been doing since

independence. As the respondents did not pursue this defence, it will not be considered, save to say that this long standing practice must come to an end now.

93. The people of Nomad and North Fly will not have it their way this time round but must follow what the law says. If the law under Section 43 of the *Organic Law* says that Nomad LLG is in Middle Fly Open electorate, then that is the law. It is not an option. They must vote in Middle Fly Open electorate. If they want to vote in the North Fly Open electorate, then they must ask the Electoral Commissioner to move them out of Middle Fly and put them in North Fly before the next General election in 2022.

94. The Election Manager, Returning Officer and Election Steering Committee officials for North Fly Open electorate had no jurisdiction to hold polling or sent a polling team from North Fly Open electorate to Nomad to conduct polling. In so doing, they made an error in their judgment and also failed in their mandated duty to ensure that polling was conducted within the gazetted prescribed locations in the electorate of North Fly. And they had the opportunity to stop polling at Nomad LLG at the time they were distributing the ballot-boxes and ballot-papers in Kiunga but they did not. Simply put, it was a bad judgment call.

95. It is also my view that they had made a deliberate decision to conduct polling in Nomad against the gazettal notices prescribing the polling locations in Middle and North Fly Open electorates but it was based on a misconceived notion that it has been a common practice at every General election that part of Nomad LLG vote in North Fly Open electorate.

96. Given the geographical location of Nomad LLG and the practical challenges in terms of accessibility, I am not satisfied that the decision to conduct polling and admission of ballot-boxes from Nomad LLG was intended to deprive voters or disadvantage any candidate to constitute illegal act within the meaning of Section 215 of the *Organic Law*.

97. However, it is my view that the error is significant because the admission and inclusion of the ballot-boxes in the North Fly Open electorate brings up the question of whether the result of the election was likely to be affected.

98. And it does not really matter or necessary to determine whether the appointment of Mr. Papin as new Returning Officer and the reversal of Mr. Soni's decision/or announcement of the decision to exclude the Nomad ballot-boxes from scrutiny are illegal.

99. If Mr. Soni's decision or announcement of the decision in the first instance based on grounds other than Nomad LLG being outside the gazetted polling locations for North Fly Open electorate was adhered to, and the ballot-boxes not admitted to scrutiny, the dispute would have not come this far. It follows that it is not necessary to consider the submissions of counsel on these grounds.

100. The important consideration now is whether the result of the election was likely to be affected as a result of the error. It was the finding of the Court [68] above that on 27<sup>th</sup> July, after completion of primary, purity check was conducted. Amongst the candidates, before ballot-papers in ballot-boxes 26 and 27 were counted:

- James Donald scored 3,024.
- Paiyo Bale scored 2,882.
- Sam Bob Auwi scored 2,852.
- Samson Suale Diolobe scored 774.

101. Where none of the candidates score the absolute majority which is calculated on the allowable ballot-papers remaining + 1, elimination of candidates with lowest number of votes will proceed until the second last candidate (runner-up). The last candidate remaining will be declared the candidate elected.

102. Elimination should have proceeded at this stage if none of the candidates reached the absolute majority but did not. The ballot-papers from ballot-boxes 26 and 27 were included and, counted and the votes collected by these first four candidates were:

- James Donald – 704.
- Paiyo Bale – 209.
- Sam Bob Auwi – 26.
- Samson Suale Diolobe – 1,586.

103. Adding the votes at the primary counts:

- James Donald – 3,728.
- Paiyo Bale – 3,088.
- Sam Bob Auwi – 2,877.
- Samson Suale Diolobe – 2,360.

104. In my view, the ballot-papers from ballot-boxes 26 and 27 should not have been counted in the first place. When they were counted, they were distributed amongst the candidates before elimination started as can be seen from the votes scored by the first four candidates including Mr. Bale and Mr. Donald. As a result, they became part of the allowable ballot-papers to calculate the absolute majority + 1. In so doing, they affected the final result of the election.

### **Conclusion**

105. It is the conclusion of the Court that by the error of the Election Manager, Mr. Paul, Returning Officer Mr. Papin and Election Steering Committee officials, including Mr. Donald and other candidates who supported him to have ballot-boxes 26 and 27 admitted to scrutiny, the result of the election was likely to be affected. To rectify the error, there must be a recount of the ballot-papers excluding ballot-papers from ballot-boxes 26 and 27 from Nomad LLG.

106. The relief open to the Court to grant to do justice to the parties is to uphold the petition, declare the election of Mr. Donald, null and void and order a re-count of ballot-papers excluding ballot-papers from ballot-boxes 26 and 27 from Nomad LLG. Ballot-boxes 28 and 29 were not counted but for avoidance of doubt and completeness sake, they will be excluded from counted. The re-count must take place within a period of time to be fixed.

### **Order**

107. The orders are:



1. The petition is upheld.
2. A declaration that polling at Nomad LLG by Teams 26, 27, 28 and 29 for North Fly Open electorate is illegal.
3. A declaration that the decision of the acting Returning Officer to reverse the decision of the Returning Officer and count the ballot-boxes is illegal, null, void and of no effect.
4. An order that the declaration and election of the first respondent Mr. James Donald as member for North Fly Open electorate is null and void
5. An order for re-count of ballot-papers for North Fly Open electorate excluding ballot-papers from ballot-boxes for Teams 26, 27, 28 and 29 from Nomad LLG.
6. An order that the re-count of ballot-papers shall be conducted and completed within two months from the date of this decision which will be Monday 16<sup>th</sup> April 2018 and the result shall be presented to the Court for approval on Monday 23<sup>rd</sup> April 2018 at 9:30 am at Waigani National Court.
7. To maintain the current status, the first respondent Mr. James Donald will remain member of North Fly Open electorate until the completion of re-count of ballot-papers and presentation of result for approval by the Court.

8. The respondents, Mr. Donald and Electoral Commission will pay the costs of the petition, to be taxed, if not agreed.
  
9. The security deposit in the sum of K5,000.00 held by the Registrar of the National Court shall be refunded to the petitioner, Mr. Paiyo Bale forthwith.
  
10. Time for entry of these orders, shall be abridged to the date of settlement, which shall take place forthwith.

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Jefferson Lawyers : *Lawyers for Petitioner*

Centurion Lawyers : *Lawyers for First Respondent*

Kawat Lawyers : *Lawyer*

