

PAPUA NEW GUINEA

In The National Court at Waigani

EP no. 34 of 2017

Ano Pala

Petitioner

Lekwa Gure

First Respondent

Electoral Commission of Papua New Guinea

Second Respondent

Waigani: Neill J

2018: 30 January; 1 February

Election Petition – objection to competency – allegation of bribery – pleading facts and particulars to establish grounds of petition – distribution of preferences.

Cases

Dusava v Waranaka & Electoral Commission [2008] N3368

Darius Kombe v Robert Naguri & Electoral Commission [2017] unreported

Holloway v Ivarato [1988] PNGLR 99

Siaguru v Unagi & Electoral Commission [1987] PNGLR 372

Thompson v Pokasui & Electoral Commission [1988] PNGLR 210

Mond v Okoro & Electoral Commission [1992] PNGLR 501

Raymond Agonia v Albert Karo [1992] PNGLR 463

Sir Arnold Amet v Peter Charles Yama (2010) SC 1064

Karo v Kidu & Electoral Commission [1997] PNGLR 28

Togel v Ogio & Electoral Commission [1994] PNGLR 396

Bourne v Voeto & Electoral Commission [1997] PNGLR 298

Wasege v Karani [1998] PNGLR 132.

Lus v Kapris & Electoral Commission [2003] N2326

Francis Koimanrea v Alois Sumunda (2003) N2421

Mathias Karani v Yawa Silupa (2003) N2385

Counsel

Mr T. Kamuta for the Petitioner

Mr A. Kongri for the First Respondent

Mr L. Okil for the Second Respondent

DECISION ON OBJECTIONS TO COMPETENCY

BACKGROUND

1. This is a ruling on objections to competency of the petition against the return of the First Respondent as the successful candidate in the Rigo Open Electorate (Central Province) in the 2017 National Elections.
2. On 31 August 2017 a petition was filed in which the Petitioner challenged the declaration of the First Respondent as the duly elected member for the Rigo Open Electorate. The petition was served on the respondents. Service of the petition was made on the respondents by publication on 5 September 2017 (see) Rule 8(2)(b) of the *Election Petition Rules 2017 (EP Rules)*.

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3. An objection to competency was filed by the First Respondent, 17 November 2017 (**document 36**). There was confusion about who acted for the Second Respondent. After this confusion was resolved and orders extending time were made, the Second Respondent filed an objection to competency on 1 November 2017 (**document 50**).
4. This Decision will address: 1. Form of petition; 2. Grounds:- (a) bribery by party (b) bribery by agent (c) errors & omissions; 3. Objection of First Respondent; 4. Objection of Second Respondent; Conclusion.

FORM OF PETITION

Election Petition Rules 2017

5. The EP Rules came into effect in July 2017. In Schedule 2 forms are provided to assist the parties to a petition in drafting their respective documents.

Form 1, requires a petitioner to state these matters in the petition:

B: THE FACTS relied on to invalidate the return of the first respondent are set out as follows: (set out the facts in numbered paragraphs)

C: THE GROUNDS upon which the petitioner relies are: (set out the grounds in numbered paragraphs)

Form 1 in paragraph "B" accords with section 208 of the *Organic Law on Provincial and Local-Level Government Elections (Organic Law)*:

208. Requisites of petition.

A petition shall-

- a) set out the facts relied on to invalidate the election or return...

"THE FACTS" as pleaded

6. Paragraphs numbered 1 to 10 of the petition recite matters relating to the standing of the Petitioner and details of the election in which he and the First Respondent stood as candidates. None of the mixture of facts and matters in those 10 paragraphs relate to the requirement in Form 1 to support the petition "to invalidate the return of the first respondent".
7. Paragraph 11 of the petition states, "The Petitioner will allege bribery by the First Respondent to induce voters for their votes..." Nothing there sets out any facts to support the allegation.



8. Paragraph 12 of the petition states, "The Petitioner will further allege errors and omissions committed by the Second Respondent during the counting..." Nothing there sets out any facts to support the allegation.
9. It follows the petition would fail as the relevant facts to support the petition have not been stated. However, under the heading GROUNDS in the petition are set out facts to support the petition. The effect of that pleading, if taken into account, would be to disregard the requirements of Form 1.
10. Section 217 of the Organic Law provides:

217 Real Justice to be observed

The National Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.

11. Form 1 looks to a petitioner addressing the matters required by section 208 to do justice to the parties to a petition, be it petitioner or respondent. It has the authority of the Court. A petitioner who ignores Form 1 may fail to inform a respondent of necessary matters or disadvantage himself.
12. *Dusava v Waranaka & Electoral Commissioner* [2008] N3368 (Manuhu J) noted that a finding of bribery has dire consequences for a successful candidate and the electors. It will automatically result in the voiding of his election and the electors will have no voice in the Parliament until such time a by-election is held.
13. Form 1 which has been drafted specifically to comply with section 208(a) to identify the substantial merits of a matter and to minimise instances of injustice that might come about by legalities or technicalities. To regard Form 1 as a form which a petitioner can ignore would mean they could put in any sort of document. The Court is conscious of the authorities which emphasis that to ignore the distinction between *Facts* and *Grounds* will result in a petition being dismissed.
14. The Court will exercise discretion under *National Court Rules (NCR)* Order 1 Rule 7 and Rule 11(2). And, will apply an interpretation that, where Rule 11(2) refers to the forms in the NCR, it also applies to the forms in the schedule to the EP Rules.
15. The reasons for the Court to dispense with compliance of Form 1 are:
 - (a) neither respondent objected to the form;

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(b) the relevant facts are stated in the petition, albeit in the wrong place, but in such a way there has not been prejudice to the respondents.

The Court will not dismiss this petition for the drafting of "B. FACTS".

Pleading facts

16. A judgement (yet to be published) of Yagi J in regard to a petition which also arose out of the 2017 election, *EP 22 of 2017 Darius Kombe v Robert Naguri & the Electoral Commission of PNG* (November 2017) reviewed the law and principles on objections. At paragraphs 18 to 21 his Honour notes:

18. The Supreme Court in the Holloway case (*Holloway v Ivarato* [1988] PNGLR 99) also went further to construe and gave meaning to the term "facts". The Court said facts must be "material or relevant". It stated:

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.

19. There are numerous other cases that essentially restate and applied the law in different contexts, facts and circumstances. I do not consider it necessary to cite or refer to all these cases in my ruling. It will suffice in my view, that a reference is made to a few of these cases. See *Siaguru v. Unagi & Electoral Commission* [1987] PNGLR 372; *Thompson v. Pokasui & Electoral Commission* [1988] PNGLR 210; *Mond v. Okoro & Electoral Commission* [1992] PNGLR 501 and *Raymond Agonis v. Albert Karo* [1992] PNGLR 463.

20. It is also important to appreciate the underlying object and purpose of pleading facts in a petition. The Courts have emphasised that the purpose is for the petitioner to clearly state his or her case in a summary way so that the respondents and the Court are able to fully comprehend the facts and the issues to meet a trial. The facts must be sufficiently clear leaving no room for speculation, conjecture or ambiguity. In the Supreme Court case of *Sir Arnold Amet v Peter Charles Yama* (2010) SC 1064 Justice Davani made the following statement of the principle:

The significance of applicants complying with the requirements of s.208 is clear. It is not for a Court to draw conclusions on what are clearly omissions be they typos or incorrect using of statutes, etc. They all go towards satisfying the requirements in s.208. It is the applicant and his counsel who must ensure that the petition is entirely correct, before it is filed.

21. In *Siaguru v. Unaggi* [1987] PNGLR 373 the court in considering the issue held:

What are sufficient facts depends on the facts alleged and the grounds these facts seek to establish. Anything short of that would defeat the whole purpose of pleading, that is, to clearly indicate the issues upon which the opposing party may prepare his case and to enable the court to be clear about the issues involved.

GROUNDINGS

17. The petition (in summary) sets out under GROUNDINGS the following facts:

Bribery by the First Respondent

- On 24 May 2017 in the course of a public gathering at Bore Village Rigo, food and refreshments were served to the people who attended;
- the First Respondent made a campaign speech and then Keina Sale announced the First Respondent had given him K100 as contribution to registration of a Rugby League Club;
- Keina Sale and the persons present were all electors;
- this giving of K100 was to induce them to vote for the First Respondent.

Bribery by agents of the First Respondent

- The First Respondent gave two envelopes containing money to village councillor Kone Rua and "with the knowledge and authority" of the First Respondent, Kone Rua distributed the money (ranging from K150 to K50) to four named electors and this was to induce them to vote for him.

Errors & Omissions

Over the period 10 to 23 July 2017, the Second Respondent made errors due to:

- 100 voting papers with butts attached were included in counting votes;
- An incorrect opening tally took into account 638 votes;
- Iga Kepi Gima got "of about" 70 extra votes due to extra ballot papers.

In consequence as set out in the petition, voting tallies during elimination of candidates took into account the errors thus affected the margin for a winning majority and as a consequence the First Respondent was declared the winning candidate over the Petitioner by 101 votes.

FIRST RESPONDENT'S OBJECTION TO COMPETENCY

18. The First Respondent objects on several bases:

- (a) The petition did not plead facts as required by section 208 of the Organic Law and notes that bribery is an offence under section 103 of the Criminal Code, i.e. *Criminal Code Act (Code)*.
- (b) The petition is lacking in providing facts or particulars.

In other words, the facts which have been given by the petitioner albeit under "GROUNDINGS" go only some way to inform on the petition.

Section 103 of the Code provides

103. Bribery.

A person who—

- (a) gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on, or for, any person any property or benefit of any kind—

- (i) on account of anything done or omitted to be done, or to be done or omitted to be done, by an elector at an election in the capacity of an elector; or
- (ii) ...
- (iii) in order to induce any person to endeavour to procure the return of any person at an election, or the vote of any elector at an election; or
- ..
- (d) advances or pays any money to or to the use of any other person with the intent that the money will be applied for any of the purposes referred to in Paragraph (a), (b) or (c) or in discharge or repayment of money wholly or in part applied for any such purpose; or ..

Section 215 of the Organic Law makes void an election for bribery:

215. Voiding Election for Illegal Practices.

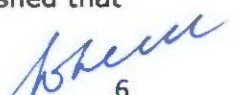
- 1) If the National Court finds that a candidate has committed or has attempted to commit bribery or undue influence, his election, if he is a successful candidate, shall be declared void.
- 2) A finding by the National Court under Subsection (1) does not bar or prejudice a prosecution for an illegal practice.
- 3) The National Court shall not declare that a person returned as elected was not duly elected or declare an election void-
 - a. On the ground of an illegal practice committed by a person other than the candidate and without the candidate's knowledge or authority; or
 - b. On the ground of an illegal practice other than bribery or undue influence or attempted bribery or undue influence, unless the Court is satisfied that the result of the election was likely to be affected, and that is just that the candidate should be declared not to be duly elected or that the election should be declared void.

19. *Karo v Kidu & Electoral Commission* [1997] PNGLR 28 (Injia J) explained:

The effect of s.215 (1) & (3) is as follows. An election will be voided for illegal practices or bribery or undue influence (or attempted bribery or attempted undue influence) committed by the winning candidate. In such a case, it is not necessary for the petitioner to show that the result of the election was likely to be affected.

Likewise, under s. 215 (3) (a), an election may be voided for bribery or undue influences (or an attempt thereof) committed by a person other than a winning candidate with the knowledge or authority of the winning candidate. In which case, it is also not necessary for the Petitioner to show the likelihood of the election being affected.

An election may be declared void if the bribery or undue influence (or an attempt thereof) is committed by a person other than a winning candidate with the knowledge or authority of the winning candidate provided the Court is satisfied that the result of the election was likely to be affected".



20. *Agonia v Karo & Electoral Commission* [1992] PNGLR 463 (Sheenan J) from the headnote:

2. A charge of bribery is a serious allegation challenging the electoral process; therefore, the base facts constituting the crime of bribery must be pleaded with clarity and definition.

4. Intention to induce a course of action of corrupt practice or interfere unlawfully in the free voting of elections by voters is an element of the offence of bribery under s. 103 of the *Criminal Code*, and must be pleaded specifically in the petition along with the other elements of the offence.

Ground concerning K100 gift regarding Rugby Club

21. The petition pleads a gift of K100 to registration of a Ruby Club speculates that it was to induce but does not say how that gift was 'in order to induce'.

22. In *Togel v. Ogio & Electoral Commission* [1994] PNGLR 396 (Doherty J) there was a somewhat similar situation of giving funds to recipients, in summary:

The member for the electorate had allocated grants from discretionary funds to two groups in the electorate. The funds were drawn from the National Development Fund, available to all members of the Parliament but he did not know the members of the recipient groups, several of whom were requested by the persons delivering the funds to "remember" the first respondent, and who therefore felt obliged to vote for him.

The Court concurred with the comments (of Woods J which he made in another petition) that, "Whilst I must criticise the timing of these grants and point out that a Government that allows such grants to be made just before an election could be creating grave suspicions as to its *bonafides*, ...I am unable to find that such grants were bribery. The Court in the *Togel* case considered the standard of proof required in regard to section 215 as, "it must be proved to the entire satisfaction of the Court, and that the standard of proof may be just short of the criminal standard." The Court in the *Togel* case dismissed the petition as on the facts there was no evidence that the first respondent knew what manner of person would receive the benefit and if they were eligible to vote or not.

23. The petition does not state who were to be the recipients of the K100 for "registration" of the Rugby Club to show the recipients were electors. It follows, in line with the *Togel* case, that this ground in the petition fails on that basis. It is of note the standard of proof applied in the *Togel* case differed from the higher standard applied in the *Agonia* case. The Second Respondent submits that there is no pleading to show an intention on the part of First Respondent to bribe. The timing of donating is what Woods J noted "with grave suspicions". Here, with the donation of K100 for the

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registration of the Rugby Club, the Court is realistic and suspicious but the requisite intention to bribe is not proved.

24. *Dusava v Waranaka & Electoral Commissioner* [2008] N3368 (Manuhu J) in reviewing decisions of the Court approved the standard of proof applied in *Bourne v Voeto & Electoral Commission* (Frost CJ) and applied in the *Agonis* case, that is to say disapproved the standard adopted in a criminal trial. The Court also noted the need to distinguish the material before the court in an objection to competency application to the case where the matter has gone to substantive hearing, evidence given and determinations of fact made.
25. In in the current petition, the standard of proof in *Togel* i.e. that it may be just short of the criminal standard, is applied.

Ground concerning agent distributing envelopes with money - intention

26. In *Wasege v. Karani* [1998] PNGLR 132 (Sawong J) the matter proceeding to evidence. It involved an allegation that the first respondent's campaign manager attempted to bribe an elector. In dismissing the petition, the Court cited with approval the *Agonia* case and said in regard section 103, "The element of intention on the part of the giver of the money is an integral part of the offence of bribery." Then held, "...even if I infer that Mr Karani did give such money there is absolutely no evidence that he intended that such money be used to induce electors to vote for him."
27. In *Lus v. Kapris & Electoral Commission* [2003] N2326 (Kapi DCJ) the petition alleged bribery in that the campaign manager for the First Respondent, giving rice, tinned fish and sugar said to the voters. "*Yupela Kaikai dispel kaikai na votim Gabriel Kapris osem open member na me osem ward member*" and subsequently said "*Yumi mas pulim ol lain blo Sir Pita long kam na votim Gabriel na me.*" The Court said: (a) the allegation of bribery was against a person other than the First Respondent, (b) the petition pleaded bribery was carried out with the knowledge and authority of the First Respondent (c) but failed to plead any facts to support this allegation. The petition was dismissed. This decision illustrates the strictness of requirements to prove bribery.
28. The current petition is similar to the situation in the *Lus* case as there are no facts in the petition to show that the alleged distribution by councillor Kone Rua of money to the four persons named was "with the knowledge and authority" of the First Respondent and nor that it was with the intention to induce whoever the recipients might turn out to be, to vote for him. The difficulty to prove these elements is inherent in bribery where the transactions are secret but no facts have been pleaded to show intention.

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SECOND RESPONDENT'S OBJECTION TO COMPETENCY

29. In addition to supporting the First Respondent's the Second Respondent's objection states further matters where it is claimed that the petition is lacking in providing facts or particulars. In effect the Second Respondent's objection says in alleging errors, the petition is incorrectly projecting figures of votes and there is no fact stated in the petition to show the "100 voting papers with butts attached" were not legally cast or otherwise tainted.

30. In the cited EP 22 of 2017, Yagi J considered further the position of the Electoral Commission (paragraphs 22, 23 and 24):

22. As the grounds relied upon in the present petition are founded on s.218 of the Organic Law it is necessary that I also consider the specific principles. *Section 218 of the Organic Law* provides.

218. Immaterial errors not to vitiate election.

1) *Subject to Subsection (2), an election shall not be avoided on account of a delay in the declaration of nominations, the polling, the declaration of poll or the return of the writ, or on account of the absence of an error of, or an omission by, an officer which did not affect the result of the election.*

23. The case law authorities indicate that the pleading must not only plead the facts constituting the ground but also show how the alleged errors and omissions did or is likely to affect the result of the election or return....

24.In *Mathias Karani v Yawa Silupa* (2003) N2385 the Court said:

"Where a petition is founded on alleged errors and omissions of electoral officials the pleading must set out the relevant material facts. Allegations in petitions founded on errors and omissions must provide the following:

- a) The error or omission complained of;*
- b) The error or omission was committed or made by the electoral officer; and*
- c) The error or omission "did affect the result of the election".*

31. The petition states that Iga Kepi Gima received "of about" 70 extra votes and the difference in votes between the First Respondent and the Second Respondent, "The winning margin was about 101 votes". In paragraph 29 figures are stated as: "about 78" and "about 425 ballot papers", "and excess of about 70 ballot papers". The petition lacks pleading facts of precise numbers when using the word "about". When the First Respondent was declared the winning candidate by 101 votes, to introduce imprecise numbers undermines the assertions set out in the Petition.



32. Section 153 of the Organic Law sets out the facts to determine if a vote is informal. Section 153(5) qualifies the earlier subsections, "...a ballot-paper shall not be informal for any reason other than a reason specified in this section." Suffice it to say that the section does not list a paper with the butt attached as one which could be informal. There were 100 papers which has butts attached. The petition does not state the ground which relates to make those 100 votes informal or illegal. The pleading that these had the butts attached is misconceived as it does not relate to any possible ground. It is used in the speculation of a distorted counting but there is no basis to not count these 100 votes.
33. In *Mond v Nape* [2003] N2318 (Kandakasi J) emphasised the requirement for pleading in the petition, in that instance by reference to section 215 of the Organic Law (illegal practices). To expand on the concise comment as cited by counsel, "After all, pleadings drive the evidence" a lawyer has first to gather the evidence to be able to draft pleadings to then at trial go into evidence by calling witnesses and producing documents. Put another way, the quality of work to be done depends largely on the quality of materials used in the construction. This is true for a builder and for a lawyer the good material he needs is facts.
34. Counsel for the Petitioner has called on the Court to note the difficulty for him to give a cogent explanation of how at the beginning of the elimination process there was an incorrect opening balance of allowable votes by the inclusion of an "extra 638 ballot papers" (paragraph 26). The petition says there was an incorrect total. Counsel for both respondents say the distribution of preferences is done using the same ballot papers that recorded the primary votes. Hence an extra 638 paper cannot come from nowhere when the counting is done in the preference distribution.
35. It is for a candidate's scrutineers to see if there are irregularities in the tally process and promptly raise the irregularity so either it is resolved in the tally room or at least so evidence is collected by them to in turn provide to the candidate's counsel to draft a petition. There is no explanation pleaded of how the tally on distribution could be increased by such a number. It is not suggested (say), a wad of paper of 638 ballot papers was illegally put into the total count, or a mistake in arithmetic somehow was included in the tally to distort the preference distribution tally. There is no fact pleaded to the effect that scrutineers raised objection to the tally.
36. The former electoral system "first past the post" was that the votes polled by a candidate determined the tally. Unlike the former system the current electoral system takes into account the other preference votes collected from unsuccessful candidates when they were eliminated from the process.

37. For that reason, an important thrust of the petition is the distribution of votes in the elimination process. This ground is based on what is pleaded in the petition as "an extra 638 ballot papers had a greater mathematical effect on the entire elimination process". It is pleaded that in distribution of the votes (e.g. paragraphs 31 and 32 of the petition) of the unsuccessful candidates that the numbers did not favour the Petitioner. There are no facts in the petition which evidence error in regard to the elimination process only speculative projection of voting numbers.

38. Albeit the margin of 101 votes is close and the Petitioner and his supporters would be sorely disappointed, given the defects in pleading facts, there is no basis to grant the petition or to order a recount. Though counsel urged the Court to give the Petitioner the chance to prove his case, as counsel for the Second Respondent correctly pointed out, the objection to competency is a legal process, call it a "filter", to see if there are sound legal reasons for a petition to go onto hearing evidence. If the objection is upheld then the matter does not go onto that second stage of litigation.

ORDERS

1. The objection to competency of the petition is upheld.
2. The petition is dismissed as being incompetent.
3. The Petitioner shall pay the cost of the First Respondent and of the Second Respondent in accordance with the scale under the *Election Petition Rules 2017* to be taxed if not agreed.
4. The security for cost deposit held by the Registrar shall be paid to the First and the Second Respondents in equal shares towards settlement of their cost in part.

MADE 01 February 2018



JUSTICE WILLIAM NEILL

Petitioner:	Kamutas Legal Services
First Respondent:	Kongri lawyers
Second Respondent:	Kimbu & Associates Lawyers