

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

EP NO. 41 OF 2017

IN THE MATTER OF A DISPUTE RETURN FOR  
THE KEREMA OPEN ELECTORATE

BETWEEN:  
THOMAS OPA  
*Petitioner*

AND:  
HONOURABLE RICHARD MENDANI  
*First Respondent*

AND:  
ELECTORAL COMMISSION OF PAPUA NEW GUINEA  
*Second Respondent*

Kerema : Koeget, J  
2018 : 22<sup>nd</sup>, 23<sup>rd</sup> 24<sup>th</sup> May  
2019: 8<sup>th</sup> March

***PRACTICE AND PROCEDURES - Election Petition - "Bribery" Organic Law on National and Local Government Elections – section 215(1) Bribery - Criminal Code Act section 103.***

**TRIAL:**

**Undisputed Facts**

This is a trial disputing the validity of the election of the sitting member for Kerema Open in 2017 general election.

The Petitioner Thomas Opa and the First Respondent Richard Mendani were among 48 other candidates for the Kerema Open Electorate in 2017 National General Election.

The polling for Gulf Province including Kerema Open Electorate commenced on 26<sup>th</sup> June 2017 and ended on 8<sup>th</sup> July 2017.

The casting of Ballot Papers and counting of Ballot Papers commenced on 25<sup>th</sup> July 2017.

This include counting of casted Ballot Papers and Declaration of the result for 2017 Kerema Open Electorate.

The First Respondent polled 7,322 First Preference votes whilst the Petitioner Polled 4,655 votes. When all elimination processes were completed with final 48 exclusive of the runner-up candidate Nickson Laine Niki, the First Respondent polled 10,255 votes while the Petitioner polled 9,873 votes with a difference of 382 votes to become the unsuccessful runner-up.

The Absolute Majority (50% + 1) margin was 10,066 votes. The First Respondent Polled 189 votes above the Absolute Majority resulting in the victory. The Petitioner fell about 193 votes from the Absolute Majority margin.

On 25th July, 2017 the returning Officer, Mr. Roney Hawengao declared the election results and named the First Respondent as the candidate duly elected for the Kerema Open Electorate.

The Petitioner filed, a petition challenging the First Respondent's win on 1<sup>st</sup> of September, 2017.

**Relief sought by the Petitioner:**

- (a) A Declaration that the election of the First Respondent is absolutely void pursuant to *sections 212(i)(h) and 215(i)(3) of the Organic Law on National and Local Level Government Elections 1997.*
- (b) A Declaration that the election of the First Respondent is void pursuant to *section 212(i)(h) and 218(1) of the Organic Law on National and Local Level Government Elections 1997.*

- (c) A Declaration that the First Respondent who was return as the elected member was not duly elected as member for Kerema Open Seat pursuant to *sections 212(i) and (3) and 218(i) of the Organic Law on National and Local Level Government Election 1997.*
- (d) An order that a By-Election for Kerema Open be held forthwith.

**Cases Cited:**

- (1) *Raymond Agonia v. Albert Karo and Electoral Commission [1992] PNGLR 463.*
- (2) *re Menyamya Open Parliamentary Election, Neville Bourne v. Manesseh Veoto [1977].*
- (3) *Francis Koimanrea and Aor v. Alois Samunda (2003) (N2421).*
- (4) *Allan Ebu v. Roy Evara [1982] PNLR 201.*
- (5) *Sigirok v. Fairweather (2014) (N5577).*
- (6) *Tomokita v. Tomuriesa (2018) (N7120).*
- (7) *Bryan Kramer v. Nixon Philip Duban and Electoral Commission (2013) (N5213).*
- (8) *Junive v. Oveyara (2008) (SC 875).*
- (9) *Talita v. Ipatas (2016) SC 11603.*

**Counsel:**

*Mr. J. Talopa for the Petitioner*

*Mr. T. Waisi for the First Respondent*

*Mr. A. Kongri for the Second Respondent*

The basis for the Declaration of Election for Kerema Open Electorate void and order for By-Election are set out in the Petition are as follows:-

**1) ALLEGATION OF BRIBERY at Epo Village, Central Kerema (case one)**

On 19<sup>th</sup> of June, 2017 at around 3 o'clock in the afternoon during the campaign period, the First Respondent went to Epo village in the Central Kerema Local Level Government, to attend one of his campaign rallies with his coordinator Mr. Joel Mirihao who stood close to him. The First

Respondent handed out cash totally K550.00 to Joel Mirihao. The campaign coordinator in the presence and with the full knowledge and authority of the First Respondent handed the cash of K550.00 to Ori Pare, a voter standing with them. When the cash of K550.00 was handed out to Ori Pare, Joel Mirihao said: "*Skelim disla moni waintaim ol lain belong yu na yupela tingim member long vote*" (English Translation; *share this money with your people and remember to vote for the member*" (the First Respondent).

The voter, Ori Pare took the cash and shared it with five other voters and told them to cast their vote one for the First Respondent.

As a result during the counting of votes on count No 7 the First Respondent was candidate No 54 collected total of 287 formal preference vote in the Ballot Box No 121323 that contain casted votes for Wards 5 and 6, central Kerema Local Level Government(LLG). The votes included the votes of Ori Pare and 5 others that received the cash of K550.00.

### **Evidence for the Petitioner**

The Petitioner Thomas Opa in his affidavit dated 27th November, 2017 stated he is from Iokea village, East Kerema in the Gulf Province. In the 2017 General Election, himself and the First Respondent were candidates for Kerema Open Electorate. The First Respondent Honourable Richard Mendani scored total votes of 10,245 votes whilst he scored 9,873 votes. The difference between the First Respondent's total votes and his was 383 votes so he was declared the winner of the 2017 General Election. He was declared the runner-up in the 2017 General Election so he filed a petition alleging Bribery, undue Influence, Errors and Omission.

The key witnesses for the allegations of Bribery are Ori Pare and Marcus Kii, both filed affidavits and gave oral evidence in the trial at Kerema. The witnesses Ori Pare stated he is from Lou village in the Central Kerema Local Level Government in Kerema. He represents Ward 6 community and he is a strong supporter of the First Respondent Richard Mendani. In the affidavit deposed to dated 27th November 2017, filed on 30th November 2017, he stated the following:

## **Paragraph 2**

On 19th June 2017, there was a campaign rally organised for Richard Mendani at Epo village. The villagers from nearby villages attended the rally.

## **Paragraph 4**

The representatives from Wards 1-14 gathered at Philip Mai's house at the top at 3pm. *"I represented ward 6 community. Richard Mendani was there as well as his coordinator Joel Mirihao. They dished out cash to representatives at the rally."*

## **Paragraph 5**

*"Among others, Joel Mirihao gave me K550-00 in the presence of Richard Mendani and representatives from wards 1-14. Joel Mirihao said: "Skilim dispela moni wantaim ol lain bilong yu (to ward 6, Central Kerema LLG) na yu pla tingim memba lo vote 1 tasol."*

## **Paragraph 7**

*"I took the cash and shared it with five other voters."*

## **Paragraph 9**

*"I cast my vote 1 for Richard Mendani on the polling day."*

In oral evidence in court, Ori Pare stated he is from Lao village in the Central Kerema Local Level Government (LLG) and is a strong supporter of the First Respondent Richard Mendani. He attended a campaign rally for the First Respondent Richard Mendani at Epo village, Central Kerema Local Level Government (LLG) on 19th June 2017. The rally commenced in the afternoon at 3 o'clock and concluded at seven o'clock at night. He represented ward 6 members at the rally.

When the rally concluded and as he walked outside the venue, his name was called so he walked up to the meeting venue. The First Respondent Richard Mendani gave cash to his campaign coordinator Joel Mirihao. As Joel Mirihao handed cash of K550.00 to Ori Pare, he stated: *"Vote Richard*

*Mendani*". He took the cash, shared it with other voters, and family members and made small feast. On the polling day he casted vote 1 for the First Respondent.

The next witness for the Petitioner was Marcus Kii who stated he comes from Uriri village, Central Kerema Local Level Government (LLG). He was give cash of K300.00 by Ori Pare at the back of the Catholic church at Epo village on the afternoon of 19th June 2017. He accepted the cash and shared it with his family members.

### **Evidence for the First Respondent**

The First Respondent's evidence is that on 19th June 2017, he was at National Broadcasting Commission Headquarters at 5 Mile in the National Capital District as a guest speaker at the launching of Hemdei Coffee. The launching of the programme was organised by Kotidanga Rural Farmer's Association. So he was not present at Epo village on 19th June 2017 as alleged by the Petitioner. He went to Epo village the following day (20th June 2017) and at 3 o'clock in the afternoon, he was distributing his campaign posters. His evidence was corroborated by the evidence of witnesses Gulu Iada, Jacob Lasi and George Pekou.

In the course of the First Respondent giving sworn evidence the trial judge asked him the following question:

*Q: On 20th June 2017, what mode of transport did you and your party use to travel to Epo village, Central Kerema in the Gulf Province to distribute your campaign posters?*

The First Respondent did not answer the question and none of the witnesses called and asked the same question were able to provide answer as well.

The answer to the question was crucial to determine if he travelled to Epo village on 20th June 2017 because the distance between Port Moresby and Epo village is far and it takes between 5 - 6 hours by motor vehicle travelling at a speed of 90-100 kilometer per hour. (I have personal knowledge and have travelled on court circuits on the highway for the last three years.)

So I ask myself these questions:

- (1) *How did the First Respondent travel from Port Moresby to Epo village on 20th June 2017 and be at that location by 3 'o clock in the afternoon to distribute his election posters?*
- (2) *What time did the First Respondent and party depart Port Moresby for Epo village?*

None of the materials such as copy of programme of the launching were attached to the witnesses affidavit to demonstrate and confirm that such event took place at National Broadcasting Commission Headquarters at 5 mile on 19th of June 2017. Such evidence goes to the credibility of the witnesses.

In the circumstances of this case the only unambiguous account is that of the Petitioner and his witnesses so I believe their evidence. I find that the First Respondent and party were present at Epo village on 19th June 2017 at the campaign rally where his Kamea tribe reside.

I accept the evidence of the Petitioner and witnesses that at the campaign rally, a Joel Mirihao gave cash of K550.00 to Ori Pare in the presence of the First Respondent seated a meter away and he uttered the following words: *"sklimi displa moni wataim ol lain blo yu na yupla tingim memba lo vote"*.

The First Respondent contends that the giving of cash of K550.00 and the utterance of the words by Joel Mirihao amounted to Bribery pursuant to *section 103 of the Criminal Code Act*. *Section 103 of the Criminal Code Act* states:-

**"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) *on account of any person acting or joining in a procession during an election; or*
- (iii) *in order to induce any person to endeavor to procure the return of any person at an election, or the vote of any elector at an election; or*
- (b) *being an elector, asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of anything done or omitted to be done, or to be done or omitted to be done, by him at an election in the capacity of an elector; or*
- (c) *asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person, on account of a promise made by himself or any other person to endeavor to procure the return of any person at an election, or the vote of any person at any 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 purposes; or*
- (e) *corruptly transfers or pays any property or money to any person for the purpose of enabling that person to be registered as an elector, and so influencing the vote of that person at a future election; or*
- (f) *is privy to the transfer or payment referred to in Paragraph (e) that is made for his benefit; or*
- (g) *being a candidate at an election, convenes or holds a meeting of electors or of his commitment in a house licensed for sale of fermented or spirituous liquors,*



*is guilty of a misdemeanour.*

*Penalty: A fine not exceeding K400.00 or imprisonment for a term not exceeding one year."*

In the case of *In the Matter of the Organic Law on National Elections and in the matter of the Election for the Moresby South Open Electorate; Raymond Agonia v Albert Karo and Electoral Commission [1992] PNGLR 463*, Sheehan J said (at 469):

*"Without analysing [s103] exhaustively, it is clearly a section that is designed to prohibit improper inducements to persons, to electors, or candidates in an election. Whether those inducements are made to an elector - defined as any person entitled to vote at any election - or other persons, the corrupt practices aimed at are those inducements offered or sought, with the intention of interfering with the lawful process of an election.*

*It is also clear that there is in s 103 no general definition of bribery standing apart from the specific instances set out, which does not include an intention to induce a course of action of corrupt practice. It is clear, therefore, that intention is an integral part of the offence. Such phrases as offering gifts, benefits, or inducements on 'account of', or 'in order to induce', or 'with the intention that', are all phrases that show that the purpose of offering the inducement is an element of the offence."*

In this case Joel Mirihao handed the cash of K550.00 to Ori Pare at Epo village on 19th June 2017 and he uttered the words: *"skelim disla mani wantaim ol lain blo yu no yupla tingim memba lo vote"*. In my view two pertinent questions arise and they are:

- (1) Where did Joel Mirihao get the cash of K550.00 to hand over to Ori Pare at Epo village on 19th June 2017?
- (2) Did the First Respondent authorise Joel Mirihao to say to the voter: *"Skelim disla mani waitaim ol lain blo yu na yupla tingim memba lo vote"*?

The Standard of proof regarding allegations of bribery are of criminal nature so the standard is "*beyond reasonable doubt*". The Petitioner has the onus of proof beyond reasonable doubt that the cash of K550.00 was given to Joel Mirihao by the First Respondent and he authorised the latter to utter those words when handing over cash to Ori Pare.

In the affidavit depose to by Ori Pare and filed in court, he states that the cash of K550.00 was handed to him by Joel Mirihao at Epo village on 19th June 2017. The First Respondent was present seated a meter away from Joel Mirihao.

In his oral evidence on trial he said when the rally concluded he left the venue and walked outside. The First Respondent gave the cash to Joel Mirihao. His name was called so he went up and receive the cash handed to him by Joel Mirihao. So a question is posed: *How does he know that the cash was given by the First Respondent to Joel Mirihao when he was outside the venue?* His oral evidence is inconsistent with the account in the affidavit. So which one of the account is accurate?

I accept the account in the affidavit as it was fresh in his mind, accurate as it is closer in time to the date of giving of the cash. The oral evidence is a recent fabrication in my opinion because he had opportunity to rethink of the evidence to come up with a different version and so it is rejected.

A witness Kwalimu Avosa stated: "*Siviri Feaviri told me to cast vote for Richard Mendani.*" This evidence is irrelevant as he is not the First Respondent's campaign coordinator or a staff and he was not authorised to make such statement to voters on behalf of the First Respondent.

*In re Menyamya Open Parliamentary Election, Neville Bourne v Manesseh Voeto [1977] PNGLR 298. In Francis Koimanrea & Anor v Alois Sumunda (2003) N2421 Sakora J said:*

*"When allegations of undue influence and bribery are made in a petition, these constitute allegations of criminal offences as well as electoral offences. Since*

*the case of In re Menyamya Open Election, Neville Bourne v Manesseh Veoto [1977] PNGLR 298, the law requires undue influence and bribery (ss. 102 and 103 Criminal Code Act respectively) to be pleaded and proven as criminal offences. That is to say, firstly, that all the constituent elements of these two offences be pleaded (according to s 208 (a) Organic Law) in the grounds of a petition, and secondly, proven or established in evidence by the criminal standard of proof, proof beyond reasonable doubt. See Agonia v Karo [1992] PNGLR 463; Karo v Kidu (Unreported N1626 of 9/10/97); and Lambu v Ipatas & Ors. (Unreported N1701 of 19/11/97)."*

In this case there is no evidence that the First Respondent gave cash of K550.00 to Joel Mirihao and authorise him to utter the words when handing over the cash to Ori Pare.

*"sklemi disla mani wantaim ol lain blo yu na yupla tingim memba lo vote." -*

The Petitioner has not discharge the standard of proof as required of him so this ground is dismissed.

**2) ALLEGATION OF BRIBERY at Luluapo Village, Ward 4 East Kerema (case two)**

On 1<sup>st</sup> July, 2017, at Luluapo village, Popo polling area, ward No 4 in the East Kerema, LLG where polling Team No. 12 was conducting polling, a Mr. Joel Mirihao, campaign coordinator for the First Respondent organised pig killing feast with food stuff such as taros, bananas, rice and various local cuisines for the electors with the knowledge and authority of the First Respondent wherein the electors Kake Poveta, Eau Morola, Ian Oakari Morola, Morola Pou and Joe Puri with other ward and Local Level Government were invited to the feast by Mr. Joel Mirihao. The said Joel Mirihao gave them food and meat with words translated into English as; *"eat some food and some pig meat and then go and vote our big man leader Mendani your first choice vote."*

The witnesses that deposed affidavits for the Petitioner in relation to this allegation are Kwalimu Avosa, Iki Alex Ako and Patai Kairi.

The witness Kwalimu Avosa stated at paragraph 4 of his affidavit:

*"I cut the pig, ate the meat, went and casted my vote."*

In response to questions asked by counsel, he answered:

*"I cut up the pig, ate meat and they said go and vote Richard Mendani. Siviri Feaviri told me to cast vote for Richard Mendani."*

Both Iki Alex Ako and Patai Kairi stated: *"In Toaripi custom, we cook food, meet and feed people at such gathering."*

So the killing of pigs for the feast, and cooking of food at Luluapo village, ward 4, East Kerema Local Level Government (LLG) on 1st of July 2017 to feed people at the gathering was in accordance with the Toaripi custom of the people at that location.

The killing of pigs, cooking food and feeding the people at the gathering at Luluapo was not done to induce the voters' mind to cast vote one for the First Respondent. In this case the Petitioner has not discharged the standard of proof beyond reasonable doubt so this ground is dismissed as well.

### **3) ALLEGATION OF UNDER INFLUENCE at Siviri Village, Kerema**

On 19<sup>th</sup> of April, 2017 at about mid-day before the issuance of Writ for 2017 National General Elections, at Siviri village at the out skirt of Kerema town, Central Kerema LLG, the National Alliance Party held a political rally to officially announce their candidates for the three Gulf Province seats in 2017 National General Elections.

When the political rally addressed by the political Leaders ended at about 2 o'clock in the afternoon, the First Respondent then sitting member of Parliament for the Kerema Open Seat, took the microphone and pledged a donation of a cheque for K100, 000.00 to the Tairuma Resources Owners Association and said words to the effect: *"bai mi kontinu long sapotim ol risos ona grup bilong yupela lo Kerema, wankain olsem nau grup blo*

*yupela mi luksave.*” [English Translation; “*I will continue to support Resource Owners Association in Kerema, such as yours*”]. The Petitioner alleged that pledging of the sum of K100, 000.00 with the words “*Kontinu lo sapotim*” had the effect of influencing the electors minds in believing that if the First Respondent is voted into office again as their member in Parliament, he will continue to support them in the future.

As a result the electors Mr. Tuta Lari and 6 other electors casted their First preference votes for the First Respondent on the polling date.

The key witness for the Petitioner in regard to the allegation was Tuta Lari. He is from Siviri village on the outskirts of Kerema town. He is a United Church pastor and resides in the village.

On 19th April 2017, he was present at the gathering in Siviri village when the First Respondent Richard Mendani pledge the sum of K100,000.00 to the Tairuma Resource Owners Association. The Tairuma Resource Owners Association consist of people from Siviri, Karaeta, Lou, Opa, Mei, Uwaripi and Lulutera villages in the Central Kerema Local Level Government (LLG). The First Respondent stated: “*bai mi kontinu long sapotim ol risos ona grup bilong yupela lo Kerema, wankain olsem nau grup blo yupela mi luksave.*” [English Translation; “*I will continue to support Resource Owners Association in Kerema, such as yours*”].

The witness Tuta Lari was confident that people from those villages will cast their votes for the First Respondent. So on the polling date, he casted vote for Richard Mendani.

The Writ for 2017 National General Elections were issued on 20th April 2017. The pledge by the First Respondent at Siviri village was prior to his nomination as a candidate in 2017 National General Election. The question is: *when does a person become a candidate in the National General Election?*

Reference section 3 of the Organic Law on National and Local Level Government Election (the “Organic Law”) defines candidate as:

*“candidate”, in Parts II and XVII, includes a person who, within three months before the first day of the polling period, announces himself as a candidate for election as a member for the Parliament”.*

In *Allan Ebu v Roy Evera* [1982] PNGLR 201, Bredmeyer J held that a person does not become a candidate until he has formally nominated to be a candidate. This is what His Honour said:

*"The word "candidate" is defined in s.2 of the Organic Law as follows:*

*In this Law, unless the contrary intention appears:*

*"Candidate" in Pts II and XVII includes a person who within three months before the first day of the polling period announces himself as a candidate for election as a member of Parliament.*

*That definition is not particularly helpful because s.215 is in Pt XVIII of the Organic Law. Part II deals with Administration and s.22 uses the word candidate. It provides that no candidate can be appointed as electoral officer. Part XVII deals with offences. There are numerous offences which can be committed by or against the candidate or in relation to a candidate, for example under ss 181, 182 and 202. To determine what the word candidate means in s.215 I ask: What does it mean generally in the Organic Law? and then; What special meaning does it have in Pts II and XVII?*

*I consider the word candidate when used generally in the Organic Law means a person who has duly nominated in the correct manner under ss 82 and 84. He is required to submit a written nomination on a prescribed form (form II) giving certain particulars of himself. The form must be lodged with the Returning Officer by a certain date accompanied by a K100 deposit. The form and manner of nomination is prescribed by law. When a person has nominated in that way he is a candidate, and prior to that he is simply an intending or prospective candidate.*

In *Singirok v Fairweather* (2014) N5577, Cannings J followed the *Ebu v Evera* case and held:

*"15. In addition to providing that an offence of undue influence or bribery was committed or attempted to be committed, the petitioner must prove that at the time of committing or attempting to commit the offence the successful candidate was indeed a candidate. As offence committed or attempted to be committed prior to the time at which the successful candidate became a candidate can be the subject of a prosecution under the Criminal Code but it will not give rise to a ground on which under Section 215 of the Organic Law the successful candidate's election can be declared void. This is a critical point of law highlighted by Mr Kongri for the second and third respondents, who drew the Court's attention to the National Court decision in support of it by Bredmeyer J in Allan Ebu v Roy Aua Evara [1983] PNGLR 201.*

*16. In that case it was alleged that Mr Evara, the successful candidate for the Kikori Open seat at the 1982 general election, had committed two undue influence offences (threatening to close a road and take villagers to court if they did not vote for him) in December 1981 in the course of early campaigning. The petitioner, Mr Ebu, argued that Mr Evara had committed the offences at a time that he was "candidate" as he had announced his intention to stand for election and he was campaigning. Bredmeyer J rejected the argument, holding that Mr Evara did not become a candidate within the meaning of that term in Section 215 of the Organic Law until he "has duly nominated in the correct manner". In reaching that conclusion his Honour noted that there was a definition of "candidate" in the interpretation section of the Organic Law, which stated:*

*"Candidate" in Parts II and XVII includes a person who within three months before the first day of the polling period announces himself as a candidate for election as a member of Parliament".*

*17. His Honour found, however, that that definition was not helpful as it only applied to Part II (administration) and Part*

*XVII (offences), whereas Section 215 is in Part XVII (disputed elections, returns etc). His Honour proceeded:*

*To determine what the word candidate means in s 215 I ask: What does it mean generally in the Organic Law?...I consider the word candidate when used generally in the Organic Law means a person who has duly nominated in the correct manner ....He is required to submit a written nomination on a prescribed form (form I) giving certain particulars of himself ....The form and manner of nomination is prescribed by law. When a person has nominated in that way he is a candidate, and prior to that he is simply an intending or prospective candidate.*

*18. His Honour concluded that Mr Evara did not become a candidate until 5 March 1982, so whatever words he uttered in December 1981 "and whether they amounted to undue influence or not, I cannot avoid the election because he was not a candidate within the meaning of s.215"*

*19. Bredmeyer J's judgment was delivered in 1983. It was based on the original Organic Law, which was repealed and replaced by the current Organic Laws in 1977. However, the provisions of the original Organic Law that his Honour was interpreting and applying are replicated in the current Organic Law. His Honour's reasoning remains pertinent. It has never been overruled by the Supreme Court. In fact the only reference to it appears to have been in the recent decision in *Jim Nomane v Wera Mori* (2013) SC1242 (Kandakasi J, Cannings J, Collier J), which did not, however, involve a detailed examination of it.*

*20. With the benefit of Mr Kongri's submission, I am convinced that Bredmeyer J's reasoning is correct: for an offence of undue influence or bribery to give rise to a ground for declaring the successful candidate's election void under Section 215 the successful candidate must have been a duly nominated candidate at the time the offence is committed or attempted to be committed.*



21. Mr Meten for the petitioner submitted that such an interpretation is too restrictive and overlooks the definition of candidate in Section 3 (which remains in the same terms as the definition considered by Bredmeyer J). He refers to the National Court decision of Gavara-Nanu J in *Bryan Kramer v Nixon Philip Duban* (2013) N5213 in which his Honour, during the course of hearing an objection (on a number of grounds) to the competency of the petition, considered an argument by the respondents that the successful candidate, Mr Duban, was not a candidate at the relevant time. It is useful to look at the facts of this case, which show how the meaning of "candidate" can become a critical issue. The key dates were:

. 23 March 2012: the date three months before the first day of the polling period;

. 20 April 2012: the date on which the successful candidate was alleged to have committed bribery;

. 23 May 2012: the date on which the writ for the election was issued (Mr Duban could not have nominated before this);

. 23 June 2012: the first day of the polling period.

22. Gavara-Nanu J applied the definition of "candidate" in Section 3 and found on the facts that Mr Duban had announced himself as a candidate within the period of three months before the first day of the polling period (ie on or after 23 March 2012). Therefore, he was a candidate on 20 April 2012 even though he had not formally nominated by that date. He was a candidate at the time he allegedly committed bribery and his election could be declared void under Section 215. His Honour proceeded to dismiss the ground of objection to competency of the petition that relied on the argument that Mr Duban was not a candidate at the relevant time.

23. *It appears, however, that neither Bredmeyer J's judgment in Ebu v Evara nor the limited application of the definition of candidate in Section 3, were brought to his Honour's attention. I tend to think that if those matters had been highlighted a different conclusion might have been reached. Whatever the case I am respectfully unable to agree with the approach his Honour took to this issue in Kramer v Duban. I find compelling the approach taken by Bredmeyer J in Ebu v Evara, and tha tis the approach that I will take in this case".*

In the recent case of *Tomokita v Tomuriesa (2018) N7120*, Makail J discussed the issue of when a person becomes candidate in the following way:

***"Bribery at Bolubolu station, Goodenough Island on 24 April 2017.***

16. *Looking at the facts pleaded at para. 2.1 9(a) to (g) of the petition, this is one of the allegations of bribery which occurred prior to the nomination of the first respondent as candidate. It occurred on 24 April 2017.*

17. *The source of the date of nomination of the first respondent is not the petition but an affidavit of the Returning Officer one Mr. Gansen Kadi sworn and filed 13 November 2017. That affidavit annexed a copy of the nomination form completed by the first respondent. It is dated 26 April 217 as the date of its receipt by the Returning Officer. Mr. Kadi's evidence is verified by the first respondent and his First Secretary Mr. Nelson Kurina in their respective affidavits.*

18. *The petitioner does not contest the source of this information and the date of nomination but submitted that the question of candidacy of the first respondent is a matter for trial because it is not settled law as to when a person becomes a candidate.*

19. *There is one view that a person is not a candidate until he or she nominates and the definition of a candidate under Section 3 of the Organic Law includes a person who announces himself as a candidate in the three month period before the commencement of polling but only for the purpose of Part II and Part XVII of the Organic Law: Allan Ebu v*

*Roy Evara [1983] PNGLR 201 applied in Jerry Singirok v. Ken Fairweather (2014) N557.*

20. *The case of Bryan Kramer v. Nixon Philip Duban & Electoral Commission (2013) N5213 supports the view that a candidate under Section 3 of the Organic Law is a person who announces himself as a candidate in the three month period before the commencement of polling.*

21. *As to whether the question of when a person is a candidate can be raised at a competency hearing or a trial is not settled. In Kramer v. Duban, the question was considered at a competency hearing of Singirok v. Duban.*

22. *In this case, there are a couple of reasons which support the approach taken by the Court in Kramer v. Duban. First, the petitioner takes no position on the date of nomination of the first respondent of 26 April 2017. In any case, there is uncontested evidence that the first respondent nominated on that date.*

23. *Secondly, parties have adequately addressed the question of candidacy in their respective submissions. In so doing, they pointed out the differing views expressed by the Court in the mentioned cases. Given this, if the question is left until trial, parties will be repeating their submissions. For these reasons, it is appropriate that it be determined now at the competency stage.*

24. *Proceeding on this premise, the Kramer v. Duban case did not consider the decision in Allan Ebu, Singirok v. Duban did. Allan Ebu and Singirok are consistent with the definition of a candidate under Section 3 of the Organic Law. Section 3 makes it clear that the definition of a candidate under Section 3 of the Organic Law includes a person who announces himself as a candidate in the three month period before the commencement of polling but only for the purpose of Part II and Part XVII of the Organic Law.*

25. *Part XVII of the Organic Law provides for offences. Section 215 of the Organic Law is not one of the offences covered by this Part. That rules out the application of Part XVII to a case of undue influence or bribery under Section 215.*

26. *It follows that the first respondent was not a candidate within the meaning of Section 215 when he alleged bribery took place at Bolubolu station on 24 April 2017. This ground is incompetent and struck out.*

27. *This conclusion renders it unnecessary to consider whether there are sufficient facts pleaded to constitute bribery."*

The First Respondent was not a candidate on the date he pledged the sum of K100,000.00 to the Tairuma Resources Owners Association and by virtue of Section 215 (1) of the Organic Law, his election cannot be declared void for the event on 19th April 2017. This ground is dismissed as well.

#### **4) ERRORS AND OMISSIONS**

The witness Samuel Kairi stated in his affidavit that on the 18<sup>th</sup> July, 2017 the Second Respondent's Returning Officer, a Roney Hawengao allowed their securities, agents and officials to proceed to count Ballot Papers in Ballot Box number 115607, Polling Team No. 18, polling places Heavala ward 7, Tauri - Laikakamu LLG.

The total number of Ballot Papers was 1,736 marked with *section 141* written, in ink by the Returning Officer Mr. Roney Hawengao for reasons only known to him. The dispute over inclusion in the counting of Ballot Papers marked with *section 141* at the back on each paper was raised by the scrutineers and so counting was suspended for a day with the view that these Ballot Papers will be excluded.

However, the counting of Ballot Papers including those marked with *section 141* continued resulting in the First Respondent declared winner of Kerema Open seat in the 2017 National General Election.

Section 126 is the relevant part of the Organic Law and it states:

**"126. Ballot Papers to be initialled.**

- (1) No ballot-paper shall be delivered to a voter without being first initialled or affixed with an official mark as prescribed by the presiding officer, and an exact account shall be kept of all initialled ballot-papers.*
- (2) The initials of the presiding officer shall be placed on the back of the ballot paper in such a position as to be easily seen when the ballot-paper is folded so as to conceal the names of the candidates".*

Section 153, Organic Law provides;

**"153. INFORMAL BALLOT-PAPERS**

- (1) Subject to this section, and to Division 3 and 4 and the Regulations, a ballot-paper is informal where: -*
  - (a) it is not authenticated by the initials of the presiding officer or by an official mark as prescribed; or*
  - (b) subject to Subsections (2) and (3), it has no vote indicated on it or it does not have the voter's first preference for one candidate and his contingent votes for two other candidates or where there are less than two other candidates, for the remaining candidate; or*
  - (c) subject to Subsection (4), it has on it any mark or writing (not authorized by this Law or Regulations made under this Law to be put on it) by which, and on the face of the ballot-paper alone, in the opinion of the officer conducting the scrutiny, the voter can be identified.*
- (2) Where there are two candidates only and the voter has indicated this vote by inserting the identification numbers or the name of one candidate for the first preference and left the other two squares and lines blank, the voter shall be deemed to have indicated the order of his preference for both candidates.*
- (3) Where there are three candidates only and the voter has indicated his vote by inserting the identification numbers and/or the names of*

*two candidates for the first and second preferences, and the square and line for the third preference has been left blank, the voter's preference shall be deemed to have indicated his preferences for all candidates.*

*(4) Subsection (1)(c) does not apply to a mark or writing placed on a ballot paper by an officer, notwithstanding that the placing of the mark or writing on the ballot-paper is a contravention of this section.*

*(5) Subject to Division 3 and 4, a ballot-paper shall not be informal for any reason other than a reason specified in this section".*

Section 126, Organic Law provides for the Presiding Officer to put his initials or an official mark at the back of the ballot paper before giving it to the voter. Section 153, Organic Law prescribes certain situations where a ballot paper can be made informal.

Should a ballot paper that has Section 141 written on it at the back apart from the Presiding Officer's initials or official mark placed at the back of the ballot paper be made informal?

It should not because it is not one of the situations prescribed under Section 153 of Organic Law.

In the present case, all the ballot papers had Section 141 written at the back. Should all ballot papers be excluded? The evidence is that the integrity of the votes have not been compromised in any way. In *Jurive v Oveyara* (2008) SC 875, the Presiding Officer put his initials on the front of all the ballot papers. The Supreme Court held that the initialing of the ballot papers on the front by the Presiding Officer does not render the ballot papers informal.

Recently, the Supreme Court in *Talita v Ipatas* (2016) SC 11603, held that immaterial errors that do not affect the result of the election will not void an election. At paragraphs 107 & 108, the Supreme Court made the following observations:

*107. The crux of this ground is the declaration of the winning candidate by a person lacking the authority to do so. It concerns the allegations of error or omission on the part of electoral officials. The law is clear*

*under section 218 (1) of the Organic Law, that immaterial errors will not void an election if it does not affect the results.*

*108. We agree with the respondents. There is no utility in pursuing this ground. It will not affect the results of the elections. Where legitimate votes are cast, and there is no dispute at counting, and a final votes tally is posted with an eventual winner, immaterial errors or omissions concerning declarations or return of the writ should not upset the election results. That is the rationale behind s. 218(1) of the Organic Law which vests in the National Court, the powers to declare a candidate duly elected who was not returned as elected".*

In the present case, the Presiding Officer signed the ballot papers at the back and wrote Section 141 on each of them. That evidence is from the Returning Officer's Affidavit. The evidence from the Petitioner's witness, Kairi Samuel was that there was no complaint regarding polling.

There was no evidence from the Petitioner's witnesses that the integrity of the ballot papers was compromised and consequently the ballot papers cannot be rendered informal.

In my view, the Returning Officer correctly made decision to count the ballot papers marked with Section 141 at the back of each ballot paper, this ground is, therefore, dismissed.

Since all the grounds for invalidation of the Petition are dismissed, the Petition is also dismissed with costs awarded to the Respondents.

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Talopa Lawyers : *for the Petitioner*  
Waisi Lawyers : *for the First Respondent*  
Kongri Lawyers : *for the Second Respondent*