

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

EP. NO. 47 OF 2017

**IN THE MATTER OF THE ORGANIC LAW ON NATIONAL AND
LOCAL LEVEL GOVERNMENT ELECTIONS (AMENDED) LAW 2006**

AND

**IN THE MATTER OF A DISPUTED RETURN OF ELECTION RESULT
FOR THE SOHE OPEN ELECTORATE IN THE 2017 NATIONAL
GENERAL ELECTIONS**

BETWEEN:

DELILAH PUEKA GORE

Petitioner

AND:

HENRY JONS AMULI

First Respondent

AND:

THE ELECTORAL COMMISSION OF PAPUA NEW GUINEA

Second Respondent

Popondetta: Geita J.

21, 22 February; 19,20,21,23 March 2018

PRACTICE AND PROCEDURE - Election Petitions – No case submissions – Rules of practice and procedure not available – Courts must be guided by the substantial merits of each case– Standard of prima facie usually employed in criminal cases used here as a guide. –Need for real justice to be observed - Section 217 Organic Law on National and Local Level Government Elections.

PRACTICE AND PROCEDURE- Election Petitions – The perceived errors of or omissions by electoral officials amounts to an irregularity – Section 151 (1) (d) OLNLLGE- Complaints including protests verbally or in writing from scrutineers must be addressed immediately –Scrutineers are entitled to be heard where protests raised in order to defray suspicions during scrutiny – Section 154 OLNLLGE.

PRACTICE AND PROCEDURE - Election Petitions – All electoral officials named in Form 66A and Form 66B including Scrutineers must be made to sign off these forms for final authenticity and correctness – Failure will amount to breaches and errors – Section 125 (electorates), Section 126 (elections) and Section 187C Constitution.

Cases Cited

Dr. Philip Basse v Electoral Commission of Papua New Guinea and John Tongri Hicky (2002) N 2340.
Dumal Dibiaso Incorporated land Group & 3 Others vs Kola Kuma and 10 Others. SC 805, 3rd November, 2015.
Holloway v Ivarato [1988] PNGLR 99.),
Kapi v Electoral Commissioner of Papua New Guinea [2003] PGNC 155; N2327,
Kuli v Apamia [2013] PNGNC 104; N5275 (15 July 2013)
Philemon Embel v Robert Kopaol (2003) N2460,
Reipa v Bao [1999] PGSC 53; [1999] PNGLR,
Steve Toap Hoap v Peter Welawe Iwei (2008) N3420,
Tomscroll v Electoral Commission of Papua New Guinea [2003] PGNC 147; N2349,

Counsel

Desmond Kipa and Rose Kelly for the Petitioner
Brendan Lai for the First Respondent
Joppo Simbala for the Second Respondent

DECISION

23 March 2018

1. GEITA J: This is a ruling on the substantive election petition filed by the Petitioner Delilah Pueka Gore, a candidate in the 2017 General Elections for Sohe Open Electorate Seat after the said seat was won by the First Respondent, Henry Jons Amuli and was declared as Member for Sohe Open Electorate. The First Respondent polled a total of 7713 votes and the Petitioner a total of 7524, with a losing margin of 189 votes.

2. On 21 February 2017 the Respondent's objection was dismissed and the petition proceeded to trial proper. Following that on 22 February 2017 after the close of the Petitioner's case, the Respondents' Lawyers gave notice that a no case submission would be moved on behalf of their respective clients. On 22 February 2017 the Respondents moved their no case application. Both parties were heard on their well-prepared lengthy submissions however the Court in the exercise of its discretion dismissed the no case application primarily on the reasons of good conscience and substantial merits of this petition with reliance on the terms of *Section 217 of the Organic Law. (real justice to be observed)*. In the absence of any rules and procedure in no case submissions in election petition cases, I have adopted the test of "*Prima Facie*" as is normally used in criminal cases as a guide here. I am therefore satisfied that there is sufficient evidence before me including questions which remains to be answered; hence I consider it good reasons why this case should not be stopped at this stage.

3. Might I add here that because there were no rules and procedure in place in election petition cases the Respondents' Lawyers had a field day in inviting the Court to rule on the substantive merits of the case in the absence of the Respondents' evidence? In any event the Lawyers were reminded that the Court will not be drawn into the substantive merits of the case without hearing the Respondents' evidence. Subsequently a ruling on *prima facie* was arrived at, as it was clear to the Court that there were some evidence to prove some grounds for invalidating an election. Such evidence need to be rebutted.

Petitioner's Evidence in Brief

4. This Petition is based entirely on grounds of errors of or and omissions of electoral commission officers pursuant to *Section 218 (1) of Organic Law*.

5. A total of five (5) instances of errors and omission were alleged to be committed by electoral officials during the scrutiny of votes which affected the result of the election for Sohe Open Electorate. They are enumerated hereunder:-

1. *Scrutineers unable to scrutiny ballot papers.*
2. *Irregularities at Exclusion No. 9.*
3. *Irregularities at Exclusion No. 29.*
4. *Irregularities at Exclusion No. 39.*
5. *Irregularities at Exclusion No. 40.*

6. The Petitioner's evidence came by way of six (6) affidavits deposed by herself and five other witnesses. Four of whom were former electoral officials who were trained and engaged by the Second Respondent in the recently

completed National General Elections 2017. All witnesses were subjected to cross examination.

Witness Delilah Peuka Gore

7. The evidence for the purpose of this judgment is the evidence led in the trial which may be conveniently summarized by setting out the findings of fact made by the Court.

1. Despite scoring less votes from Higaturu LLG which she considers her stronghold with a population of 32,910 according to the 2017 Common Roll, the Petitioner was leading with 5,258 votes at the close of the primary counts. The First Respondent polled 3,457 votes. A total of 42 candidates were in the race for the Sohe Open seat.
2. According to figures extracted from Form 66A and Form 66B, exclusion number 30 to 39 a total of 2,712 ballot papers were exhausted from the 2nd and 3rd preference ballot distributions.
3. On the 40th exclusion of candidate Paulinias Uhena, his 6,685 votes were distributed. Out of which the Petitioner received 228 and the First Respondent received 566 votes. A total of 5,891 ballot papers were ruled exhausted after Mr. Uhena's elimination. This was her second election and she was surprised to see that a huge amount of ballot papers were declared exhausted.
4. After Mr. Uhena's elimination the total ballot remaining in count were 15,237 enabling him to win the race with 7619 votes: an absolute majority of 50+1 votes. A total of 22,719 ballot papers were declared exhausted.
5. The First Respondent polled 94 votes above the absolute majority with 7713 and the Petitioner was 95 votes short of the absolute majority of 7524. A difference of 189 votes between the Petitioner and the First Respondent.

Witness 2: Gill Pueka

8. The witness was amongst one of three persons appointed by the Petitioner as her Scrutineer during the counting for Sohe Open Electorate. He was present throughout the whole counting period, conducted at Popondetta Secondary School Mess.

1. On 13 July 2017 when counting started the Assistant Returning Officer for Kokoda LLG Mr. Terrence Baurima took charge of the counting and told all scrutineers to remain 3 meters away from the counting table.
2. The witness was seated some 7 meters away to observe the sorting and counting proceedings behind the counters, looking after the Petitioner's tray.
3. As he stood up to observe primary count 9 a police personnel ordered him to sit and so he was unable to see clearly how the ballot papers were distributed and counted.
4. Terrence Baurima and his polling team from Kokoda LLG comprising of Lius Kene, Stanley Mukawa, James Pelege, Joe Kadi, Leo Sime, Wellington Aijo and Janet Onya were in control of all aspects of the counting process from sorting to bundling and putting away the exhausted ballot papers.
5. The witness said scrutineers complaints for verification of ballot papers were not heeded by Mr. Baurima and ignored all throughout the entire counting process.
6. On 19th July 2017 all the scrutineers and Wesley Duncan Porepeba protested against Mr. Terrence Baurima when he instructed for Team 23, Box 23 to be counted in the absence of the Presiding Officer Mr. Wesley Tirari. The counting was suspended for the evening and resumed the next day in the presence of the Presiding Officer.
7. At candidate exclusion 9 the witness again attempted to draw Baurima's attention for lack of verification of ballot papers but was shouted down by Mr Baurima: *"We are running out of time, we cannot waste our time getting your scrutineers to verify exhausted ballot papers"*.
8. At exclusion 28 the figures did not balance out on the tally board and it took Mr. Baurima and the counting officials three hours to sort it out.
9. After three hours when the figures were made up to balance the tally, no explanations were given to the scrutineers, including candidate Kilapat's scrutineer who asked for an explanation for the three hours delay.
10. The witness again disputed unaccounted ballot papers before they were being bundled and put away as exhausted at exclusion 29 of candidate Jeff Gore Agumi but was told by Mr. Baurima to take the matter to Court of disputed returns.

11. At exclusion 39 the witness says four (4) live ballot papers belonging to the Petitioner pulled out of the exhausted ballot papers by Mr. Wesley Tirari and handed over to be counted. When Mr. Tirari tried to get Mr. Baurima to recheck the exhausted ballot papers his requests were ignored.
12. When Paulinas Huena was eliminated at exclusion 40, with 6685 votes, 5891 of his votes were deemed exhausted with only 794 redistributed between the Petitioner and the First Respondent.
13. Mr. Baurima and his team of six (6) electoral officers were still in control of the counting process at this stage of counting. Ballot papers remain unconfirmed and verified before being bundled away and declared exhausted. The witness said he saw only six (6) batches of ballot papers put together and called out totalling 794 votes, with the remaining 5891 bundled away and declared exhausted. Terrence Baurima called two of those batches with the other officials calling the rest.
14. He said the 5891 exhausted ballot papers were not raised up and shown to the scrutineers before being stored away.
15. During the 40th exclusion he saw Stanley Mackenzie Mado who was looking after the First Respondent's tray putting away some ballot papers on the side of the tray of the First Respondent and he suspected that something was wrong.
16. When Stanley Mackenzie Mado attempted to raise a query, Mr Baurima retorted that no more queries would be entertained but to be taken to the Court of Disputed Returns.
17. The witness said after the calling of the final sixth batch he saw another caller Francis appear and called another batch of ballot papers in favour of the First Respondent as he watched helplessly with Mr Baurima standing in front and watching.
18. He said the 40th exclusion was completed within 30 minutes. He then went to the Petitioner's residence and informed her of all that he had observed and urged her to file the Petition.

Witness 3: Stanley Mackenzie Mado

9. This witness was a trained counting official for the scrutiny of votes and the declaration for the Sohe Open Electorate in the 2017 National General Elections. He was also an assistant presiding officer in the 2012 National

General Election and is therefore familiar with the general election process in regards to polling and counting. He gave testimony of how the counting tables were arranged and described the different roles played by electoral officials including scrutineers and the processes that were used. He deposed in his affidavit evidence as follows:-

1. During the 2017 National General Elections a total of 41 candidates nominated and contested the Sohe Electorate. Prior to the elections proper 78 counting officials were trained and engaged by the Electoral Commission to run the Sohe Open Electorate elections.
2. The Kokoda LLG Manager Mr. Terrence Baurima who was also the Assistant Returning Officer, together with six other officers from Kokoda LLG took charge of the entire counting process. These officials include, Lius Kene, Stanford Mukawa, James Pelege, Joe Kadi, Leo Sime, Wellington Aijo and Janet Onya.
3. At exclusion 9 ballot papers were grouped into two separate lots as instructed by Mr Baurima: one group as live allowable ballot papers and the other exhausted ballot papers. No proper checks and verification were made to those exhausted ballot papers before they were packed and stored away as was the normal process.
4. When Mr. Gill Pueka, the Petitioner's scrutineer verbally disputed the manner in which the exhausted ballot papers were processed Mr. Baurima angrily shouted back at him and said "*We cannot waste our time getting you scrutineers to verify exhausted ballot papers*". From that point onwards no proper verifications were carried out on exhausted ballot papers.
5. Similar verbal disputes by Peter Oresi, Malcus Esegeta and Fred Daingo's scrutineers went unheeded by Mr. Baurima.
6. At the 29th exclusion of candidate Mr. Jeff Agumi the witness saw Gill Pueka again raised verbal dispute as to why counting officials were exhausting ballot papers without verification and scrutiny by scrutineers. Mr. Baurima picked up an argument with Gill and told him to take the matter up with the Court of Disputed Returns.
7. At exclusion 39 of Peter Oresi on 25 July 2017 the witness saw Presiding Officer Mr. Wesley Tirari retrieve four live ballot papers belonging to the Petitioner from the exhausted ballot papers tray and handed over for counting. At the time the Petitioner was leading with 7296 votes, the First

Respondent running second with 7147 votes and Mr. Uhen in third place with 6685 votes.

8. On 25 July 2017 at 3.00 pm Paulinius Uhen was excluded at the 40th elimination. At the time I was minding the First Respondent's tray and responsible for counting his ballot papers collected from Mr. Uhen's eliminated votes.
9. When Paulinius Uhen's ballot papers were brought in to be counted I saw Mr. Baurima and his team of counting officials from Kokoda namely, Lius Kene, James Pepega, Leo Seme, Stanford (Stanley) Mukawa, Janet Onya, Wellington and some other presiding officers sorting the ballot papers into exhausted and live ballot papers.
10. Six (6) batches of allowable live ballot papers were sorted out and counted whilst 5891 were deemed exhausted but never verified by the scrutineers. The witness outlined what usually happens or ought to happen during counting from the time boxes were opened for counting through to the time results were posted on the tally board through to ballot papers being exhausted and stored away.
11. Callers for the six (6) live ballot papers came from within Mr. Baurima's chosen six (6) officials with Mr. Baurima who called Batch 1 and 3. Followed by Mr. Herbert Dengo who called Batch 2; Mr Kingsley Waimi called Batch 4 & Batch 6 and Mr. Francis Eripi who called Batch 5.
12. From Batch 1, Mr. Baurima commenced the final 40th exclusion counting and passed on the counted ballots to me and I noticed live ballot papers marked 2nd and 3rd Preferences for the Petitioner. I counted a total of 100 ballot papers and placed them face downwards on the side of the First Respondent's tray to be queried after the counts.
13. When I raised my hand to query why the 100 votes for the Petitioner were to be put in the First Respondent's tray Mr. Baurima told me to wait until all the Batches were counted.
14. During the calling of Batch 2 Mr. Baurima walked over to me and told me not to make any query whilst the remaining batches were counted. He went back, collected Batch 3 and began calling them out.
15. The witness said Mr. Baurima passed onto him 160 allowable ballot papers which had 2nd and 3rd Preferences marked for the Petitioner to put into the First Respondent's tray. The 160 ballot papers were added onto

the first 100 and placed faced downwards besides the First Respondent's tray to be queried later on and to be returned to the Petitioner's tray.

16. After calling Batch 3 Mr. Baurima approached the witness and told him not to raise any query until all six batches were called out.
17. After Batch 6 counting was completed the witness saw Francis Eriripa came to the scene and began calling votes from the 7th Batch. After calling he handed over to me 50 ballot papers in favour of the First Respondent however 6 votes were for the Petitioner.
18. By now the witness had collected a total of 266 votes belonging to the Petitioner, now placed on the side of the First Respondent's tray.
19. Mr. Baurima approached the witness again and directed him to count all the ballot papers including the ones put on the side and reminded the witness again not to raise any query but to refer them to the Court of Disputed Returns as they were running out of time since the results for Ijivitari Electorate and Oro Provincial Seat were already declared.
20. From the 40th exclusion I counted a total of 566 votes, from which the First Respondent only collected 300 second preference votes with 266 coming from the extra votes.
21. When the 566 votes were added to the First Respondent's progressive tally of 7147 votes his final total increased to 7713 votes. The Petitioner polled 228 votes which increased her final total from 7296 to 7524.
22. The First Respondent polled 94 votes above the absolute majority and the Petitioner 95 votes short of the absolute majority. The winning margin between the Petitioner and First Respondent was a total of 189 votes.
23. After the declaration of the First Respondent the witness deposed that he and his family have been constantly intimidated and issued death threats and warned not to say anything.
24. On 28 September 2017 death threats and obscene words were written on a piece of card board and thrown under the door of his house. Suspicious looking Toyota Land Cruiser 10 seater vehicles were also seen driving up and down their street, causing his family to live in constant fear.

Witness 4: Wesley Tirari

10. The witness is a village leader from Beama village in Oro Bay LLG, Ijivitari District in Northern Province. He has extensive experience in the conduct of elections since 2015 and was recently engaged again as a Presiding Officer for Team 23, Kokoda Rural in the recently completed 2017 National General Elections. He deposed in his affidavit as follows:-

1. Kokoda LLG polling was supervised by Assistant Returning Officer Mr. Terrence Baurima who was our immediate supervisor while Duncan Korapebe was the Returning Officer for Sohe Open Electorate. Most presiding officer including him were involved in the counting process after polling was completed.
2. I noticed that Sohe Electorate counting was dominated by presiding officers from Kokoda LLG headed by Mr. Baurima. The other officials include Lius Kene, Stanford Mukawa, James Pelege, Joe Kadi, Leo Sime, Wellington Aijo and Janet Onya.
3. The Returning Officer Mr. Duncan Korapebe was absent most of the time from the counting centre and did not supervise the counting. Baurima was in control of the counting centre.
4. The witness gave a description of how the counting centre was set up and described the process that was used from the time a box was brought in to be counted, votes tallied all the way to certain votes being exhausted and stored away.
5. He deposed that on 19th July 2017 around 6 pm Mr. Terrence Baurima instructed Team 23 ballot box to be opened in his absence but was advised against doing so by Mr. Duncan Korapebe, the Returning Officer with the support of other scrutineers. The counting of that box was suspended until the following day and counted in the presence of the witness.
6. He deposed of noticing ballot papers being exhausted without scrutiny and verification at exclusion 9 and Mr. Gill Pueka raising verbal dispute at the time. However Mr. Baurima shouted angrily at him and said, *“We cannot waste our time getting you scrutineers to verify exhausted ballot papers”*.
7. Scrutineers for candidates Peter Oresi, Malcus Esegeta and Fred Daingo also raised verbal disputes in the counting room however were disregarded by Mr. Baurima who told them to take their disputes to the Court of Disputed Returns.

8. At exclusion 29 of Mr. Jeff Agumi he saw Gill Pueka again verbally objected in the manner in which counting official were bundling ballot papers said to be exhausted and put away without proper scrutiny and verification by Scrutineers but Mr. Baurima picked up an argument with him and told him to take up the matter with the Court of Disputed Returns.
9. At exclusion 39 he assisted other counting officials (Joe Kadi, James Pelega, Leo Seme, Stanley Makawa, Janet Onya, Lius Kene, Namalock, Wellington Aijo, James Tura, Herbert Dengo, Kingsley Waimi, Ezekiel Rasibori, Francis Eriripa) and sorted the ballot papers into six batches and left them on the table to be called by counters. It was the duty of the Caller to call the ballot papers, whether exhausted or live, show to the scrutineers for viewing and verification before handing them over to the counters to be placed in their appropriate boxes.
10. When he noticed that some of the bundles of ballot papers on the table ready to be counted were put away without scrutiny and verification, he randomly picked up a bundle of exhausted ballot papers, checked through and discovered four live or allowable ballot papers which had 2nd Preference choice for the Petitioner.
11. He gave the four (4) live ballot papers to Joe Kadi to be put in Box. 47 tray to be counted for the Petitioner. Suspecting that there could be more live ballot papers in the exhausted tray the witness asked Mr. Baurima to recheck all the exhausted ballot papers and verify them but his request was ignored by Mr. Baurima.
12. The witness said has experience from past elections was that ballot papers were fully verified before being put away as exhausted. However this did not happen during the counting for Sohe Electorate during the 2017 National Elections. He said this was more so during exclusion 39 and 40 where ballot papers were just bundled and dumped as exhausted without any verification by the counting officials which resulted in a huge volume of ballot papers being put away as exhausted.
13. The witness deposed that after exclusion the Petitioner was leading with 7296 votes with the First Respondent running second with 7147 votes. On 25 July 2017 the candidate running at third place, Mr. Paulinias Ukena was eliminated at the 40th exclusion.
14. He gave an account of the six batches and the officials from Kokoda led by Mr. Baurima who were instrumental in the sorting, counting and calling of those batches.

15. He said after the final sixth (6) batches were called by Mr. Kingsley Waimi, he saw Francis Eriripa holding on to the seventh (7) batch of ballot papers and began calling them.
16. The witness said after the calling of the 7th Batch, the ballot papers were counted and the First Respondent's progressive tally increased from 7147 votes to 7713 votes, having collected 566 votes. The Petitioner collected 228 votes which brought her total to 7524.
17. He said at the 40th exclusion he saw Stanley Mackenzie Mado sitting beside the First Respondent's tray and was the one who counted the final ballot papers for the First Respondent that led to his win.
18. He said since they were part of the Electoral Commission officials he could not say or do anything other than to observe and comply with instructions from Mr. Baurima and senior officials.

Witness 5: Ezekial Rasibori

11. The witness is self-employed from Gona village, Oro Bay LLG, Ijivitari District. He was engaged as a Presiding Officer by the Electoral Commission for Team 13, Higaturu LLG in the 2017 National Elections. He deposed in his affidavit as follows:

1. As a Presiding Officer I was also engaged in the counting for Sohe electorate and was present to witness the opening and counting of Box number 13 that was under his supervision.
2. During the exclusion counts, I observed that proper process of counting and exhausting of ballots were not followed by the Assistant Returning Officer Mr. Terrence Baurima and other counting officials.
3. He said that ballot papers were being bundled, labelled and dumped as exhausted papers without disclosing and proper verification.
4. The witness said at exclusion 39, he also assisted other counting officials sort out the ballot papers and placed them in six (6) batches ready to be called by callers.
5. He noticed that some of the bundles of ballot papers left on the table were put away as exhausted ballot papers without calling and verification by the scrutineers.

6. He said at exclusion 39 of candidate Peter Oresi he saw Mr. Wesley Tirari, a Presiding Officer pull out four (4) live ballot papers for the Petitioner and handed them over to be counted.

Witness 6: Kingsley Waimi

12. The witness deposed that during the 2017 National Elections, he was employed and engaged as a Presiding Officer for Team 3, Kaiari Ward 4 to Korisatata Ward 5, and Tamata LLG Sohe District in Northern Province. He was also engaged in counting duties for Sohe Open Electorate after the close of polling on 26 June 2017 in which 42 candidates nominated to contest the Sohe Open Electorate.

1. The witness said as part of their induction training prior to the elections they were taught how to go about counting First, Second and Third Preference votes during primary counts and the elimination process and the Limited Preferential Voting system. (LPV)
2. At exclusion 39, I witnessed Mr Wesley Tirari pull out four live ballot papers marked for the Petitioner from the exhausted ballot papers tray. The live ballot papers were handed over to be counted.
3. At the 40th exclusion there were six (6) batches of allowable or live ballot papers. From the 4th and 6th Batches I called according to their preferences market on them, there were no exhausted ballot papers.
4. After I called the 6th Batch, the table was clear of any more ballot papers for calling when I saw Francis Eriipa approached from the front table with another batch of ballot papers which made me suspicious but I did not say anything. Francis Eriipa then called the suspicious batch he held.
5. The distribution of the 40th exclusion was surprisingly completed in less than an hour.
6. On 25th July at about 4.00pm the First Respondent was declared winner.

Witness 6: Francis Eriipa

13. The witness, a subsistence farmer from Hohorita village in Sohe District was recently engaged as a Presiding Officer for Team 12 for polling places Papoga, Jijau and Waru in Ward 20 and Gigira, Ongoho and Oere in Ward 21 Higaturu LLG. After polling he continued on for counting duties for Sohe Open seat which was held at the Popondetta Secondary School. The witness deposed as follows:-

1. Polling for Sohe Electorate commenced on 26 June 2017 and ended on 11 July 2017 with 42 candidates who nominated to contest the Sohe Open Electorate seat.
2. Prior to the elections I attended an induction course organized by the Election Manager Peter Malaifeope with 78 counting officials on how to go about with counting First, Second and Third preference votes during primary counts including the elimination process and the Limited Preferential Voting system. We were rostered into two shifts with 39 officials per shift for Sohe Electorate.
3. I undertook calling duties from the preliminary counts all the way to the exclusion counts when called upon by Mr. Baurima to do so. Mr. Baurima was in control of the entire counting process for Sohe Electorate.
4. At the 40th exclusion of candidate Paulinias Huena (Box19) I was delegated to call Bath 5 and Batch 7 which was the final batch. I noticed certain irregularities which were not normal as to what we were initially directed by the Electoral Commission management during briefings.
5. There were six (6) batches of allowable or live ballot papers sorted out ready for calling and distribution from which Mr. Baurima selected me to call the 5th Batch. After calling I returned to the counting table.
6. Mr. Kingsley Waimi took over and called batch 6 and when he had finished Mr. Baurima approached me and told me to go count the last batch as I was doing okay: *“Son yu callim ol paper orait so callim displa last batch.”*
7. I was not sure where the 7th Batch came from but I went ahead to call them as directed for the First Respondent. There were 50 ballot papers all together and I called them in favour of the First Respondent and passed it to his tray.
8. When I completed calling this batch, candidate number 50, Henry Jons Amuli was declared winner after the 50%+1 absolute majority was reached.
9. To my understanding and the procedures we were following is that; when ballot papers were called but accidentally sent to the wrong tray by the counting officials when handling the ballot papers, they (ballot papers) were instantly checked by other counting officials looking after the trays and then queried after the calling was completed and sent back to the correct candidate trays. This did not happen in this case and because of

the insistence of Mr. Baurima, ballot papers were not properly verified before being sent to the tray of Box No. 50.

10. From what I observed Mr. Baurima was continuously switching from his delegated duties as an ARO and involving himself with actual counting, sorting and bundling of ballot papers as well as calling duties when there were enough personnel assigned for these duties.

Respondents' Evidence

14. At the outset of the Respondents' calling their witnesses, the Petitioner's Lawyer Mr. Kipa objected to the calling of and use of seven (7) affidavits, intended to be relied on by the Respondents. The Petitioner's Notice of Objection was filed on 24th January 2018 and served on the Respondents. It was made pursuant to s.35 (2) of the **Evidence Act**. Those witnesses included Mr. Terrence Baurima, Wellington Haijo, James Pelega, Joe Kadi, Louis Kene, Leon Sime and Stanford Mukawa.

15. As a result of the Notice of Objection, all counsels were heard. The gist of the Petitioner's objections as I understood is that all those persons that the Respondent intended to call were former Electoral Official staff and it was not proper to have them on his side and on the First Respondent's side and for him to use them.

16. Mr. Lai for the First Respondent argued that the Petitioner was allowed to call witnesses of her choice and the process went through with very little objection and questioned why the Respondents choice of witnesses should also be questioned. He asked that in all fairness they should be allowed to call witnesses of their choice, irrespective of where they come from. And basically submitted that they were to assist the Court and that should be noted by this Court.

17. Now the second Respondent's Lawyer, Mr. Simbala also assisted Mr. Lai by submitting that the witnesses were free to choose who to support and that the Respondent was at liberty if he so wishes to call witnesses from amongst them. In support of his arguments he invited Court to look at a Supreme Court 2004 SC case ***Dumal Dibiaso Incorporated land Group & 3 Others vs Kola Kuma and 10 others. SC 805***, 3rd November, 2015. "Basically as I understood from that case; Certain landowners disputing which certain witnesses were to be called however the National Court or the lower court ruled against them and the Supreme Court said the lower Court was wrong in doing that because the witnesses, irrespective of whether they are for or against as long as they assist the Court and so those witnesses were allowed".

18. Having heard all Councils, the Court ruled against the objection and allowed the Respondents to call witnesses of their choice so long as they assisted the court. The Court's ruling was primarily guided by *Section 217 OLNLLGE*. (Real justice to be observed.)

19. That hurdle cleared, the First Respondents called evidence. Such evidence came by way of seven (7) affidavits deposed by the seven witnesses. Ironically all of whom were former electoral officials who were trained and engaged by the Second Respondent in the recently completed National General Elections 2017. The Second Respondent elected not call any witnesses. All witnesses were subjected to cross examination.

Witness 1 Terence Baurima

20. The witness is the LLG Manager for Deboin village, Tamata LLG, Sohe Electorate, Oro Province. In 2017 he was appointed Assistant Returning Officer for the Sohe Open Electorate and was actively involved in the entire election. The four Assistant Returning Officers including the witness were present during the traditional speech making ceremony by the Acting Provincial Administrator Mr. Tako Gwae and other leaders.

21. He said the counting of ballot papers was under the direct supervision of Returning Officer Mr. Duncan Korapeba and not him as alleged by the Petitioner and her witnesses.

22. He confirms that 78 counting officials were appointed and were rostered on two shifts of 39 counting official and 40 scrutineers present all the time during counting.

23. He deposed that the Returning Officer was present at all times during the entire counting period save to take short periods of absence to take a nap. During those times any one of those four Assistant Returning Officers were nominated to stand in for him. The witness maintains that he was not the only one who stood in for the Returning Officer all the time as alleged by the Petitioner.

24. The witness stated that the Returning Officer was not responsible for following up on counting officials as Assistant Returning Officer Mr. Suckling Derari was responsible for that job.

25. The witness deposed that prior to counting, the Petitioner's scrutineer Mr. Gill Pueka and other scrutineers were briefed by the Returning Officer Mr. Duncan Korapepe on some guidelines set down by the Electoral Commissioner on their roles and responsibilities during the counting process. The guidelines include:

- a) The scrutineers shall not touch a ballot paper;
- b) The scrutineers shall not influence a counting official in the performance of his or her duties at the scrutiny;
- c) The scrutineers shall not be involved in behavior that disrupts the conduct of the scrutiny;
- d) The scrutineers shall obey the lawful instructions of the Returning Officer;
- e) The scrutineers shall not interfere or attempt to interfere with a counting official;
- f) The scrutineers shall not speak to any accounting official unless she or she first addresses the Returning Officer;
- g) The scrutineers shall not, in accordance with the Declaration of Secrecy he or she may not communicate at any time to any person any information obtained at the counting center;
- h) The scrutineers shall, at the counting of votes not attempt to ascertain any number of any ballot paper or communicate any such information obtained at any such counting as to the candidate for whom any vote is given on any particular ballot paper.

26. The witness maintained that at no time did he warn Mr. Gill Pueka from coming any closer to the counting table, adding that this was a false allegation by the Petitioner.

27. The witness refuted allegations that he told scrutineers to stay three (3) meters away from the counting table.

28. Similarly he refuted allegations that he selected six people who controlled the scrutiny of the ballot papers at any one time. Adding that counting officials were appointed by the Provincial Electoral Office with 39 of them present during any shift.

29. He maintained that all allegations made against him in the Petition were false and denied that he abused his position as the Assistant Returning Officer to interfere with the counting process in the Sohe Open Electorate in the 2017 National General Elections.

30. The witness maintained that the entire counting process for Sohe Open Electorate was done with transparency and denied any tampering and or illegal practices by him or counting officials as alleged by the Petitioner which assisted the First Respondent to tally more votes than the Petitioner.

31. He said the First Respondent won because he consistently scored more votes in the elimination process by picking up more second and third preference votes than the Petitioner.

32. In cross examination it was general accepted that the witness and those electoral officials named in the Petition all live with at Kokoda Station in close proximity with the First Respondent, also at the Station. As to the 5 allegations levelled against him the witness maintained that they were all not true.

33. In cross examination Mr Baurima admitted receiving K50, 000.00. Paid into his personal account but denied using any of those monies. He said those monies were paid to service providers who took part in the Kokoda Day celebrations.

34. Mr Baurima then gave a length explanations that if the Petitioners Lawyer was assuming that the payments were received from the First Respondent, he asked to be placed on record that that was not so and he did not benefit from those monies.

Witness 2: Louis Kene.

35. The witness is the Assistant District Administrator for Hamara village in Kokoda LLG in Sohe Electorate. He was engaged as a counting official and assisted in the Sohe Open Electorate in the 2017 National General Elections. He deposed that counting started on 13th July 2017 and concluded on 25th July 2017 when the First Respondent was duly elected as member for Sohe Open Electorate, defeating the Petitioner.

36. He gave evidence of talks made by the Provincial leaders prior to the counting in which all counting officials, including the four Assistant Returning Officer attended.

37. He deposed that the counting of ballot papers were under the direct supervision of the Returning Officer Mr. Duncan Korapebe and not Mr Terence Baurima as alleged by the Petitioner and her witnesses. He confirmed that 78 counting officials were engaged with 39 officials per shift for Sohe Open Electorate counting.

38. He confirmed that the Returning Officer was present at all times throughout the counting period save for short periods of absence in between change of shifts for a quick nap.

39. In his short absence the Returning Officer would appoint anyone of his four Assistant Returning Officers to stand in for him, adding that Mr Terence Baurima was not the only one who stood in for the Returning Officer all the time as alleged by the Petitioner.

40. He said that Returning Officer was not responsible for following up counting officials entitlements. To all that job was assigned to Mr. Suckling Derari, the Assistant Returning Officer.

41. The briefings by Mr. Duncan Korapebe to all scrutineers, including Mr. Gill Pueka prior to counting was a mirror of what was stated by Witness Terence Baurima. (Guidelines from Electoral Commissioner Mr. Patilias Gamato.)

42 The witness refuted allegations that Mr. Terence Baurima told scrutineers to stay three meters away from the counting table.

43. He refuted allegations that Mr. Terence Baurima selected 6 people who controlled the scrutiny, saying that they were appointed by the Provincial Electoral Office.

44. The witness maintained that all allegations made against Mr. Terence Baurima were false and added that he did not abuse his position as Assistant Returning Officer to interfere with the counting process in the Sohe Open Electorate in the 2017 National General Elections.

45. He deposed that the entire counting process for Sohe Open Electorate was done with transparency and there was no tampering and or illegal practices committed by counting officials which assisted the First Respondent to tally more votes than the Petitioner.

46. The witness said the First Respondent won because he consistently scored more votes in the elimination process by picking up more second and third preference votes than the Petitioner.

47. In cross examination the witness affirmed that he was part of the Kokoda Polling Team and they all live and work at Kokoda Station. He further agreed that the First Respondent also lives within the same Kokoda Station locality.

48. When questioned whether it was not possible for him to say with certainty that the Returning Officer may not be at the counting center during the times he was not rostered the witness said he was certain that the Returning Officer was present at all times.

49. He agreed during cross examination that he was aware of the five allegations and whatever was contained in his affidavit were his responses.

50. When he was referred to his bold denials and assertions in certain parts of his affidavit especially in paras 11, 12, in support of Terence Baurima he maintained that whatever was contained therein were his evidence given to the best of his abilities.

51. When questioned that it was not possible for him to vouch for Mr Baurima's action as he may be on shift at times the witness said he was there all the time.

Witness 3: Stanford Mukawa

52. Witness Stanford's evidence in Court through his Affidavit market Exhibit "C" is the exact replica in content to those of Witness Louis Kene, Exhibit "B". I will take judicial notice of his evidence; hence see no utility in reproducing his evidence herein. However pertinent points of his oral evidence which came into court through cross examination is recorded hereunder.

53. Since witness Mukawa's evidence was the exact replica with minor cosmetic changes his responses in cross examination were almost similar to those answers given by witness Louis Kene. In a nutshell he denied any wrong doing by Mr Baurima and that he had come to court to clear his name and not others.

54. In cross examination they all confirmed as engaged during the scrutiny of votes for Sohe Open and witnessed the counting. They all confirmed they were aware of the specific allegations made in the Petition and that they had read the Petition and the affidavit evidence of the Petitioner's witness and that what was in their affidavit was in response to those allegations.

55. All this witnesses confirmed that they were all part of the Kokoda Polling team who then became part of the counting team and were also involved in the elimination. In fact at paragraph 2 of their affidavits they all say that they were actively involved in the counting process from the commencement to its conclusion. Yet, in their evidence they decide not to contradict or refute the specific allegations levelled against them by the Petitioners' witnesses.

56. These witnesses evidence are all tainted and prejudiced. They instead of giving evidence for the Second Respondent, have gone ahead to defend the First Respondent's return. Obviously each witness would have seen or heard or perceived things quite different from the other. However, this identical nature of their evidence demonstrates the lack of truthfulness and veracity to their statement.

Witness 4 : James Pelega

57. Witness James Pelega's evidence in Court through his Affidavit market Exhibit "D" is the exact replica in content to those of Witness Louis Kene, Exhibit "B". I will take judicial notice of his evidence; hence see no utility in reproducing his evidence herein. However pertinent points of his oral evidence which came into court through cross examination is recorded hereunder.

58. Similarly the tenor of witness Pelega's responses in cross examination where akin to those of earlier witnesses.

59. In cross examination they all confirmed as engaged during the scrutiny of votes for Sohe Open and witnessed the counting. They all confirmed they were aware of the specific allegations made in the Petition and that they had read the

Petition and the affidavit evidence of the Petitioner's witness and that what was in their affidavit was in response to those allegations.

60. All these witnesses confirmed that they were all part of the Kokoda Polling team who then became part of the counting team and were also involved in the elimination. In fact at paragraph 2 of their affidavits they all say that they were actively involved in the counting process from the commencement to its conclusion. Yet, in their evidence they decide not to contradict or refute the specific allegations levelled against them by the Petitioners' witnesses

Witness 5 : Joe Kadi

61. Witness Joe Kadi's evidence in Court through his Affidavit marked Exhibit "E" is the exact replica in content to those of Witness Louis Kene, Exhibit "B". I will take judicial notice of his evidence; hence see no utility in reproducing his evidence herein. However pertinent points of his oral evidence which came into court through cross examination is recorded hereunder.

62. Similarly the tenor of witness Kadi's responses in cross examination were akin to those of earlier witnesses. In his case he confirmed receiving K50, 000.00 paid into his personal account as cash advance from Sohe District Authority General Expense Account.

63. He said the funds were to be used to organize for the First Respondents welcome ceremony. The witness also confirmed similar huge cash payments to Richmond Taylor, an amount of K50, 000.00 and Leo Sime another K45, 000.00, all for the purposes of organizing a welcome ceremony for the First Respondent.

64. The witness said in cross examination that what's contained in his Affidavit were his answers in response to the allegations made against him.

65. When put to him that at paragraphs 7, 10, 11, 12 and 13 he was making general assumptions and speaking for others instead of only himself, he tried to qualify what he said in the statements and answered them as statements of what he saw and not of others.

66. He is not an independent witness. He gave his evidence for the First Respondent instead of the Second Respondent demonstrates his willingness to do anything for the First Respondent.

Witness 6: Leon Sime

67. Witness Leon Sime's evidence in Court through his Affidavit marked Exhibit "F" is the exact replica in content to those of Witness Louis Kene, Exhibit "B". I will take judicial notice of his evidence; hence see no utility in reproducing his evidence herein. However pertinent points of his oral evidence which came into court through cross examination is recorded hereunder.

68. In cross examination the witness confirmed that he received K50, 000.00 as well from the District CEO following the request made by the First Respondent on 15th August 2017. He confirmed he was an HEO at the time. Initially he denied receiving the money but when prodded in cross examination and pressured to read the contents of a letter written by the First Respondent he admitted receiving such monies. (16th August 2017 Subject: Authority for Payment) The letter clearly showed that he was lying as the letter was signed by the First Respondent.

Witness 7 : Wellington Haijo

69. Witness Wellington Haijo's evidence in Court through his Affidavit marked Exhibit "G" is the exact replica in content to those of Witness Louis Kene, Exhibit "B". I will take judicial notice of his evidence; hence see no utility in reproducing his evidence herein. However pertinent points of his oral evidence which came into court through cross examination is recorded hereunder.

70. In cross examination they all confirmed being engaged during the scrutiny of votes for Sohe Open and witnessed the counting. They all confirmed they were aware of the specific allegations made in the Petition and that they had read the Petition and the affidavit evidence of the Petitioner's witness and that what was in their affidavit was in response to those allegations.

71. All these witnesses confirmed that they were all part of the Kokoda Polling team who then became part of the counting team and were also involved in the elimination. In paragraph 2 of their affidavits they all said that they were actively involved in the counting process from the commencement to its conclusion. Yet, in their evidence in cross examination they decided not to contradict or refute the specific allegations levelled against them by the Petitioners' witnesses

The Law

72. Section 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 the poll or the return of the writ, or on account of the absence or an error of, or an omission by, an officer which did not affect the result of the election.

73. Section 151. Conduct of scrutiny. (OLNLLGE)

The scrutiny shall be conducted as follows:—

- (a) it shall commence as soon as voting in the electorate is completed; and*
- (b) any scrutineers duly appointed under Section 150 and any persons approved by the officer conducting the scrutiny, may be present; and*
- (c) all the proceedings at the scrutiny shall be open to the inspection of the scrutineers; and*
- (d) the scrutiny may be adjourned from time to time as necessary until the counting of the votes is complete.*

74. Section 152. Action on Objections to Ballot-papers

- (1) If a scrutineer objects to a ballot-paper as being informal, the officer conducting the scrutiny shall mark the ballot-paper "Admitted" or "Rejected", according to his decision to admit or reject the ballot-paper.*
- (2) Nothing in this Section prevents the officer conducting the scrutiny from rejecting a ballot-paper as being informal although it is not objected to.*

75. Section 168. Scrutiny of votes in Elections. (OLNLLGE)

- (1) Subject to this section and the Regulations the result of an election shall be determined by scrutiny in the following manner:—*
 - (a) the Returning Officer shall ascertain the total number of first preference votes given for each candidate;*
 - (b) the candidate who has received the largest number of first preference votes, if that number be an absolute majority of votes, be elected;*
 - (c) if no candidate has received an absolute majority of votes, a second count shall be held;*
 - (d) on the second count the sealed parcels of ballot-papers shall be opened by the Returning Officer, the candidate who has received the fewest number of first preference votes shall be excluded and*

each ballot-paper counted to him shall be counted to the candidate next in order of the voter's preference;

(e) where a candidate then has an absolute majority of votes he shall be deemed to be elected, but where no candidate then has an absolute majority of votes the process of excluding the candidate who has the fewest votes and counting each of the ballot-papers to the un-excluded candidate next in order of the voter's preference shall be repeated until one candidate has received an absolute majority of votes;

(f) ...;

(g) ...;

76. Section 169. Further provisions relating to Scrutiny. (OLNLLGE)

The officer conducting the scrutiny shall, in respect of ballot-papers scrutinized by him—

(a) place in a separate parcel all the ballot-papers which have been rejected as informal; and

(b) place in a separate parcel the un-rejected ballot-papers; and

(c) seal up the parcels and endorse on each parcel a description of its contents, and permit any scrutineers present, if they so desire to countersign the endorsement.

77. Section 50. (1) (d) Constitution

Special Rights of Citizens.

Right to vote and stand for public office.

(1) Subject to the express limitations imposed by this Constitution, every citizen who is of full capacity and has reached voting age, other than a person who—

(a) ...

(b) ...

(c) ...

(d) to vote for, and to be elected to, elective public office at genuine, periodic, free elections; and

(e) to hold public office and to exercise public functions.

(2) The exercise of those rights may be regulated by a law that is reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind.

What is Scrutiny?

78. The Courts understanding of the phrase “proceedings of scrutiny” in *Section 151 (c) OLNLLGE* has been adequately stated by His Honour Injia J in the case of *Dr. Philip Basse v Electoral Commission of Papua New Guinea and John Tongri Hicky (2002 N 2340*. I quote what His Honour said and adopt and apply his views in this case. His Honour said:

“ In my view “proceedings at the scrutiny” means the whole process of “counting” the votes cast at the polling in an election. And “open to inspection by scrutineers” means that the counting of votes is an openly transparent process which takes place in public and in the presence of and witnessed by scrutineers: See s. 154 for the procedural steps at the counting. And “inspection” cannot mean that every ballot paper in a ballot box for a particular candidate, to be allocated to a particular candidate and subsequently counted, is to be made available to every scrutineer, for physical inspection before it is counted, for it would be impractical to complete the counting process within reasonable time. I do not think that is the intention of s. 151(c). But in a situation where a scrutineer(s) were to witness certain questionable activities say in the distribution of ballot papers to individual candidates, which would raise suspicion in the scrutineer’s mind that the “scrutiny” or “counting” of the votes is not being done properly in accordance with s. 154, then the onus is on that scrutineer(s) to raise or register an objection, before the votes are counted or after the votes are counted but before the winner is declared under s. 168, and make a request to the proper counting official to inspect the ballot papers placed against each candidate in their respective “trays”. If no such objection and/or request is made, then the electoral official is entitled to assume that the votes so allocated to each candidate remain unchallenged, and proceed to count them and declare the result of the election. Thereafter, it would not be open to a scrutineer representing a candidate to later complain of the votes for a particular candidate being wrongly allocated to different candidates. Such an assertion would lack proper basis and at the most, be speculative.”

If they were so denied, then it would be proper to plead that they were “unlawfully and irregularly” prevented from scrutinising and inspecting the ballot papers in contravention of s. 151(c).”

Submissions for and against in brief.

Final Submissions in Brief for the First Respondent – Mr. Brendon Lai

79. Mr. Brendon Lai on behalf of the First Respondent submitted that the First Respondent’s witnesses denied all allegations in a general manner. He submitted that the five allegations leveled against them were not supported by

evidence. As regards the 266 “live” ballot papers allegedly counted in favour of the First Respondent, he says that no other statements or witnesses were called to verify that and stated that election officials who committed those were not called. As to the four “live” ballot papers discovered by Wesley Tirari he submits that those 4 “live” papers which were extracted had already been counted in favour of the Petitioner and that has increased her lead. And so any assertions made on those 4 “live” ballot papers should not amount to errors and omissions because they have not affected the results.

80. In general he maintained that if there were assertions of the First Respondent benefiting from those alleged irregularities, the Petitioner also benefitted likewise. Mr. Kipa however took issue with those assertions in his submissions. (*I will come to that*).

81. As regards Form 66A and Form 66B, Mr. Lai submitted that the Petitioner was not prejudiced by those alleged acts, again directly saying that they were of very little utility to the counting and maintains on behalf of the Respondent that all Respondent’s witnesses should be believed as their evidences before this Court were consistent and not irregular and asked that the Petition be dismissed or disallowed. He added that the Petitioner in this case has failed to clearly establish the errors and or omission’s complained off. Mr. Lai submitted that the evidence remains untrustworthy and unable to prove errors and or omissions and submits that the 5 witnesses for the First Respondent have denied all allegations. He said that the electoral process more so in the Form 66A and Form 66B were submitted to the Electoral Commission showing results of the elections for Sohe and those documents do not show substantial errors or omissions on the part of electoral officials.

82. As for discrepancies shown during cross examination Mr. Lai submitted on behalf of the First Respondent that those discrepancies were the responsibility of the Returning Officer and not the Assistant Returning Officer and so were off no real value to the question of errors and omissions.

83. As to the question of Form 66A and Form 66B, I state here that I quite disagree with that assertion whereby I will come to that later during the body of my judgment. At the end of the day the Respondent submits that the Petitioner has failed to show how the results of Sohe Open Electorate were affected and maintains that if Stanley Mackenzie Mado’s evidence cannot be believed on the “live votes” no others were called to assist Mado and submits that this Petition should fail and be dismissed with costs. All the grounds alleged in the Petition be dismissed and asked for costs and for the deposit to be returned.

Final Submissions in Brief for the Second Respondent – Mr. Joppo Simbala

84. I also heard Mr. Simbala in his brief address basically echoing and supporting what Mr. Lai has said as their submissions. As I understood it, their evidences and submissions were supportive of each other. In short the First Respondent's Lawyer argued that the Petitioner's evidences together with those of her witnesses bears very little weight and urged Court to reject their evidence. He said all evidence from Stanley Mackenzie Mado, Wesly Tirari, Ezikiel Rasibori, Kingsly Waimi, and Francis Eriripa should be disregarded as they carried no weight or very little weight and should all be dismissed. He submitted that the Petitioner's evidence in its entirety failed to prove that there were errors and omissions and submits that the Petitioner's evidence in substance were inconsistent, conjectures speculations and generally unreliable and all their evidence not to be believed. Instead invited the Court to believe the First Respondent's evidence and asked for this Petition to be dismissed. As regards the signatures by scrutineers on Form 66A and Form 66B and the certification Mr. Simbala for the Respondent's submitted that those were immaterial considerations and in no way affected or amounted to errors and omissions and were of very little utility.

Final Submissions in Brief for the Petitioner – Mr. Desmond Kipa

85. I also looked at Mr. Kipa's submissions for the Petitioner. In a nutshell submitting that the Petitioner's evidence was solid in that the whole of the Petitioner's witnesses remain intact, not rebutted, not tainted, as no evidence was called by the Respondents to rebut. He said the Petitioner's witnesses remained consistent in their evidence. Mr Kipa expressed disdain in the manner in witness the primary witness for the Respondent Mr. Terence Baurima was called to give evidence? The Petitioner's Lawyer submitted that Mr. Baurima amongst all witnesses ought to come to Court with concrete evidence to disprove all those allegations which were leveled at him however he has not done that. Instead he had come to Court with generalized statements refuting all those allegations saying that to his knowledge the Sohe Open Electorate was conducted in a fair manner with no irregularities, no errors and omissions. As to the evidence from other witnesses Mr. Kipa submitted that they were all similar in content. All evidence contained in the affidavit of the witnesses, thus referring to Louis Kene, James Pelega, Stanford Mukawa, Leo Sime and Wellington Hajjo to be almost identical. In light of the similarities he submitted that any submissions made in his view covered them all. He submitted that all those witnesses were not independent witnesses. Although they admitted certain things they were not independent witnesses.

86. Mr Kipa however qualified that by saying that although collaboration was not a requirement, however states and quotes the case of *Kuli vs Apamia*. In the absence of that independent witnesses who ought to be called to discredit the State witnesses. In short arguing that the Respondents' witnesses, the evidence before this Court should all be rejected as they all have a motive to tell lies and their evidence remain not credible, unreliable, not independent and tainted. And more so; their motive questionable, asking this Court therefore to consider the Petitioner's evidence ahead of the Respondents' evidence.

87. Mr. Kipa again raised the issue of all the witnesses for the Second Respondent now turn witnesses for the First Respondent and submitted that under those circumstances they cannot be said to be independent witnesses and all their evidence identical in nature and in his words they demonstrated lack of truthfulness and veracity to their statement and evidence. And submitted that they should be rejected.

Court Analysis of Issues

88. I will retain the grounds as set out in the order they were presented in the petition and discuss them accordingly followed by my findings as I see them. Where necessary or in places where the grounds overlap I will group them into issues as I see them giving appropriate issue headings. Other grounds surfacing during the course of evidence will also be identified and discussed against evidence.

(1) Was the scrutiny open to inspection by scrutineers?

(2) Irregularities at Exclusion Number 9

89. The Respondent's argued through their Witness Terence Baurima that all the allegations made against him were false and he denied abusing his position as Assistant Returning Officer to interfere with the counting process in the Sohe Open Electorate in the 2017 National General Elections.

90. He argued that the entire counting process was done with transparency and vehemently denied any tampering and or illegal practices committed by him or by counting officials which assisted the First Respondent score more second and third preference votes during the elimination process.

91. In cross examination Mr Baurima agreed that five allegations were levelled against him by the Petitioner and her witnesses however he vehemently stated that they were all false and not true.

92. When questioned during cross examination that all his replies to the five allegation were not specific answers, he maintained the same wholesale approach that all five allegations made against him were lies and not true.

93. However evidence before Court shows that:-

- At least four (4) instances of scrutineers' complaints for verification of ballot papers made were not heeded, by Mr. Terence Baurima all throughout the entire counting process. Witness Gill Pueka's first attempt to draw Terence Baurima's attention for lack of verification at exclusion number 9 was met with a shout down by Mr Baurima. His evidence was corroborated by Witness Stanley Mackenzie Mado and Wesley Tirari who attested that no proper checks and verifications were made at exclusion 9 when ballot papers were deemed exhausted and packed away at Mr. Baurima's instructions.
- There is no evidence from Mr. Terence Baurima or any of the Respondent's witnesses who challenged the corroboration and the lack of checks and verifications.
- Although they all maintained in cross examination that they each were apprised of the five allegations leveled against Mr Terence Baurima and against them, none of them were able to offer any credible evidence rebutting this allegation.
- If anything, all Respondents witnesses only made sweeping statements as regards the transparency of Sohe Open Electorate and likewise denied any tampering and or illegal practices.

The Law

94. Section 147 OLNLLGE states that the result of the polling shall be ascertained by scrutiny. Section 151 OLNLLGE states that the scrutiny shall be conducted as soon as voting in the electorate is completed. It also allows for any scrutineers duly appointed under s. 150 and any persons approved by the officer conducting the scrutiny may be present. *Section 151 (c)* states that all the proceedings at the scrutiny shall be open to the inspection of the scrutineers.

95. Although "scrutiny" has not been given a definitive meaning, case law developed over time has given meaning to scrutiny and what should amount to an open and proper scrutiny process. In the case of *Steve Toap Hoap v Peter Welawe Iwei* (2008) N3420, Sevua J said and I quote para. 48 & 49:-

"The counting of votes is subject to scrutiny in accordance with Part XIV of the **Organic Law**. *By s. 151 (1) (c)*, all the proceedings at the scrutiny must be open to the scrutineers' inspection. There are very good public policy reasons that they must be so. One of the reasons that scrutineers are appointed is that they must carefully scrutinize the counting of votes so that the integrity of the counting process is not jeopardized or undermined by any unlawful conduct by counting officials."
(Emphasis mine)

96. In the case of *Philemon Embel v Robert Kopaol* (2003) N2460, Los J observed that scrutiny was a compulsory process by which the result of the polling shall be ascertained by scrutiny under s. 147 OLNLLGE.

97. "The conduct of the scrutiny process is a public affair, therefore it must be done fairly and openly for the scrutineers to see and inspect. That is the intent and the purpose of s.151. (Gavara Nanu J in *Kapi v Electoral Commissioner of Papua New Guinea*[2003] PGNC 155; N2327 (21 February 2003) at page15).

98. Now in applying the principles of law and judicial observations on what is scrutiny and what ought to happen during the scrutiny process, the irregularities complained off here must prevail.

99. Therefore in the absence of any evidence to the contrary this court is entitled to infer that Scrutineer Gill Pueka was denied the opportunity to be heard on his complaint for verification of ballot papers. *Section 151 (c)* is in clear mandatory terms that all the proceedings (emphasis mine) at the scrutiny shall be open to the inspection of the scrutineers. This also includes diligently attending to scrutineer's complaints, however insignificant they maybe, in the interest of transparency and fair play giving reasonable explanation for the decisions made.

100. To this end I am satisfied that Assistant Returning Officer Mr. Terence Baurima's conduct together with those of his counting officials in this instance amounted to an irregularity and his actions and or omissions amounted to breaches of *Section 151(c)* OLNLLGE.

(3) Irregularities at Exclusion Number 29

101. The Respondent's argued through their Witness Terence Baurima that all the allegations made against him were false and he denied abusing his position as Assistant Returning Officer to interfere with the counting process in the Sohe Open Electorate in the 2017 National General Elections.

102. He argued that the entire counting process was done with transparency and vehemently denied any tampering and or illegal practices committed by him or by counting officials which assisted the First Respondent score more second and third preference votes during the elimination process.

103. However evidence before Court shows that:-

- At exclusion 29 of candidate Jeff Gore Agumi, the Petitioners Scrutineer Mr Gill Pueka disputed why unaccounted ballot papers were being bundled and put away as exhausted but was told by Mr. Baurima to take the matter to the Court of Disputed Returns.
- This evidence was corroborated by Witness Stanley Mackenzie Mado.

104. All these evidence remains intact and not rebutted by any of the Respondents' witnesses including Mr. Terence Baurima. All their rebuttals were in generalized and wholesale fashion without meaningful substance. Although all the witnesses claimed to be present most of the time during the counting process through to the final eliminations, none of them came forward with direct rebuttal evidence. Inferentially this court is entitled to infer that all Respondents witnesses were either lying to Court or were selective in giving their evidence. Their credibility and the weight of their evidence now left floundering without support.

105. Again all genuine attempts to be seen to conduct a fair and impartial scrutiny now questioned allowing for any suspicions of foul play to emerge. Evidence shows that the scrutineers played their part by raising this concern however the Electoral Officials did not play their part in accordance with *Section 154 OLNLLGE*.

106. Therefore I am satisfied that the Assistant Returning Officer Mr. Terence Baurima's conduct by ignoring Gill Pueka's protests amounted to an irregularity and his actions and or omissions amounted to breaches of *Section 169 (a)(b)(c) OLNLLGE*. Mr Pueka's request under the circumstances was a genuine one and not speculative therefor Mr Baurima was obligated to hear him out and not pick an argument with him.

(4) Irregularities at Exclusion Number 39 – The retrieval of four (4) live ballot papers from the exhausted bundle?

107. The Respondent's argued through their Witness Terence Baurima that all the allegations made against him were false and he denied abusing his position as Assistant Returning Officer to interfere with the counting process in the Sohe Open Electorate in the 2017 National General Elections.

108. He argued that the entire counting process was done with transparency and vehemently denied any tampering and or illegal practices committed by him or by counting officials which assisted the First Respondent score more second and third preference votes during the elimination process.

109. However evidence before Court shows that:-

- At exclusion 39 Mr Wesley Tirari retrieved four live ballot papers belonging to the Petitioner from amongst the exhausted ballot papers tray. He assisted 13 other counting officials sort ballot papers into six (6) batches to be called and recorded on the tally board. Six officials, all named, were from the Kokoda LLG area. Suspecting that there could be more live ballot papers in amongst the exhausted ballot papers he asked Mr Terence Baurima to do a recheck but Mr Baurima ignored his request.
- He said the absence of any rechecks and verification was evident in that at exclusion 39 and 40 huge volumes of ballot papers were put away as exhausted.
- His evidence was corroborated by witness Gill Pueka when he deposed in his affidavit of seeing Mr. Wesley Tirari retrieve four live ballot papers belonging to the Petitioner and handed them over to be counted. Witness Stanley Mackenzie Mado also gave testimony of seeing Wesley Tirari retrieve the four live ballot papers and handed them over for counting.
- He said at that time the Petitioner was leading the race with 7296 votes, the First Respondent running second with 7147 and Mr. Ukena in third place with 6685.
- Witness Ezekial Rasibori, an experienced electoral official testified of taking part in the sorting out of ballot papers into six (6) batches ready to be called. He observed that the proper procedure of counting and exhausting ballot papers were not followed by Mr Terence Baurima and other counting officials. He noticed that bundles of ballot papers left on the table were put away as exhausted ballot papers without calling and verification by the scrutineers.

110. It is not disputed that Mr. Wesley Tirari retrieved four (4) live ballot papers belonging to the Petitioner from the exhausted ballot papers lot. It is also not disputed that he took part in sorting the ballot papers into six (6) batches ready to be called and counted at exclusion 39. It is also not disputed that by exclusion 39 and 40 a huge volume of ballot papers were put away as exhausted. It is also not disputed that Wesley Tirari's request to have the exhausted ballot papers rechecked again, was indeed rejected by Mr. Baurima.

111. All these evidence remains intact and not rebutted in way by Mr. Terence Baurima or any of the Respondents' witnesses. All their rebuttals were not direct but in generalized and wholesale fashion without meaningful substance. Although all the witnesses claimed to be present most of the time during the counting process through to the final eliminations, none of them came forward with direct rebuttal evidence on the retrieval of four live ballots and calls for a re-check by Mr. Wesley Tirari. Inferentially this court is entitled to infer that all Respondents witnesses were either lying to Court or were selective in giving their evidence. Their credibility and the weight of their evidence now left floundering without support. Ironically all seven (7) witnesses were engaged by the Second Respondent in the recently completed National General Elections but now turn witnesses for the First Respondent.

112. Again all genuine attempts to be seen to conduct a fair and impartial scrutiny now questioned in light of the retrieval of four live ballot papers from the exhausted lot. This is serious business and ought to be attended to with due haste to clear any and all suspicions of an impartial scrutiny. Common sense should dictate that the probabilities of finding additional live ballot papers in the exhausted lot remains real, therefore immediate corrective measures ought to be put in place to remove any suspicions of foul play. This lone recorded instance of retrieving the four (4) live ballots from the exhausted lot is cause for serious concern in my view. The scrutiny process is now comprised. It is no small matter for the First Respondent's Lawyer to argue that the four live ballots have since been added onto to the Petitioner's tally and of no series concern.

113. To my mind this lone recorded irregularity draws real constitutional implications of the citizens right to vote now jeopardized in what is supposed to be a genuine, free and fair election. The enormity of this irregularity is so great that the Court in *Tomscroll v Electoral Commission of Papua New Guinea* [2003] PGNC 147; N2349 (17 March 2003) had this to say per Injia J:

"Reading s.50 and s.126 (6) & 7) of the Constitution, and OLNE, s.218 (1) together, in a situation where errors or omissions of electoral officials raises questions concerning the integrity of the votes cast at an election and the election as process as a whole, then provided those errors or omissions are material in that they did affect the result of the election, the election or the return of the person as duty elected may be invalidated by this Court."(Emphasis mine)

114. Put differently had those four (4) live ballot papers not being retrieved, four citizens' fundamental rights to vote as enshrined in Section 50 of the Constitution would be meaningless to them and the Constitution violated in a big way. The Supreme Court in *Reipa v Bao* [1999] PGSC 53; [1999] PNGLR lamented on the haphazard manner in which electoral officials conducted

elections thus: “...So how can this right have any meaning if the State and the relevant State authorities do not ensure that all eligible voters can exercise their right and for a complete security or integrity of the poll...”

115. This is more so in view of the fact that out of 6685 votes distributed from the 40th Exclusion of Candidate Paulinius Uhena, only 794 allowable ballots were distributed. The rest of the ballot papers totaling 5891 were declared exhausted under dubious circumstances without verification and or proper scrutiny according to evidence before this court. Evidence shows that the scrutineers played their part by raising this concern however the Electoral Officials did not play their part in accordance with *Section 154 OLNLLGE*.

116. Therefore I am satisfied that the Assistant Returning Officer Mr. Terence Baurima’s conduct by ignoring Tirari’s request for a re-check amounted to an irregularity and his actions and or omissions amounted to breaches of *Section 1 69(a) & (c) OLNLLGE* and Section 50 of the Constitution. Mr Tirari’s request under the circumstances was a genuine one and not speculative therefor for Mr Baurima to have ignored his request in my view was a serious omission of conduct.

(5) Irregularities at Exclusion Number 40 – Whether the 266 ballot papers meant for the Petitioner were incorrectly added to the First Respondents final tally?

117. The Respondent’s argued through their Witness Terence Baurima that all the allegations made against were false and he denied abusing his position as Assistant Returning Officer to interfere with the counting process in the Sohe Open Electorate in the 2017 National General Elections.

118. He argued that the entire counting process was done with transparency and vehemently denied any tampering and or illegal practices committed by him or by counting officials which assisted the First Respondent score more second and third preference votes during the elimination process.

119. In cross examination Mr Baurima agreed that five allegations were levelled against him by the Petitioner and her witnesses however he vehemently stated that they were all false and not true.

120. When questioned during cross examination that all his replies to the five allegation were not specific answers, he maintained the same wholesale approach that all five allegations made against him were lies and not true.

121. However evidence before Court shows that:-

- At exclusion 40 Mr Stanley Mackenzie Mado was given 100 live 2nd and 3rd preference ballot papers belonging to the Petitioner to be placed in the First Respondent's tray by Mr. Terence Baurima after counting Batch 1. Instead Mado correctly placed them facing downwards on the side of the First Respondent's tray and not inside. As Mado raised his hands to raise a query with Mr. Terence Baurima, he was told to wait until all six batches were counted.
- A further 160 allowable ballot papers bearing 2nd and 3rd preference votes marked for the Petitioner were handed over to him by Mr Terence Baurima after he had called Batch number 3. Again Mado placed them faced downwards besides the First Respondent's tray to be queried later.
- His evidence was corroborated by Witness Gill Pueka who said he became suspicious when some ballot papers were handed over to Mado by Baurima to be placed in the First Respondent's tray. Stanley Mado was responsible for the First Respondent's tray.

122. Mr. Terence Baurima was in court as a witness and had every opportunity to clear his name however he choose not to do that and instead made sweeping statements of the scrutiny process being transparent and all allegations levelled against as lies and not true. These are very serious allegations and he ought to provide some explanation. He has not done that resulting in these allegations uncontested and intact. He appears to me to be very learned and experienced in life and his occupation however very slow comprehends the questions put to him in cross examination. I find great difficulty in convincing myself that he is a witness of truth and honesty and his versions of events must be believed.

123. As to whether Mr. Mado was allowed to register his complaint after the count of Batch 6 we don't know because there is no evidence however what we do know and from which the court can draw inference is that the 40th elimination was concluded in record time of 30 minutes with great haste and declarations made soon thereafter.

124. In the absence of any evidence to the contrary this court is entitled to infer that Stanley Mackenzie Mado was indeed given two lots of ballot papers totaling 260 belonging to the Petitioner to be placed in the First Respondents tray to be counted by Mr Terence Baurima. Mado however placed them faced downwards to be queried later but upon Baurima's directions, they were called in favour of the First Respondent together with six (6) ballot papers belonging to the Petitioner given to him by Francis Eriripa.

125. Therefore I am satisfied that the Assistant Returning Officer Mr. Terence Baurima's conduct of deliberately handing over and ordering the 266 ballot papers belonging to the Petitioner to be counted in favour of the First Respondent amounted to an irregularity. Those errors and or omissions resulted in the Petitioner being denied the opportunity to pass the absolute majority mark hence not elected into office thereby breaching *Section 168 (1)(e) OLNLLGE*. Similarly the Petitioner's right to be elected in a fair and just election compromised, resulting in breaches of Section 50 of the Constitution. (*Reipa v Bao* [1999] PGSC 53 supra)

(6) Does the Court have jurisdiction to consider other errors and or omissions in the evidence but no pleaded in the Petition?

126. Council for the Petitioner Mr Kipa has correctly pointed that in election petitions pleadings of the evidence is not a requirement as opposed to ordinary civil suits where only material facts and pleaded and not evidence. (**Holloway v Ivarato** [1988] PNGLR 99.) and (Order 8, r 8 of the National Court Rules.). There are good reasons for these proposition. Firstly as is always the case in election petition cases, a party would not be in a position to collect all the evidence within the limitation period and furthermore a party may need to apply to the court during the hearing of the petition for certain electoral documents, e.g. roll to prove a ground. The primary enabling provision is *section 217 OLNLLGE* where National Courts are urged to be guided by the dictate of this provision.

“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”

127. The Court has indeed identified some errors and or omission and they ought to be considered within the spirit of *S. 217 OLNLLGE*. I have also had the benefit of been referred to the case of **Kapi v Electoral Commissioner of Papua New Guinea** [2003] PGNC 155; N 2327 (21 February 2003) which affirmed the proposition that Courts do have jurisdiction to consider other evidence not contained in the Petition.

Irregularity at Exclusion Number 28 – Whether difficulties experienced during the balancing of the Central Tally Board amounted to errors of and or omissions?

128. The Respondent's argument on this irregularity can safely be inferred from his generalized sweeping rebuttals that all allegations made against him

were false and that he denied abusing his position as Assistant Returning Officer. Furthermore He argued that the entire counting process was done with transparency and vehemently denied any tampering and or illegal practices committed by him or by counting officials.

129. However evidence before Court shows that:-

- At exclusion 28 the Tally Board did not balance out. Scrutineer Gill Pueka, together to Steven Kilapat's scrutineer and other scrutineers' attempts to seek an explanation from Mr. Baurima and his counting officials to explain how they arrived at balancing the tally board at exclusion 28 remained unanswered. They claimed an exercise which took three hours to rectify. The counting officials never explained to the scrutineers how the figures were calculated to balance out the tally board.
- There is no evidence from Mr. Terence Baurima or any of the Respondent's witnesses who directly challenged this allegation.
- Although they all maintained in cross examination that they each were apprised of the five allegations leveled against Mr Terence Baurima and against them, none of them were able to offer any credible evidence rebutting this allegation.
- If anything, all Respondents witnesses only made sweeping statements as regards the transparency of Sohe Open Electorate and likewise denied any tampering and or illegal practices.
- In cross examination Mr Terence Baurima conceded that tally entries made at Exclusion 2 for losing candidate Wowoia David Beu were wrong. The total count of votes recorded on the official tally, Form 66B, after exclusion two was 54, instead of 44, a discrepancy of 10 votes. These figures were extracted from the 1st and second exclusion respectively: 18 votes + 26 votes = 44.
- Similarly in cross examination Mr Terence Baurima conceded that tally entries made at Exclusion 10 for losing candidate Ruben Malewa were wrong. The total count of votes recorded on the official tally, Form 66B, after exclusion ten was 151, instead of 153, a discrepancy of 2 votes.
- When it was suggested to him that due to the series of discrepancies in the tally recordings the scrutineers were denied the opportunity to scrutiny and countersign Form 66B, Mr Baurima said it was the responsibility of the Returning Officer and not his.

- When asked if he attempted to assist the scrutineers to come forward and sign the Form, Mr. Baurima said he reminded the Returning Officer but never followed up to see it was done as he had moved on to do other things.
- When he was reminded that that piece of evidence was not contained in his affidavit the witness said he did not respond because it did not form part of the allegations.
- As regards the correctness and verification of the Statement of Compliance signed off by the Electoral Commissioner Mr. Patilias Gamato, Mr Terence Baurima with great difficulty and hesitation admitted that it was not correct as the Assistant Returning Officers and Scrutineers did not countersign the Statement of Compliance. Adding that it was not his role but that of the Returning Officer.
- When questioned to define the word Scrutiny Mr. Baurima said any forms that are used in the counting process should be scrutinized by the scrutineers. He added that if the scrutineers were to see the ballot papers that to his understanding was scrutiny.
- As regards the author of the Statement of Compliance Mr. Baurima said the Electoral Commissioner Mr. Patilias Gamato was the author and affixed his signature and not him.
- As regards the series of questions raised by the Petitioner's Lawyer pointing out certain discrepancies during eliminations /exclusions and votes recorded in the Forms, Mr. Baurima said it was the Returning Officer Mr Duncan Korapebe's responsibility to verify correctness before submitting them to the Electoral Commissioner.

130. As can be seen from Mr. Terence Baurima's evidence elicited in cross examination, his vehement denial of all the allegations made against him as false and the abuse of his position as Assistant Returning Officer in interfering with the counting process in the Sohe Open Electorate in the 2017 National General Elections fails to find corroboration.

131. Furthermore his argument that the entire counting process was done with transparency, his denial of any tampering and or illegal practices committed by him or by counting officials which assisted the First Respondent score more second and third preference votes during the elimination process again found wanting and not corroborated. Any wrongdoing and blameworthiness was now shifted to the Returning Officer Mr. Duncan Korapebe.

132. Those vote discrepancies' identified in Form 66B is cause for serious concern. At the end of the day it means that a voter who has exercised his right to vote, sanctioned by the Constitution, now unceremoniously rejected or falsified due to the carelessness of those persons temporarily mandated to conduct a fair and transparent elections.

133. Those vote discrepancies' recorded in Form 66B corroborates Scrutineers complaints of the Tally Board not balancing out resulting in a delay of three hours to rectify the problem. There is no rebuttal evidence save blanket denials of fair play. The scrutineers were deliberately left in the dark as to how the Tally Board was corrected. Again every ballot paper or vote represents a citizen excising his fight to vote, now tampered with by electoral officials.

134. This Court is flabbergasted by the Second Respondents submissions that the failure to have the scrutineers countersign Forms 66A and 66B(Quality Checks) were immaterial consideration and not likely to effect the result of the election. Although that argument may sound plausible, the overall implications it has on the integrity of a fair and free election is comprised. Of all people we have the Second Respondent's hired Lawyer at great expense to the people of Papua New Guinea come and tell this Court to disregard this grave anomaly. I fail to understand where Mr. Simbala was coming from? In my view the effect of leaving out the scrutineers from signing the two most important forms in the electoral process is tantamount of series Constitutional breaches in the highest order. Sections 125 (electorates); *Section 126* (elections) and *Section 187C Constitution* breached. The Chief Electoral Commissioner Mr. Patilias Gamato, ML has been misled into certifying and presenting to the Head of State that Sohe Electorate Elections were conducted with due care and integrity by respective officers. (Returning Officers, Assistant Returning Officers and Scrutineers). Evidence before court shows that that certification is a falsehood. The culminating effect of those breaches in my view, are errors. I am sure that this Court or any other Court of similar jurisdiction will not sit back and allow this postposterous submission to go unchallenged.

135. In the absence of any evidence to the contrary this court is entitled to infer that Scrutineer Gill Pueka and other scrutineers were denied the opportunity to be told why the delay of three hours and how the figures were calculated to balance out the tally board. This court is entitled to draw inference that those discrepancies, however minor they may be, eventually snowballed into the collapse of the tally board balancing out at exclusion number 28.

136. This also includes providing reasonable explanation and justification to scrutineers on how the scrutiny was conducted. Furthermore the onus was now on the Returning Officer and his counting officials to explain away or remove

any and all suspicions of an unfair conduct of scrutiny. That was not done in this instance.

137. Therefore I am satisfied that Assistant Returning Officer Mr. Terence Baurima's conduct together with those of his counting officials in this instance amounted to an irregularity and his actions and or omissions amounted to breaches of Section 151 (c) OLNLLGE and Sections 125 (electorates) ; Section 126 (elections) and Section 187C Constitution.

Irregularities at Exclusion Number 40. – Whether the ballots paper in the mysterious 7th Batch was put under scrutiny?

138. The Respondent's argued through their Witness Terence Baurima that all the allegations made against were false and he denied abusing his position as Assistant Returning Officer to interfere with the counting process in the Sohe Open Electorate in the 2017 National General Elections.

139. He argued that the entire counting process was done with transparency and vehemently denied any tampering and or illegal practices committed by him or by counting officials which assisted the First Respondent score more second and third preference votes during the elimination process.

140. In cross examination Mr Baurima agreed that five allegations were levelled against him by the Petitioner and her witnesses however he vehemently stated that they were all false and not true.

141. When questioned during cross examination that all his replies to the five allegation were not specific answers, he maintained the same wholesale approach that all five allegations made against him were lies and not true.

142. However evidence before Court shows that:-

- When Paulinius Uhena was eliminated at the 40th exclusion his 6685 votes were then sorted out by Mr Terence Baurima and his officials into six (6) batches of allowable live ballots. However 5891 ballots were deemed exhausted without verification by scrutineers.
- Mr Terence Baurima called Batches 1 & 3; Mr. Herbert Dengo called Batch 2; Mr Kingsley Waimi called Batches 4 & 6, Mr. Francis Eriripa called Batch 5.
- Mr Stanley Mackenzie Mado further maintained that after the sixth and final batch was called he saw Francis Eriripa appear and called another batch of ballot papers from the 7th Batch and after calling them he handed

over 50 ballots in favour of the First Respondent to him with only six (6) ballots for the Petitioner. He said he stood there helplessly as Mr. Terence Baurima was standing in front of him at the time. By now a total of 266 ballot papers in favour of the Petitioner were collected and placed on the side of the First Respondent's tray to be queried later. However he was told by Mr. Terence Baurima not to raise any more queries until all six batches were called out.

- At exclusion number 40 Witness Francis Eriripa said he was delegated to call Batch 5 and Batch 7 which he considered irregular and not normal. He said he was not sure where Batch 7 came from but was directed to call them by Mr Terence Baurima adding that : “*son you callim ol paper orit so callim displa last batch.*” A total of 50 ballot papers were called in favour of the First Respondent. After his last call Henry Jons Amuli was declared winner.

143. Again neither Mr Terence Baurima nor other witnesses came forward with credible evidence to rebut this allegation. For the moment this evidences intact and convincing. Here was an opportune time for Herbert Dengo and Kingsley Waimi to be brought to court to clear their name and most importantly to assist court in establishing the truth or otherwise of the mysterious 7th Batch. That was not done.

144. In the absence of any evidence to negate the presence of the mysterious 7th Batch as alleged by Petitioner's witnesses this court is entitled to believe their version of events as recorded. The Respondents version remains unconvincing and not believed. Similarly the Court is entitled to infer that the inclusion of the mysterious 7th Batch at the 11th hour contributed to the 50 ballot papers propelled the 1st Respondent to win the elections.

145. Therefore I am satisfied that the Assistant Returning Officer Mr. Terence Baurima's conduct of deliberately allowing the 50 ballot papers from the mysterious 7th Batch and counted in favour of the First Respondent amounted to an irregularity and his actions and or omissions amounted to breaches of *Section 151 (c) OLNLLGE*.

146. As can be seen from all the evidence detailing instances of scrutineers objections being raised and not adequately attended too, the scrutiny process now remains tainted and riddled with suspicion of not being properly and fairly conducted by Mr Terrene Baurima and his counting officials.

147. The irregularity complained off by the Scrutineers in the scrutiny was not a one-off or a lone complaint and could easy be swept under the carpet, so to speak. There were several instances of complaints. That should be serious cause

of concern by the Assistant Returning Officer who was in charge of the scrutiny. That was not the case here. The questionable activities which raised suspicions in the minds of scrutineers and witnesses began at exclusion 9 through to exclusion 40.

148. In almost all complaints the manner in which the ballot papers were exhausted raised suspicions in the minds of scrutineers. All such complaints or protests were either ignored or told to refer such complaints to the Court of Disputed Returns. Clearly they were not addressed properly in accordance within the spirit of *Section 154 OLNLLGE*.

Court Observations

149. Evidence before Court shows that Mr. Duncan Korapepe was the duly appointed Returning Officer to conduct the election process for the Sohe Electorate however he was not available for most of the 13 days, the counting was in progress. (13 July – 25 July 2017). The counting was controlled by his Assistant Returning Officer Mr. Terrence Baurima. Mr. Korapepe's lone appearance at the counting centre was on 19 July 2017 in the afternoon when he together with other scrutineers prevented Mr. Terrence Baurima from opening Team 23 ballot box in the absence of Wesley Tirari.

150. The Returning Officer Mr. Korapepe was not called to give evidence so the Court is left unassisted however the only recorded evidence came from the Petitioners witnesses. Although all the Respondents witnesses maintained that the Returning Officer was present throughout the scrutiny process save for brief spells in between I find their evidence lacking credibility and not to be believed. The same however cannot be said for the Petitioner's witnesses. I find them to be witnesses of truth with their credibility intact.

151. Although there was nothing wrong with his Assistant Returning Officer controlling the counting, one wonders why the Returning Officer was away most of the time and not attending to his core function of controlling the scrutiny for Sohe Electorate. To my mind that is gross dereliction of duty and is cause for serious concern. His dereliction of duty has brought about the conduct of elections for Sohe Open Electorate put into question and disrepute by the acts and or omissions of his Assistant Returning Officer Mr. Terrence Baurima and his electoral officials. It follows that he also must be made accountable for his actions also.

152. Furthermore any suspicions of Mr. Terrence Baurima and his team of 6 electoral officials from Kokoda manipulating the election process in favour of the First Respondent heightened due to them all living in close proximity in Kokoda. For the moment they remain suspicions however when such suspicions

are mirrored against the irregularities, acts and or omission by Mr. Terrence Baurima and his electoral officials from Kokoda they pose real serious concerns of a fair and impartial scrutiny for Sohe Open Electorate.

153. Higaturu was considered her stronghold as she had put in lots of impact projects during her term in Parliament as a Government Minister. And rightly so the Petitioner was expecting to collect more 2nd and 3rd preferential votes from candidate Paulinius Uhena who is also from the same electorate as the Petitioner. When her expectations of getting votes from Higaturu area dwindled her suspicions of irregularity during scrutiny was heightened. I see nothing wrong with the Petitioner's expectations. We see it all the time when the election season hits the country after every five years, leaders who have invested heavily in their electorates tend to get the edge over other would be candidates.

154. Now assuming that the Petitioner was leading the race with 7296 votes at the 39th exclusion of Peter Oresi. At the 40th exclusion of Paulinias Uhena, she collected 288 votes bringing her total to 7524. Supposing the 266 votes which were incorrectly added onto the First Respondents tally were returned to her, the Petitioner's new total would be 7790.

155. Conversely with the First Respondent leading at the 40th elimination with 7713 votes. Supposing 266 votes improperly added to his tally were removed his revised total would be 7447.

156. Court Determinations

1. I am therefore satisfied that there were errors of andor omissions by the Assistant Returning Officer and electoral officials and those errors of andor omissions were likely to affect the result of the election.
2. The undisputed evidence on record includethe 1st Respondent who polled 7619 votes and was declared elected. It is also not disputed that the Petitioner polled 7524 votes and was the runner-up to the first respondent. Furthermore, it is not disputed that the difference of the votes between the 1st Respondent and the Petitioner was only 189 votes.
3. From the uncontested 266 ballot papers, I find that theyhad they been placed in the Petitioner's tray and counted, the final outcome of the elections would be different. In other words the election result would be affected. Had the 266 uncontested votes been added to the

Petitioner's tally, her total tally would have increased to 7790 and she would have been declared elected?

4. This Court has been invited to use its powers under *Section 212 (f) OLNLLGE* and return the Petitioner as the duly elected member for Sohe Electorate however this cause of action is precluded by *Section 218 (1) OLNLLGE*. Furthermore to do so otherwise would cause grave injustice to all concerned as the 266 votes in contention still remain untested and not authenticated.
5. The most appropriate relief in my view, although expensive is to order a recount of all the ballot papers under a strict and regimented scrutiny, in particular the status of the 266 disputed ballot papers. Having done that the Court would be assisted in the final determination of this petition. I am satisfied that this approach is the correct one under the circumstances as justice will be done in this case.
6. In the exercise of my powers under *Section 212 (1) (d) OLNLLGE*, I order that a recount of all ballot papers in the Sohe Open Electorate be conducted as soon as practicable.
7. Accordingly, the Court orders as follows:-
 - (1) That there shall be a recount of all ballot papers in the Sohe Open Electorate election.
 - (2) That the Petitioner's costs of the proceedings to the date of this judgment shall be paid by the second respondents to be taxed, if not agreed.
 - (3) That this Order is abridged to the date of settlement which shall take place forthwith. However, in the light of the order for a recount, it is necessary to make formal consequential orders and these are:-

157. Orders are:-

- (1) The recount will be carried out in Popondetta as the electoral documents are still kept under lock and key at Popondetta Police Station.
- (2) The recount shall commence on Monday, 21st May 2018 at 8.30 am at the direction of Mr. Patalius Gamato ML the Electoral Commissioner or his delegated Officer who shall be present to oversee the recount.

- (3) The recount shall be conducted under the supervision of the Registrar of the National Court Mr. Ian Augerea.
- (4) All those electoral officials who took part in the scrutiny of Sohe Open Electorate Elections in 2017 are precluded from the precincts of the recount centre unless called to verify signatures and other electoral documents. For the avoidance of doubt the precluded officer include the former Returning Officer, former Assistant Returning Officers and all counting officials who took part.)
- (5) The result of the recount shall not be announced to the public until it is confirmed by the Electoral Commissioner or his nominee and Mr. Augerea and communicated to the Court immediately after the completion of the recount and the Court has deliberated on the result.
- (6) All parties and their counsels including the Electoral Commission officials charged with conducting the recount and the Registrar must be present in the National Court at Popondetta on 11 June 2018 at 9.30 am
- (7) The First Respondent shall remain in Office until the recount official results are returned to the Court.

Orders accordingly.

Twivey Lawyers : *Lawyer for the Petitioner*
B.S.Lai Lawyers : *Lawyer for the First Respondent*
Harvey Nii Lawyers: *Lawyer for the Second Respondent*