N10224(LT)

PAPUA NEW GUINEA

[In the Leadership Tribunal appointed under Section 27(2)(a) of the Organic Law on the Duties and Responsibilities of Leadership]

And in the matter of a Reference by the Public Prosecutor under s. 27(7) of the Organic Law on Duties and Responsibilities of Leadership

AND:

[In the matter of the **HONOURABLE BRYAN KRAMER MP**. Member for Madang Open Electorate]
(The leader)

Waigani: Kangwia J, Nidue PM & Komia M

2023: 01st May

LEADERSHIP TRIBUNAL – Penalty – leader found guilty after trial on charges of scandalizing the judiciary and misappropriation – leader scandalized the Judiciary by publishing untrue and unverified articles on his face book page insinuating a conflict of interest by the Hon. Sir Gibbs Salika, Chief Justice of Papua New Guinea – leader Scandalising the Judiciary by posting articles on his Facebook account accusing Hon Peter O'Neill and his lawyers of filing a fake Warrant of Arrest to deceive and mislead the Court – actions of leader scandalised the Judiciary and called into question the integrity of the Chief Justice and the Judiciary – leader did not personally benefit from the monies paid to the company - recommended penalty of dismissal from office and payment of fine

Cases Cited:

Papua New Guinean Cases
Peter Ipu Peipul v Hon Justice Sheean & Ors (2002) SC706
See Application by John Nilkare (1997) SC536
Application by Peter Peipul (2002) SC706
Re Michael Nali (2003) N2399
Re Hon Michel Somare (2011) N4230
Hon Jim Kas 27.9.00 (unreported Judgment)

Manoka: Re Organic Law on duties and Responsibilities of leadership [2014] N5690
Hon Anderson Agiru (2002) SC687
Hon Gerard Sigulogo [1988-89] PNGLR 384
Hon Boka Kondra (2015) N2632
Hon Galus Yumbui (2007) N4052
Hon Timothy Bonga
Hon Sir Peter Ipatas (2006) N3078
Hon Delilah Gore (2015) N5981
Jerry Singirok v Hon Justice Jalina & Ors (2000) N2068

Overseas Cases:
McCardie J. in Naylor, *Benzon & Co. Ltd -v- Krainische Industrie Gesellschaft* [1918] 1 KB 331 at p. 342.

Counsel:
P. Kaluwin & D. Kuvi, for the Referrer
N. Yalo, for the leader

PENALTY

01st May, 2023

1. **KANGWIA J:** Having found the Hon Brian Kramer MP (the Leader) guilty on 7 allegations of misconduct in office, the tribunal is required by s 27 (5) of the *Organic Law on Duties and responsibilities of Leadership (Organic Law)* and 28(1A) of the *Constitution* to make recommendations on penalty to the appropriate authority.

2. Under s27(5) of the Organic Law it is mandatory for the tribunal to recommend that:

> *(a) he be dismissed from office or position or*
> *(b) as permitted by s28(1A) (further provisions relating to the Leadership Code) of the Constitution some other penalty provided for by an Act of Parliament be imposed.*

3. Section 28(1A) of the *Constitution* says:

> *"An Organic Law may provide that where the independent tribunal referred to in Subsection (1)(g) finds that –*
>
> > *(a) there was no serious culpability on the part of a person found guilty of misconduct in office; and*
> > *(b) public policy and the public good do not require dismissal; it may recommend to the appropriate authority that some other penalty provided for by law be imposed".*

4. The relevant Organic Law is the provisions of s2 of the *Leadership Code (Alternative Penalties) Act* which provides the penalties which may be recommended and imposed in these circumstances which are:

> (a) be fined an amount fixed by the tribunal, not exceeding K1,000.00; or
> (b) be ordered by the appropriate authority to enter into his own recognizance in a reasonable amount, not exceeding K500.00, fixed by the tribunal that he will comply with Division lll.2 (Leadership Code) of the Constitution and with the Organic Law during a period fixed by the tribunal, not exceeding 12 months from the date of the announcement, under Section 27(6) of the Organic Law, of the decision of the tribunal; or
> (c) be suspended, without pay, from office or position for a period not exceeding three months from the date of commencement of the suspension; or
> (d) be reprimanded,
> or if he is a public officeholder as that expression is defined in Section Sch. 1.2(1) of the Constitution, that, as determined by the tribunal-
> (e) he be reduced in salary; or
> (f) if his conditions of employment are such as to allow of demotion – he be demoted.

5. The combined effect of those provisions is clear. The preferred outcome is a recommendation for dismissal from office upon finding a leader guilty of misconduct in office. Despite that, the provisions also provide an exception under which dismissal may be avoided with alternative penalties. That can only happen on a finding of no serious culpability, or the public good and public policy did not require dismissal.

6. We are not alone on these propositions. In the Supreme Court case of *Peter Ipu Peipul v Hon Justice Sheean & Ors* (2002) SC706 Amet J (as he then was) viewed s28 (1A) this way:

> *"I am prepared to accept the proposition that s28(1)(g) does imply that in all findings of guilty of misconduct in office the Tribunal starts with the Primary premises that it shall recommend dismissal from the office unless pursuant to s28(1A), (a) and (b) it found that there was no serious culpability and that public policy and public good do not require dismissal."*

7. Tribunals have stated that where a leader was found guilty of misconduct in office, dismissal from office ought to be considered unless there is no serious culpability on the part of the leader, or the public good and public policy do not require dismissal from office other penalties may be imposed. *(See Application by John Nilkare* (1997) SC536; *Application by Peter Peipul (*2002) SC706; *Re Michael Nali* (2003) N2399).

8. The invariable practice developed by earlier tribunals is that a separate hearing has to be conducted after the finding of guilty to determine whether there was no serious culpability, or the public policy and public good do not require a recommendation for dismissal from office.

9. We followed suit and have heard the leader and received written and oral submissions of both counsels. We now approach it this way.

10. As required by s 28 (1A) we ought to recommend dismissal from office unless we find:

a) that there was no serious culpability on the part of the leader and;
b) the public policy and public good do not require dismissal from office.

11. If we find both (a) and (b) then it can impose any one or more of the alternative penalties prescribed.

12. Both counsels agree with the proposition that the totality of the breaches found guilty must be examined and not the findings of each allegation to determine whether there was no serious culpability or that the public policy and public good do not require dismissal from office.

13. Apart from tribunals in the *Re Hon Michel Somare* (2011) N4230 and *Hon Jim Kas* 27.9.00 (unreported Judgement) which took the separate or individual approach, most if not all prior tribunals have accepted the totality principle as the correct approach and this tribunal shall not be an exception.

14. However, our application of the totality principle will be slightly different. We will apply the principle under two distinct categories of allegations for which the leader was found guilty. The first category relates to the findings of guilty for scandalising the judiciary which events arose out of Port Moresby. The second category relates to allegations involving the

Madang District Development Authority and its enabling Act. They relate to occurrences in Madang. We have difficulty in lumping them together to make determinations on culpability under the totality principle.

15. The evidence to be evaluated in determining culpability shall primarily be a rehearsal of what was stated in the findings of guilty including the address by the leader, submissions of counsel and character references tendered by consent.

Culpability

16. It is not an easy task to precisely determine culpability of a leader found guilty of misconduct in office. There is no definite prescription or formula to guide a tribunal in arriving at a determination commensurate with the misconduct.

17. We are grateful of both counsels who have greatly assisted us with the backgrounds to various case law as possible guides to determine culpability.

18. In the Merrian Webster dictionary culpability is defined as responsibility for wrongdoing or failure. The Oxford Advanced Dictionary defines culpability as responsible and deserving of blame for having done something wrong.

19. Case law has its share of defining culpability as in *Re; Hon John Mua Nilkare* (1997) SC536, where culpability was described this way, *"It involves serious blame, an act involving wrongful intention or negligence deserving censure"*.

20. In *Manoka: Re Organic Law on duties and Responsibilities of leadership* [2014] N5690 it was stated that *"culpability relates to degree of blameworthiness on the part of an offender"*.

21. In the Judicial Review against the decision of the leadership tribunal by *Hon Peter Peipul v Sheen* (2002) SC706 the Supreme Court interpreted culpability as one of degree.

22. The notion of culpability on the part of a leader overall has been applied consistently by Leadership Tribunals through the types of determinations made.

23. Serious culpability had been determined for Criminal offences as in *Hon Anderson Agiru* (2002) SC687; Soliciting payments as in *Hon Gerard Sigulogo* [1988-89] PNGLR 384; Misapplication of public funds as in *Hon Boka Kondra* (2015) N2632 & *Hon Galus Yumbui* (2007) N4052; Disgraceful conduct as in *Hon Jim Kas;* Failure to submit annual returns as in *Hon Timothy Bonga;*

Nepotism as in *Peter Ipu Peipul* (2002) SC706 which was later over-ruled by the Supreme court.

24. No serious culpability has been determined for late submission of returns as in *Re Hon Michael Somare & Hon Sir Peter Ipatas* (2006) N3078; Verbal harassment as in *Hon Delilah Gore* (2015) N5981 and Public nuisance as in *Hon Michael Nali (No3)* (2003) N2399.

25. There is limited value to be gained from a comparison to those cases and others not cited.

26. However, from the varying tribunal determinations, it is safe to hold that the degree of culpability found on a leader was determined from the facts and circumstances of each case as facts of each case are different and different tribunals viewed circumstances differently. That proposition shall apply to the present case.

Public good and public policy

27. On public policy and public good both counsels referred to the case of *Jerry Singirok v Hon Justice Jalina & Ors* (2000) N2068 which relied on passages in the final report by the Constitutional Planning Committee that the proposal for a code was for people to observe and avoid corruption that stems from failure to put the public and national interest above personal advantage.

28. There is no difficulty in appreciating what public good is constituted of. It is easier to describe public good as constituting dos and don'ts. However, public policy seems to be the sticky one with variables. There can be no confined description of what public policy is or what it is constituted.

29. Public good and public policy are distinguished by Hon Arnold Amet CJ (as he then was) in the Supreme Court Review by Hon Peter Peipul this way:

> *"I do believe that public policy and public good require that leaders who are found to have misconducted themselves in office be penalised. I do not believe, however that it is good policy to conclude that every such leader should automatically be expected to be dismissed from office as a matter of public policy. There are so many variables in the conduct that each one must be considered on its own merits".*

30. In the tribunal hearing for the Hon Michael Nali, the Chairman Hon Justice Les Gavara-Nanu cited several overseas cases to further enhance what public policy constituted.

31. One appealing description of public policy which we reproduce, was given by McCardie J. in Naylor, *Benzon & Co. Ltd -v- Krainische Industrie Gesellschaft* [1918] 1 KB 331 at p. 342, where his Honour said:

> *"The phrase "public policy" appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; … Public policy is not, however, fixed and stable. From generation to generation, ideas change as to what is necessary or injurious, so that "public policy" is a variable thing. It must fluctuate with the circumstances of the time."*

32. Even though the term public policy seems clearer by that definition variables are still present. Therefore, any determination based on public good and public policy must also be based primarily on the facts and circumstances giving rise to the findings of guilty.

CATEGORY 1

Allegation 1. Scandalising the Judiciary by posting articles on his Facebook account and insinuating a conflict of interest by the Hon. Sir Gibbs Salika, Chief Justice of Papua New Guinea.

Allegation 2. Scandalising the Judiciary by posting articles on his Facebook account accusing Hon Peter O'Neill and his lawyers of filing a fake Warrant of Arrest to deceive and mislead the Court in the matter OS (JR) 720 of 2019.

33. Under this category Mr. Yalo after an eloquent address on the law relative to penalty in leadership tribunals, submits that the Tribunal's findings of fact lend support to recommending a lesser penalty in circumstances where:

> -the tribunal found that even though the articles may not have been intended to scandalise the judiciary untrue statements were found which were open for interpretation.
> -the Tribunal findings considered 3rd party comments by persons commenting in response to the Chief Justice's letter of criminal complaint against him which was published by Mr. John Ondalane and not the leader for which charge No 4 was dismissed.

-there was nothing wrong with the use of the term solicit as it did not connote anything negative the plain meaning being to seek or obtain inaccurate statements like CJ being appointed by Peter O'Neill and the fake warrant were used to attest negative connotation to the term solicit.
- notwithstanding the tribunal findings that statements made were inaccurate, the leader believed them to be true at the relevant time.

34. It was the further submission that considering the entirety of the articles the statements were not intended to maliciously scandalise the judiciary; that the articles were intended to reconstruct the series of events that accrued; that the statements were towards the conduct of O'Neill and his lawyers. These submissions are consistent with what the leader said when he addressed the tribunal.

35. Mr Kaluwin while posing the question as to whether anyone else should be blamed for the misconducts the leader was found guilty, submitted that the leader was culpable. The publication of inaccurate, distorted unsubstantiated and derogatory articles in a three-part series void of restraint led to the denigration of the high respect the public has of the judiciary rendering his culpability very serious and he should bear the blame.

36. It was intimated that being a person of high standing as a member of parliament for Madang Open Electorate and Minister for Police the leader had the necessary ability, intellectually or resourcefully to be informed of the respective processes and procedure involved in the administration of justice in this country. Instead, he was intentionally vindictive in his approach and the gravity of his actions amounted to scandalising the judiciary. It was submitted that the leaders conduct deserves serious censure to maintain what is and what should be the expected conduct of a leader.

37. The two allegations on which the leader was found guilty revealed a scenario where private interest is pegged against public good; a personal vendetta against Peter O'Neill as opposed to protecting the judiciary from harm. The facts being publication of articles on Facebook for the readers to draw conclusions like "O'Neill and his lawyer were seeking a return favour from the Chief Justice for appointing him" or alternatively, "the Chief Justice granted the request by O'Neill and his lawyer as return favour for appointing him" or further "the Chief Justice directs judges to make decisions". The statements in the articles were open to all manner of interpretations some of which were reproduced in the decision on verdict.

38. When the address by the leader and submissions of counsel under this category are considered together, they do not demonstrate how the findings of guilty constituted no serious culpability or the public policy and public good did not require dismissal from office as required by 28 (1A). All that the leader was required to do was satisfy the tribunal why he should not be penalised with the maximum penalty prescribed.

39. One point that requires consideration is the assertion that the articles were not intended to scandalise the judiciary. Intention is associated with the state of mind. What one intends cannot be interpreted by another the same way. All people are not the same. In the present case the responses from the articles do not reflect what the leader intended. This assertion does not operate in favour of the leader.

40. From the balance of the arguments, the tribunal has been led to revisit the facts and findings by nit picking facts and alleging lack of pleading specific facts with a view to get the tribunal to make alternative findings against the early findings that led to the findings of guilty.

41. That cannot happen as these matters are now sub judice. They were issues that could have been raised at trial when the opportunity was there. It is belated to delve into the alleged un-pleaded facts to overturn the findings. That can happen in another forum. Even if the suggestions were accepted, when the facts are considered in their totality the alleged failures were incapable of diminishing culpability.

42. On whether the public comments were only related to the publishing of the Chief Justice's letter by John Ondalane for which the allegation was dismissed does not render the findings incompetent. The fact that is unchallenged is that it all started when the leader on his own volition persistently published on Facebook articles connected to the judicial process. All the articles were connected to each other. Anything after that is a consequence of his relentless publications full stop. He cannot now apportion blame or find fault from the outcomes of what originated from him.

43. The minimum that is expected of the leader is to demonstrate that a good result was achieved from his articles. What were the benefits accruing to the public that he discovered through his relentless publications? A revelation of a benefit accrued to the public can render the guilty findings as constituting no serious culpability. The leader has not revealed any at trial or here.

44. By those determinations it is not necessary to consider what the referrer submitted. The result is that requirements under s 28 (1A) (a) & (b) have not been satisfied.

45. The next issue is whether the character references relied on by the leader and tendered into evidence satisfy the 2 requirements under s 28 (1A) of the Constitution.

46. On the issue of character references Mr Yalo while relying on the 3 Character references submits that the leader should be given the benefit of doubt as a no-nonsense anti-corruption advocate who acted without dishonesty or to deprive his people; that applying the totality approach and pursuant to s 28 (1A) there is no serious culpability on the part of the leader.

47. Mr Kaluwin referred the Tribunal to the tribunal decision in Moi Avei, as authority for the proposition that public policy and public good forbade the Tribunal from saying there is no serious culpability because of personal status and his contributions to the development of the country. Other cases were also referred to, to show that serious culpability outweighed any good character reference and unblemished pasts. It was the submission that even though the leader earned high respect from reputable persons against his conduct, the notion of higher you go the higher the fall applied here.

48. We start with the notion that the obligations imposed on a leader by s 27 of the *Constitution* requires a higher standard of behaviour and conduct than ordinary citizens. This tribunal is required to determine the public life of the leader and not personal quality of his life. Character references by reputable persons have testified in favour of the leader on his personal quality of life with an intent to diminish culpability and avoid dismissal from office.

49. The Hon James Marape MP and Prime Minister of Papua New Guinea while giving evidence on the intent of parliament to pass the District Development Authority Act speaks highly of the leader and how he relies on him in his capacity as a member of his cabinet. He proposes to reappoint him when he returns.

50. Mr Ila Geno also speaks highly of the leader as party president of the Allegiance party Inc. He had closely observed the leader's performance both national and in his Madang District and how he has developed policy initiatives to develop the District from the Ward level up and is in the process of implementing them with incorporation of companies.

51. Fr Jan Czuba speaks highly of the leader as a man of integrity and responsive to people's needs and also engages in community activities. That he was a hardworking dedicated and intelligent leader.

52. On character references the leadership tribunal in *Moi Ave* after accepting that the leader had contributed much at the highest level said: *"A leader's status or other recorded good deeds or indeed as in this case acclaimed contributions and expenses, does not make undesirable misconduct any less a conduct. Public policy and public good applies both ways. It may work in favour of a leader or it may work against it"*.

53. On this issue we cannot easily overlook the personal attributes and qualities of the leader despite the fact that the tribunal is judging the leader's public life. He has been described as a person of high integrity and hard worker by none other than the Prime Minister. His reference is supported by Ila Geno and Fr Jan Czuba who are in their own rights, reputable persons in this country.

54. There is a danger in readily accepting references to diminish culpability for a well achieved leader found guilty of misconduct in office. It paves the way for a popular and achieved leader to receive favourable results from leadership tribunals than the less fortunate who commit the same misconduct. One may argue that the world was not made to be even on all fronts.

55. Be that as it may, acceptance of references should be measured against the seriousness attached with the misconduct. To do that what we said in the decision on verdict is reproduced as follows.

56. The leader was found guilty of misconduct in office under s 27 (5) (b) and specifically subsection (1) (b), (c) & (d) of the *Constitution* on both allegations relating to scandalising the judiciary. The duties imposed by those provisions which the leader was found to have breached are that a leader demeaned his office, allowed his public or official integrity to be called into question and or endangered or diminished respect for and confidence in the integrity of government in Papua New Guinea. These are serious misconducts.

57. The overbearing question though is whether the findings of guilty when read in their totality amount to no serious culpability or the public policy and public good do not require a recommendation for dismissal from office?

58. That question was answered in our decision on verdict this way.

59. The articles published by the leader on his Face book platform did not constitute an official press release or a function related to his official duties as

Minister for Police. The articles were targeted at and against judicial process. They related to matters of personal interest that had gone through the judicial process. The articles no doubt fell into conflict with his position as Minister for Police. It was capable of breeding disharmony between the Police Force and the judiciary when the Minister for Police alleged fault within the judiciary. A very dangerous situation was created in the country. Anarchy can reign in by such fault finding.

60. It may be deemed that the leader was possessed of a privilege as an elected Member of Parliament or Minister for Police to air his views and raise issues of public concern. However, parliamentary privilege would not extend to theatrics in a gullible media like Facebook. There are limits to freedom of expression accorded by s 46 of the *Constitution*, the fundamental one being fair comment. The articles in Facebook by the leader did not come under the umbrella of privilege or fair comment. They were published only to enhance his personal interest more than the public good.

61. As a leader holding a very high public office failed to warn himself of the adverse consequences of breeding negative perception of the judiciary. He should have chosen better options if he was dissatisfied with the outcome of his personal complaint against O'Neill. Instead, he made a mockery of the judiciary by purposely publishing his resentments on his Facebook account factually untrue statements connecting the judiciary. Facebook is not subject to any editorial scrutiny. He became the author, editor, and publisher. It was a covert way to mock and ridicule the judicial process. By doing so he allowed a gullible public to pass judgement.

62. The public did pass judgement by way of responses.

63. Some of the responses insinuated corruption at the highest level where wrongdoing was least expected thereby denigrating the integrity of the judiciary overall. It gave birth to public perception of corruption by the Chief Justice and the judiciary overall. The Chief Justice cannot be isolated from the Judiciary. They go hand in hand. When something adverse is said of the Chief Justice the judiciary is naturally caught by it or vice versa.

64. The judiciary is the third arm of government to what is, colloquially referred to as the last bastion of hope. The public has high regard for the judiciary and heavily rely on it to make things work properly in this country. It is for the trodden to seek refuge and the aggrieved to seek protection. When the judiciary is brought into disrepute, or its integrity is denigrated in any shape or form the public is placed in untenable situations and as stated earlier anarchy can reign in.

65. The utterances in the form of responses from the public were an indictment of diminished respect and confidence in the Chief Justice and the judicial process. Doubts were created in the minds of the learned on the independence of the judiciary. It was at best scandalous to bring the integrity of the Chief justice and the judiciary overall into disrepute by publishing untruths connected to the judiciary.

64. The combined effect of the responses from the gullible public denigrated the high respect and confidence that the public have for the judiciary rendering the last bastion of hope, hopeless. A dent was created in the judiciary overall.

65. The judiciary must regain lost respect, confidence, and dignity. The leader acted alone when he published the articles, and he must carry the blame alone. To allow the matter to rest without any strong sanction, would in turn open the floodgate to all and sundry to bring disrepute to the judiciary at will.

66. Public good demands that the judiciary is protected from being scandalised or brought into disrepute in any shape or form, because there is no better place for the trodden to go to.

67. When those findings and considerations are weighed against the references of good repute from the 3 reputable individuals the pendulum swings in favour of finding serious culpability on the part of the leader rendering him unworthy of continuing in office. A recommendation for dismissal from office pursuant to s 27 (5) is warranted.

CATEGORY 2.

68. Under this category we start by reproducing allegations 5, 6,7,9 & 10 from which the leader was found guilty of misconduct in office.

Allegation 5.

Allowing an associate company, namely Tolo Enterprises Ltd to benefit through consultancy services to the Madang District Development Authority.

Allegation 6.

Misappropriation of K455,751. 20 to the use of Tolo Enterprise Ltd a company owned by an associate.

Allegation 7.

Use of Madang District Services Improvement Programme funds in paying Electoral Office Rentals Company contrary to SRC Determination 2015 and DSIP Funds Guidelines.

Allegation 9.

Creating a structure within Madang DDA without obtaining approval from the Department of Personnel Management.

Allegation 10.

Misapplication of Madang DSIP funds on salaries and wages of electoral staff in the Madang District Ward Project Office contrary to the DSIP guidelines.

69. In respect of all these allegations the tribunal is also required by s 28 (1A) to determine whether the findings of guilty in its totality amounted to no serious culpability on the part of the leader or the public policy and public good do not require a recommendation for dismissal from office.

70. We will apply the same approach we took under category one. The facts outlined in the decision on verdict are adopted here for purposes of determining culpability under this category.

71. All the allegations for which the leader was found guilty arose out of decisions made by the Madang District Development Authority Board (board) for which the leader was Chairman.

72. The leader when addressing the tribunal states that he was not associated in any way to Tolo by the definition of associate under the Organic Law. It is his further contention that there was no issue with how funds were expended as it was the board who made the decision and there was nothing personal. The benefit of K3000. per month to Tolo for was for its intended purpose. The K6000 per month was for rental to improve service delivery. The company was incorporated to save costs instead of engaging private companies.

73. On the structure the leader intimates that he met the Department head on it but received no advice not to establish any structure and there was no ignorance of any advice on his part. On the electoral staff he denies any personal benefit apart from benefit to people. There was no District Services Improvement Programme (DSIP) guideline on the use of the funds, and it was up to the member to decide. As to payments to church activities it was not pleaded but the tribunal ruled as outside development purposes. Since there were no guidelines, the board supported the expenditure of funds, and he did not act alone.

74. On the leader's behalf Mr Yalo of counsel submits that since the findings of guilty are connected to the District Development Authority Act a determination on culpability under these findings should take cognizance of the intent of parliament behind the passage of the relevant legislation; that the DDA Act was passed to replace JDBPC which had brought about adverse consequences without projects. Upon passage of the Act the SRC determinations were revised where individual allowances were removed and allowed one electoral allowance to be used at the discretion of the leader. By doing so the administrative component of 3% were subsumed into the 10% administrative allocation under the DSIP guidelines.

75. The main argument is that since s 7 of the Act gave wide powers to the board to do all things necessary or convenient which included paying for rent and employees, anything done with the authority of the board is taken to have been done lawfully by the Authority. Since the activities the subject of the guilty findings were based on board decisions and not influenced by the leader there was no serious culpability on the part of the leader.

76. A further argument is that the findings of guilty against the leader were distinguishable from the findings in Boka Kondra tribunal where the misconduct there related to pre 2014 reforms.

77. Mr. Kaluwin through his written submissions under three categories of the findings of guilty submits that the tribunal should look at the gravity of the recklessness and ignorance displayed by the leader from the findings.

78. Under allegation 5 & 6 it is submitted that the conduct of the leader clearly illustrated deliberate decisions and actions using his position to engage Tolo Enterprises a company owned by the wife of Sir Arnold Amet who shared strong political relationship with the leader, for Tolo to benefit from DSIP funds meant for development, which was improper. It was a conflict-of-interest situation with an element of corruption attached when the degree of involvement by the leader was higher than the other board members and payments being made for prior engagement. Therefore, his culpability was serious deserving dismissal from office.

79. Under allegation 7 & 10 Mr Kaluwin submits that the leader was knowingly double dipping when applying DSIP funds to pay wages for electoral staff and rent for electoral office while receiving electoral allowances for those purposes.
The SRC changed the figures only and not the purpose for which the allowances were paid to the leader. There was an element of dishonesty in the application of DSIP funds hence the culpability was serious warranting dismissal.

80. Under allegation 9 the submission is that that there was serious disregard and ignorance of the law when the leader created a structure outside the existing structure without approval from the department responsible as required by law. Thereafter salaries and wages were paid to staff employed therein from DSIP funds which money was intended for development purposes. Misapplication of funds under the control of Papua New Guinea to proposes to which it could not be applied was serious deserving of censure and dismissal. Based on the totality of the proven misconduct Mr Kaluwin urges the tribunal to look at the gravity of the unlawful and improper application of public funds which was huge.

81. It is the submission that the leader should bear the full blame for knowingly and intentional devising a scheme to create a duplicate structure and incorporate a company as a front to avoid financial guidelines and pay huge amounts on rental for electoral office and wages for electoral staff while enjoying the benefits of electoral allowances through his salary. As it amounted to serious culpability on the part of the leader public policy and public good demands dismissal from office.

82. All the five allegations for which the leader was found guilty relate to the Madang District Development Authority and the enabling Act the District Development Authority Act.

83. Before I proceed with a determination under this category, I am prompted to make an observation in passing on the District Development Authority Act.

"Whatever the intention might be, on a reading of the District Development Authority Act, it is apparent that parliament in its wisdom passed the Act to validate siphoning off public money (DSIP funds) under the auspices of the magic word "development". It is an open-ended legislation with no room for accountability. Any misfit who siphons off DSIP funds are protected on all four corners by the Act. The Act in my view is a sham".

84. Returning to the present case, the statements by the leader and submissions of his counsel when read together fall into the same category as referred to under category 1 of the determination.

85. The tribunal is being asked to revisit the evidence for which verdict of guilty were already returned. It is belated and sub judice. The only argument of relevance that covers all the allegations are that the findings of guilty related to matters which had valid approval of the DDA board which body was the lawful authority.

86. That argument has strong appeal in circumstances where s 7 of the Act gives unlimited powers to the board to do anything necessary or convenient. The engagement of Tolo, the payments for office rental; wages for electoral officers, setting up of a structure etc were a by-product of board resolutions for which the board members should collectively cop the blame.

87. The leader as Chairman was required to be more prudent to avoid impropriety. It seems he failed in that respect. There are elements of impropriety in respect of the engagement of Tolo Enterprises in a conflict-of-interest situation. There is impropriety in allowing misapplication of funds to purposes it could not be lawfully applied like paying for rental of electoral office when the administration building was begging maintenance; creation of a structure without the mandatory approval from the Department responsible and employment of people thereunder and paying wages from DSIP funds when the employees on the existing structure were paid through the normal process.

88. Despite those glaring improprieties, when the findings of guilty are considered in their totality, the activities involved were all direct and by-products of approvals by the lawful authority being the DDA Board.

89. In that regard I agree with Mr Yalo's proposition that since the board has wide powers under the enabling Act any decision the board makes is deemed a valid decision of the Authority. There is no other plausible explanation apart from this observation.

90. By the board decisions to create a structure and pay rental and wages to persons employed therein renders the assertion that the leader was double dipping meritless.

91. The conclusion therefrom is, despite the pivotal role the Leader played as Chairman of the board and as the sponsor of the proposals, he should not shoulder the full blame for the allegations under this category for which he was found guilty. His culpability is diminished because the alleged activities the subject of the allegations were consequences of collective decisions of the board and not solely by the leader. The public policy and public good requires that the leader be spared the ultimate penalty of dismissal from office.

92. I would recommend to the appropriate authority a fine of K2,000. 00 for each of the 5 allegations under this category to total K10,000.

DECISION ON PENALTY

93. **NIDUE PM:** From the initial 13 allegations referred to the tribunal the leader was found guilty of 7 allegations of misconduct in office. As stated by the Chairman the totality approach shall be applied under two categories. First for allegation 1 & 2 for scandalising the judiciary and second for allegations 5, 6,7,9 & 10 relating to the Madang District Development Authority and DSIP funds.

94. On the legislative framework and principles guiding penalty I adopt what the Chairman highlighted in his deliberations.

95. The issue is whether the findings of guilty constituted no serious culpability on the part of the leader and the public policy and public good did not require dismissal from office. These are requirements under s 28 (1A) of the *Constitution* to be satisfied for an alternative penalty.

96. At the start of the hearing on penalty 3-character reports were allowed to be relied on in submissions on behalf of the leader.

97. The Leader was then allowed to address the tribunal. Following that Mr Yalo on behalf of the leader spoke on his written submissions and the referrer responded. This is the decision therefrom.

Category 1. Scandalizing the Judiciary

98. For Allegation 1 and 2, it is my view that the Leader's conduct in publishing, inaccurate statements, distorted and far from the truth are a blatant misrepresentation of what had transpired. The leader failed to appraise himself of the surrounding facts properly before publishing them. This caused a backlash of insensitive and highly flammable comments from the public. What was not expected happened by the publications. Papua New Guinea is relatively new to the social media platforms. For that reason, the leader had a higher calling than ordinary men to publish truths on social media.

99. The publications in the present case were only sensational and not for the public good. I say that conduct is unbecoming of a Leader.

100. The leader demeaned his office as a mandated leader representing the people of Madang Open Electorate. He failed to exercise restraint and had no regard of the likely negative perceptions on the Judiciary.

101. The articles may not have been intended to scandalize the Judiciary, however because they were misstatements and inaccurate, the general

population, took it for what it was, as published by the Leader, and this is evident in the responses from the Public in his forum on Face book, which at the best can be seen as disgraceful, shocking and ridiculous. These types of response would not have been ignited had the Leader as author of the articles exercised restraint. There was no restraint and decorum exercised by the Leader.

102. To conclude I adopt all that we said in the decision on verdict. However, what we said at pages 23 to 24 needs special mention which I reproduce as follows:

> *"The result of his conduct was that public confidence in the Judiciary overall was denigrated. It gave birth to negative perception and disrespect for the judiciary, leading to scandalizing the judiciary, a government institution bestowed with a high degree of trust".*

103. By his persistent publications the Leader caused this to happen. No one else but the leader only can be blamed for this, and it attaches with serious culpability deserving of the maximum penalty for misconduct. I would recommend to the appropriate authority that the leader be dismissed from office.

Category 2. District Development Authority & Use of DSIP Funds

104. For Allegation 5 and 6, it is my view, that the way the leader engaged the associate company was wrong. It was a smokescreen to recuse himself from the board meeting after sponsoring the agenda to engage Tolo. By making known his interest in the meeting, he affirmed his relationship with Tolo Enterprises Ltd. He set out on a deliberate course of action to facilitate benefits to Tolo Enterprises Ltd, firstly on a temporary engagement and later for long-term engagement. The question is, what happened to the other consultants who were engaged with Tolo in the first place? Favouritism and conflict of interest is clear from those observations.

Allegation 6 is a consequence of allegation 5. Where an associate company is engaged, payments to the company would amount to the benefit of the associate company which is not allowed by s 13 of the Organic Law.

105. In Allegation 7 we found that the Ward Project Office was operating from a rented property to serve electoral office interest as against administrative functions of the district office. It was later subsumed under Ward Project company Ltd. There is a clear demarcation of the offices and staff employed in the respective offices. The District Office was run down and had been declared unhealthy by the health authorities, and as stated in the judgment, our view is that if the Leader was serious about having a good administration, he would have done repairs to that office instead of renting another property. Therefore,

the payments for electoral office rental from DSIP funds was wrong when it should have been paid from the electoral allowance of the leader.

106. For allegations 9 and 10 the Leader created a structure for the authority through board approval on 29 November 2018 without obtaining approval from the Department of Personal Management because there can never be a standalone structure from the existing one without the mandatory approval.

107. The structure was initially headed by Ruben Lulug as the Project Manager with 14 others which included electoral officers. The wages for electoral officers were supposed to be paid from the leader's electoral allowances but they were also paid from DSIP funds like the others.

108. As to culpability it must be judged on the totality of the findings and not individually. The findings when considered together mainly concerns use of DSIP funds. The use of DSIP funds did not emerge out of nothing. The authority board made the decisions from which the payments were made. The leader did not individually make any decision.

109. The issue for determination in view of all those considerations here, is not the decisions of the board. It is the way the leader was involved that needs scrutiny.

110. For that it is noted that the leader was instrumental in securing the decisions of the board. He instigated and made proposals. The board became a rubber stamp. From minutes of meetings there was no major input or objection by the other members of the board.

111. Even then the majority in the board swayed in the leader's favour if a vote was required. He appointed 3 of them. The other 3 were council presidents.

112. Even though the leader instigated the board decisions, the board approved them. It then became board decision which is allowed by the DDA Act. The leader did not act alone. He did not make any payment to anyone. He did not receive any personal benefit. Therefore, the leader shall not take the full blame for the allegations he was found guilty. It naturally diminishes culpability.

113. Because the allegations relate to flow on effects of board decisions which are permitted by the DDA Act public good and public policy did not require that the leader be dismissed from office under these categories. I would recommend to the appropriate that the leader be fined a sum of K2,000. 00 for each allegation found guilty.

DECISION ON PENALTY

114. **KOMIA M:** This tribunal on 28 February March 2023 by a unanimous decision found the leader guilty on 7 allegations of misconduct in office. The tribunal is required by s 28 (A1) of the *Constitution* to recommend to the appropriate authority for dismissal from office unless there is no serious culpability on the part of the leader or the public policy and public good requires other penalties to be imposed.

115. On 24th April 2023, parties submitted their respective submissions on penalty. The submissions centered around two main categories, the first being a combination of allegations 1 &2 two relating to scandalizing the judiciary. The second category consists of allegations 5, 6,7,9 & 10 which related to the Madang District Development Authority and DSIP funds.

116. I have read the judgment by the chairman of the Tribunal and am in concurrence with it.

117. This is my addition to the decision on penalty.

118. Prior to counsels making submissions, the tribunal allowed the leader to say a few words regarding penalty, upon request by the Leader's lawyers.

119. For the charges relating to scandalizing of the judiciary, leader stated that his articles were never intended to scandalize the judiciary or demean the office of the chief justice. The leader maintained that his publication was based on facts before him. For the inaccurate parts of the statements, he offered apologies.

120. On the allegations relating to the creation of the ward development structure; incorporation of the ward development company; appointment and engagements of consultants and the consequent expenditures from DSIP funds were from collective decisions by the DDA Board and he is not in any way solely responsible.

121. From those statements the leader is generally asking the tribunal for a lesser penalty on the grounds that he never in any manner acted alone.

Category (1) Scandalizing the Judiciary

Allegations 1 & 2

122. Under allegations 1 & 2 the leader while apologizing for the error in stating that the Chief Justice was appointed by O'Neill argues that his articles

were never in any way intended to scandalize the judiciary, nor disrepute the office of the Chief Justice and the judiciary, or to bring disrepute to his own office.

123. He then submits that his articles were factual in nature and that if there is any seriousness in the articles he had posted, it is mitigated by the fact that the matter the subject of the articles had been withdrawn.

124. He also argues that there was nothing scandalous in the articles. The reproduction of the letter by the Chief Justice was posted by John Jovie Ondonale which the leader was made aware of and not posted by him. He went on to submit that given the fact that the tribunal had dismissed the charge relating to the reproduction of the Chief Justice's letter it diminishes culpability because the comments from the public related to the publication of the Chief Justices letter which allegation was dismissed.

125. In strengthening this part of the submission, counsel for the leader while referring to the finding of facts submits that there was no serious culpability to penalize the leader with the most severe penalty as the articles were based on facts before the leader.

126. In considering this leg of the submission, I am reluctant to be guided by the plea to revisit the facts and reasons in the verdict to determine culpability. The task of revisiting that part of the judgment is in another forum. The decisions on verdict were made after considering the totality of the facts put before it. I say this because, during the trial, all relevant evidence relating to the leader's articles including comments from the general public were all before the tribunal and the tribunal was guided by those facts to arrive at the verdict.

127. On this basis, the submission on the evidence that the article that attracted the most negative comments were on the letter reproduced by John Jovie Ondonale and not the leader is rejected. All the responses were connected by what the leader published. One comment cannot be reasonably isolated from another.

128. Mr. Kaluwin submits that the leader's statements are intentional and that the leader's comments are aimed at bringing the Chief Justice, the office of the Chief Justice and the Judiciary into disrepute. It is submitted that the publication by the leader was inaccurate, distorted and far from the truth. It was highly irregular and improper for the leader to publish such statements and expect that a reader would interpret it according to his (the leader's) perception.

129. It is submitted therefore that the leader demeaned his office when he published the articles. The public perception on the judiciary, and the chief justice coupled with adverse effects it would have in creating tension and unrest between the legislative and the judicial arm of the government, is something

this tribunal should not take lightly. As such it is submitted that the leader's conduct amount to serious culpability and attracts the serious censure of dismissal from office.

130. For a start I concur with the learned Chairman's finding of the leader's submissions to be nitpicking of facts and findings. The attitude of referring to facts not pleaded for mitigation of penalty and leading the tribunal unconsciously to revisit its own findings on verdict to correct itself and arrive at a lesser penalty seems a bold act of misleading the tribunal.

131. I am unable to accept the submission that the articles were not intended to scandalize the judiciary.

132. The judiciary in this country is composed of functions established by the Constitution. It is there to protect and maintain the rule of law.

133. Every citizen, aristocrats, bureaucrats, politicians, tradesman, handyman, and layman are all subject to the rule of law, and so are the Magistrates, Chief Magistrate, Judges and Chief Justice for that matter. Whilst we are all under the rule of law, there are instances where the law allows for freedom of speech, freedom of thoughts, ideas and opinions. Such was the right exercised by the leader, and this court cannot simply ignore that right as a matter of fact and law.

134. Nevertheless, those rights and privileges accorded by law are not freefall with nothing to land on. They are subject to the interest of everyone else in this country. That freedom or right demands responsibility, and each and every person must be responsible and exercises that right, with tact and mannerism. Proper wording is one such component of tact and mannerism. In the present case proper wording in the exercise of the leader's right is in issue. The words that led to the allegations against the leader read like this:

> *"A relevant matter to note is that the Chief Justice was only recently appointed by Peter O'Neill late last year".*

and he states in his other article that ……*" What was not anticipated was that O'Neill and his lawyers would solicit the assistance from the Chief Justice and desperate enough to submit fabricated documents to mislead the Court that the warrant was defective as a means to obtain a stay order".*

135. Whilst the above information may be deemed to be based on factual circumstances, the statements are poorly worded and disseminate false information. The first statement is in essence highly erroneous and untrue.

136. The leader is an intelligent and knowledgeable person who was a cabinet minister when publishing this article. He knew very well that the appointment of the Chief Justice is never made by any individual; rather the appointment is

made by the National Executive Council (NEC), which the Prime Minister is by default the Chairman.

137. I am therefore fortified of the view that the leader knowingly wrote the article with an intent to attract derogatory remarks and comments from the wider public and consequently smear the Chief Justice and Peter O'Neill of corruption.

138. He achieved that on the social media platform, but what he failed to realize was that, by those comments responding comments from the public brought disrepute to the judiciary, the third arm of government.

139. Whether the proceeding the subject of the articles was withdrawn and became a nullity or went to a proper trial is irrelevant. What is of essence is that insinuations were propagated of a Judge who was dealing with the matter, the Chief Justice of this country, and a former prime minister of this country by another leader well versed with the various processes of governments and left it to the public to pass judgment.

140. The public passed negative judgement. The robustness and independence of the judiciary was subjected to negative comments.

141. The consequences of the publications is here today as I pass judgment in this tribunal. There no doubt would be individuals out there who would be questioning the integrity of the decision the tribunal is about to pass in circumstances where an outspoken leader who made comments against the Chief Justice is now before this tribunal. How does one clear those kinds of cruel thinking?

142. Leaders (parliamentary and non-parliamentary) apart from the ordinary person should take cognizance of what they are about to disseminate for public consumption because word has power to do or undo society.

143. I am therefore of the view that the leader's wordings in the articles were at best careless. He acted alone and must face the consequences alone.

144. Given the above discussions, the conclusion is that there is no cure for the damage already done. The only option is to deter the same from recurring by imposing the ultimate penalty allowed by law and that is a recommendation to the relevant authority that the leader be dismissed from office.

Category 2: District Development Authority & DSIP funds

Allegations 5,6, 7, 9, 10.

145. Under these allegations the leader says that he cannot be solely responsible for a decision that has been collectively made by the board. On remunerations for members of parliament the leader stated that the amendments to the SRC determination had allowed for ten percent of the DSIP component to be used for administration cost and that he has never misappropriated any monies belonging to Papua New Guinea.

146. Consistent with the leader's statement Mr. Yalo submits that the seriousness of culpability in these allegations is reduced because the decisions that led to the allegations were never made by the leader alone but board decisions; and there was no intention to mismanage or misapply DSIP funds. He relies on s.11(3) of the District Development Authority Act which states that a decision of the board is a decision by the board is deemed to have been taken by the Authority.

147. It was further submitted that the tribunal should also consider the character references given by the current Prime Minister, James Marape, former Chief Ombudsman Commissioner, and Father Jan Czuba, Secretary for Department of Higher Education. All three are reputable person in the country, and they describe the leader as a strong, intelligent leader and a strong advocate of corruption in the country. They also describe the leader as a person of repute and has a lot to contribute to the country.

148. Mr Kaluwin, argues strongly that a leader's status or good character does not in any way lessen the degree of culpability. Therefore, the leader being a person of high repute who was found guilty of misconduct should be recommended for dismissal from office.

149. On the issue of character references my view is consistent with the Chairman's view that character reports should be measured against the seriousness of the misconduct and not simply apply it as a mitigating factor. The leaders standing and prior good works should not make the misconduct any less serious. *(See Moi Avei)* The benchmark for an advocate of corruption who is found guilty of misconduct must be higher than an ordinary leader or person.

150. The findings of guilty under allegations 5,6,7,9 & 10 relate to the District Development Authority and its enabling Act.

151. From the statements of the leader and submission of Mr. Yalo I am being asked to go back to the evidence from which the leader was found guilty and disturb it. That I cannot do. That is for another forum.

152. What I should be doing now is to hear the leader's argument on why he thinks the findings of guilty amounted to no serious culpability or the public policy and public good warranted an alternative penalty. That did not happen and the findings of guilty stands undisturbed. On that basis alone I cannot find

the allegations found guilty constituted no serious culpability on the part of the leader or the public policy and public good requires an alternate penalty.

153. The question then is what should be an appropriate penalty for a person of good repute and high standing? That involves a measure of culpability. The leader's culpability should be measured against the conduct for which he was found guilty. He was instrumental in all the decisions the board made. The decisions resulted in substantial amounts of DSIP funds which are public funds to be spent on purposes for which it was not intended. It calls for serious censure.

154. Whilst s 11 (3) recognizes the authority board decisions as the decision of the authority, it cannot be used as a cover. A leader is in my view culpable pursuant to s 13 (b) of the Organic Law by his participation in introducing and voting which is an act of agreeing to fund from DSIP funds for activities related to the board resolutions.

155. In passing I find that the District Development Authority Act is a conduit for leaders in their capacity as Chairman to misappropriate public funds and apply s 11 (3) as the escape route to avoid being caught of misconduct in office. The boards should not be used as scapegoat to sanction abuse of public funds. From this observation my firm conclusion is that the leader being instrumental for all board decision in Madang District Authority be held for serious misconduct warranting dismissal from office.

156. The decisions on penalty are as follows.

1. By unanimous decision the Hon Bryan Kramer shall be recommended to the Governor General pursuant to s 28 (3) (g) (ii) of the *Constitution* to be dismissed from office for scandalizing the Judiciary forthwith.
2. By majority decision the Hon Brian Kramer shall be recommended to the Governor General pursuant to s 28 (3) (g) (ii) of the *Constitution* to pay a fine of K2,000. each for allegations 5,6,7,9 & 10 to total K10,000. to be paid within one week.

Public Prosecutor: *Lawyers for the Referrer*
Nema Yalo Lawyers: *Lawyers for the Leader*