

N229

PAPUA NEW GUINEA

IN THE NATIONAL )  
COURT OF JUSTICE )

CORAM: ANDREW, J.  
Tuesday,  
1st July, 1980.

IN RE Provincial Election, Biami  
Constituency, Western Province,  
Fly River Provincial Assembly

BANEGA ISILOWA

Petitioner

v.

YOTO BIAGUNI

Respondent

Election to Provincial Assembly - question of residence  
considered - conflict between Boundaries Commission  
Report and Electoral Rolls.

Official irregularity - exclusion of place of residence  
from the constituency.

Onus of proof in elections.

Undue influence - where alleged to have been committed  
by person other than the successful candidate.

Legislation:

- Provincial Government (Electoral Provisions)  
Regulation 1977
- Constitution of the Fly River Provincial  
Government
- Fly River Constituencies Act 1978.

Cases considered:

- |   |                         |
|---|-------------------------|
| <u>In The Matter of Charlie</u><br><u>Maino Auki</u>        | (1973) P.N.G.L.R. 243   |
| <u>Woodward v. Sarsons</u>                                  | (1875) L.R. 10 C.P. 733 |
| <u>In re Menyamya Open</u><br><u>Parliamentary Election</u> | (1977) P.N.G.L.R. 298   |
| <u>Scarcella v. Morgan</u>                                  | (1962) V.R. 201         |

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1980

June 23, 24  
KIUNGA,  
WESTERN  
PROVINCE

This is a dispute about the validity of an election for the Biami Constituency of the Western Province, Fly River Provincial Assembly and of the return made in relation to it.

June 26  
July 1  
WAIGANI,  
NATIONAL  
CAPITAL  
DISTRICT

ANDREW, J.

The petitioner, Banega Isilowa, was a candidate for the Biami Constituency in the 1979 elections and he polled a total of 951 votes which was 12 votes short of the successful candidate, Yoto Biaguni, the respondent to these proceedings, who polled 963. The petition contains three grounds which I set out as they appear in the petition.

"1. Yoto Biaguni is not a Biami man, he is a Gobasi. He has never lived in the Biami constituency. His constituency is Upper Strickland and his home village of Fabi is in the Upper Strickland Constituency. Up until a few weeks before the election, he was working as a clerk at the Government Office at Nomad which is also in the Upper Strickland Constituency. All of these things, we feel, make it illegal for him to have stood for election.

2. There was a great deal of confusion in the election. When the printed polling schedule came out, the villages of Sirigubi, Fabi, Basubi, Yulabi, Dadalibi, Wabmosom, Huhunobi, Kuludobi, Odogumi, Honabi were all listed in the Biami Constituency. Large numbers of these people intended to vote for me. However, when the polling team arrived at these places, they all were made to vote in the Upper Strickland Constituency, thus losing me all these votes.

3. The result of the election was influenced by threats and false talk, much of it originating from an interpreter employed by the Government and working on the election team. The fact that Biaguni had been working for the Government, was used to present him to our new people as being a Government representative."

No point is taken by the respondent as to the form of the petition. In short, therefore, the petition raises issues of residency, electoral errors or omissions by officials and the illegal practice of undue influence.

Before turning to the first ground I set out some of the background of the Biami Constituency. The area forms a remote part of the Western Province. It was one of the last, if not the last, area to be de-restricted in the late 1960s. Some development has occurred but it remains accessible only by air and there are few internal roads. The only cash crop is chilli and the people are generally illiterate. The main town, if it could be classed as such, is Mogulu which has the only air strip. The constituency has a common border with the Southern Highlands and with the neighbouring constituencies of the Upper Strickland and Pare which are also part of the Fly River Provincial Government. The electoral roll contains 2,355 persons. The town of Mogulu together with Igimi and Kugoyobi have a school, an aid post and a mission, but apart from that there are only scattered villages mostly linked by foot track and rivers.

I turn now to the first ground.

On the evidence before me it was clear that the petitioner had little idea where in fact the respondent was born and from what village he came. I am satisfied that he was born in the village of Basubi and indeed this was virtually conceded by the petitioner. S. 12(3) of the Provincial Government (Electoral Provisions) Regulation 1977 provides:

S.12(3) "A candidate for election to the provincial legislature must have been born in the constituency for which he intends to nominate or have resided in the constituency for a continuous period of two years immediately preceding his nomination or for a period of five years at any time."

This Act however must be read subject to the Constitution of the Fly River Provincial Government. S.11 of the Constitution provides, inter alia, that a member of the Assembly must be not less than 25 years of age; he must be a citizen of the Province and have resided in the constituency for which he intends to nominate for a continuous period of six months immediately preceding

the date of the election in which he intends to stand or have been born in the constituency for which he intends to nominate.

The difficulty that has arisen in this case is that the electoral roll for the Biami Constituency does not include the village of Basubi. It has been included in the neighbouring constituency of Upper Strickland. The electoral roll indicates that Basubi has a total of 27 persons enrolled. The Constitution of the Fly River Provincial Government provides by s.27(1) that the number and boundaries of constituencies shall be determined from time to time by the Assembly in accordance with the recommendations of the Boundaries Commission. That Commission, (the Fly River Provincial Boundaries Commission) was established in accordance with the Fly River Constituencies Act, 1978, and its report and recommendations were made in 1978 and adopted by the Assembly on 14th February 1979. The report however made no mention of Basubi village under its names of villages for either Biami or Upper Strickland Constituencies. The report does contain maps setting out the proposed boundaries. The preface of the report says that "the maps have been prepared with the greatest possible accuracy from sources available, however, due to the general nature of source of this material, no absolute accuracy can be claimed".

This appears to me to be a rather inflated claim for in no way could they be described as accurate at least in relation to the Biami and Upper Strickland Constituencies. The maps are not drawn to scale and resemble only sketch plans. The evidence before me, which I accept, is that Basubi village is geographically within the Biami Constituency. It is not in dispute that it is a Biami village and its people speak the Biami language.

I have accepted into evidence a scale map prepared by the National Mapping Bureau. By reference to the village names listed in the boundaries report and to the maps contained therein, the Bureau prepared as accurately as possible the boundaries of the Biami Constituency. From this evidence it clearly emerges that Basubi is in the centre of the Constituency. All the villages surrounding Basubi are listed in the report as being Biami villages. Furthermore, I accept the evidence of Mr. Kala Awali who was the Provincial Returning Officer for the Western Province at the time of the elections; that he had, prior to the election, attempted to have Basubi included in the Biami Constituency. This was because in his view Basubi was clearly within Biami. More evidence of the inaccuracies of the boundaries can be seen by the fact that one village listed in the body of the report as belonging to Biami is placed on the boundaries map as being in the Upper Strickland.

One of the factors which the Boundaries Commission took into account during the distribution was "community or diversity of interests; (tribal and linguistic affiliations)." S.193 of the Provincial Government (Electoral Provisions) Regulation 1977 provides:

"193. - REAL JUSTICE TO BE OBSERVED.

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

I am satisfied that the failure of the Boundaries Commission to include Basubi village in its report was an oversight. Clearly both geographically and culturally it belongs within the Biami Constituency and "being guided by the substantial merits and good conscience of each case", I find that this is so.

It follows that I am satisfied that the respondent was born in Basubi village and that this village is within the Biami Constituency. I am thus satisfied that the requirements of residency as contained in the Provincial Government (Electoral Provisions) Regulation and in the Constitution of the Fly River Government have all been satisfied.

I should add that the reason for the inclusion of Basubi village in the electoral roll for the Upper Strickland Constituency appears to be that the roll was prepared by the Electoral Commission independently of the Boundaries Commission report, and was based on old census division reports. But it is the Boundaries Commission report, once having been accepted by the Provincial Assembly, which establishes the boundaries and not the electoral rolls. I shall deal with the legal consequences which flow from this and of the effect of the electoral roll, under the second ground as it becomes, in my view, relevant to that ground.

One further point was taken on the first ground and that being that the respondent was less than the required age of 25 as provided in the Constitution of the Fly River Government. The respondent in his nomination form stated that he was born in 1953. In evidence he said he had later been told it was 1955 by persons who counted on their fingers. This would make him 25 some time this year. It is apparent that he really does not know his exact age. But apart from this the point was not raised by the ground of appeal and again applying the substantial merits and good conscience of the case, I would not accede to the point.

For all of the above reasons, the petitioner fails on the first ground.

The second ground raises the question of official irregularity. As the evidence has emerged there is nothing to show that any person has been prevented from voting in the constituency in which he was enrolled as in the electoral rolls. There was evidence that three villages, namely Fabi, Dadalibi and Kukudobi which belonged to the Upper Strickland Constituency were listed in the polling schedules for Biami. But persons from these villages did in fact vote in the Upper Strickland so this made no difference to the result. Furthermore, s.94 of the Provincial Government (Electoral Provisions) Regulation provides that an election shall not be challenged on the ground of failure to observe a polling schedule or of a variation or a departure from a polling schedule.

A more difficult question concerns the respondent's village of Basubi. I have already found that it is within the Biami Constituency. However as a consequence of its being listed in the rolls for the Upper Strickland, persons from Basubi voted in that constituency. 27 persons from Basubi appear in that roll. If more than 12 had voted and their votes been recorded for the Biami Constituency there may have been a different result to the election. There was some argument advanced that I could assume that persons from the respondent's own village would be likely to vote for him. However I cannot speculate in any way as to how persons would or might have voted.

This situation might be thought to be similar to that which arose in In The Matter of Charlie Maino Auki (1) where the successful candidate won the election by a majority of 60 but some 83 votes had been lost in a ballot box in a flooded river. In other words enough votes to have affected the result were lost and the election was declared void.

I take the law to have been correctly stated by Lord Coleridge in Woodward v. Sarsons (2). The statement of Lord Coleridge is as follows:

"We are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a free and fair opportunity of electing the candidate which the majority might prefer. This would certainly be so if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own

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(1) (1973) P.N.G.L.R. 243

(2) (1875) L.R. 10 C.P. 733 at p. 743

preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament."

However, in my view there are two matters which distinguish the mishap which occurred in In The Matter of Charlie Maino Auki's case (supra) (3) from the present case.

The first is that there is no evidence before me of how many persons from Basubi did in fact vote. The only evidence comes from the respondent who says persons from his village went to another village called Fabi in the Upper Strickland, where they voted. The onus of proof in such cases was discussed by Frost, C.J. in In re Menyamya Open Parliamentary Election (4). I agree with the conclusion reached there, that before a petition could be upheld the ground of it must be proved to the tribunal's entire satisfaction and that it may fall just short of the criminal standard, although in application there would be no real practical difference.

In ascertaining whether official irregularity may have affected the result of the elections a comparison should be made between the actual voting and what the voting would have been had the election been free from all official irregularities. See Scarcella v. Morgan (5). I also consider that this is not the type of case such as In The Matter of Charlie Maino Auki (supra) (3) where the mishap (the loss by misadventure of a greater number of cast votes than the actual majority) was held to shift the onus on to the respondent to show that the mishap did not affect the result.

I consider that it has not been shown that a sufficient number of persons from Basubi village cast their votes in the Upper Strickland Constituency, such that those votes, if recorded

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(3) (1973) P.N.G.L.R. 243

(4) (1977) P.N.G.L.R. 298

(5) (1962) V.R. 201

in Biami, would have been sufficient to change the majority into a minority.

The second reason is founded on s.190 of the Provincial Government (Electoral Provisions) Regulation:

"190. - INQUIRIES BY COURT.

The National Court shall inquire whether or not the petition is duly signed, and so far as Rolls and voting are concerned may inquire into the identity of persons and whether their votes were improperly admitted or rejected, assuming the Roll to be correct, but the Court shall not inquire into the correctness of a Roll."

I am thus precluded from inquiring into the correctness of the electoral roll for both Biami and Upper Strickland Constituencies. The voting has taken place in accordance with the electoral rolls. I cannot question the exclusion of Basubi from the Biami electoral roll so on this basis alone I am unable to say that a majority of the electors may have been prevented from electing the candidate they preferred.

I find that the petitioner fails on the second ground.

The third ground alleges the illegal practice of undue influence. It was not alleged however that this was committed by the respondent. It was said that one Opi, a Government interpreter employed on the election patrol teams had said that if people voted for the petitioner then if they brought their cash crop of chillies to Nomad he, Opi, and other Government interpreters would tip the chillies out and chase the people away.

The Provincial Government (Electoral Provisions) Regulation provides by s.191(3):

"The National Court shall not declare that a person returned as elected was not duly elected, or declare an election void -

- (a) on the ground of an illegal practice committed by a person other than the candidate and without the candidate's knowledge or authority; or
- (b) on the ground of an illegal practice other than bribery or undue influence or attempted bribery or undue influence,

unless the Court is satisfied that the result of the election was likely to be affected, and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void."

It is not alleged that the respondent had any knowledge of any illegal practices committed by anyone at all. The evidence of these statements attributed to the interpreter Opi comes from his fellows on the election patrol team. The first witness said that Opi spoke to him and other carriers at several different

villages but that this was after the voting was completed. At two of the villages he says Opi only said "vote for Biaguni not Pastor Isilowa". The witness said that at this time he had already voted. The second witness said that Opi had said that cash crops such as chillies were not coming on the mission plane and they must vote for Biaguni. He said he got frightened but did in fact vote for the petitioner. The alleged words do not amount to a threat or inducement to vote or refrain from voting in a particular way.

Similar evidence was called from two further witnesses. All these witnesses say they had already voted with the exception of one who said he voted for the petitioner anyway.

All of this evidence falls far short of satisfying the requirements of s.191(3) of the Provincial Government (Electoral Provisions) Regulation. At the most it appears to be some discussion among members of the electoral patrol team after the day's voting. In any event, even if the words were said, there is no evidence that they affected the result of the election. In these circumstances I hold that it would not be just that the respondent should be declared not to be duly elected or that the election should be declared void.

For the reasons I have given the petition fails. The petition will be dismissed.

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Solicitor for the Petitioner	:	A/Public Solicitor
Counsel	:	A.K. Amet
Solicitor for the Respondent	:	G.M.H. Delaney
Counsel	:	G.M.H. Delaney
Solicitor for the Electoral	:	
Commission	:	Secretary for Justice
Counsel	:	A.M. Pert