

IN THE SUPREME COURT OF NAURU
(COURT OF DISPUTED ELECTIONS) **COPY**

MISCELLANEOUS CAUSE NO. 14/2000
MISCELLANEOUS CAUSE NO. 15/2000

IN THE MATTER OF the Electoral Act
1965-1992

and

IN THE MATTER OF an Election in the
Constituency of UBENIDE.

DAVID ADEANG AND KENNAN ADEANG

PETITIONERS

THE RETURNING OFFICER & ORS

RESPONDENTS

Date of Hearing : 2 November, 2001
Date of Decision: 6 November, 2001

Mr. Paul Aingimea for the Petitioners
Mr. Niall for the Respondent Returning Officer) assisted by
Mr. Hammond, Q.C. for Respondent Amwano) Mr. S. B. Collin
Mr. Pres Nimes for the Respondent Dowiyogo

REASONS FOR DECISION

Two petitions addressed to the Supreme Court of Nauru sitting as the Court of Disputed Elections have been presented. They result from the General Elections held on the 8th of April 2000 but concern only one constituency, Ubenide, in which the petitioners, father (Kennan Ranibok Adeang) and son (David Adeang) were two of twenty candidates. The constituency returns four Members of Parliament. Neither petitioner was among the four elected. The results, declared by Mr. Mathew Batsiua, the Returning Officer, ranked David 5th and Kennan 7th among the candidates.

The petitions are in the same terms except that Kennan's has a complaint (which David's does not) against Bernard Dowiyogo.

Paragraph 18 of Kennan Adeang's Petition: -

“18. WHEREAS, Bernard Dowiyogo by his family and friends persisted in inviting electors going to and from the tent erected to serve as a polling place situate 20 to 30 metres across the road from his residence in Baitisi district to partake of alcoholic beverages and food.”

Common to both petitions are complaints of irregularities in the polling and a complaint against Aloysius Amwano. I do not set out the complaints of irregularity. The complaint against Aloysius Amwano: -

“16. WHEREAS, Aloysius Amwano whilst a Cabinet Minister used monies of Corporations of the Republic of Nauru inducing electors to vote in his favour; and

17. WHEREAS, Aloysius Amwano whilst a Cabinet Minister, used monies of the Bank of Nauru on 2nd March 2000 totalling approximately A\$ 200,000 inducing electors to vote in his favour; and

The prayers for relief are not in identical form. David prays: -

“1. That this Honourable Court declares that

Aloysius Amwano was not duly elected as a Member of Parliament for the Constituency of UBENIDE;

2. That this Honourable Court declares your humble petitioner duly elected; and/or in the alternative

3. That this Honourable Court declares that the election for the four Members of Parliament for the Constituency of UBENIDE on 8th April, 2000 is null and void;

4. That this Honourable Court may be pleased to make such order or orders as it will deem fit."

Kennan prays: -

"1. That this Honourable Court declares that Aloysius Amwano was not duly elected as a Member of Parliament for the Constituency of UBENIDE;

2. That this Honourable Court declares that Bernard Dowiyogo was not duly elected as a Member of Parliament for the Constituency of UBENIDE;

3. That this Honourable Court declares that the election for the four Members of Parliament for the Constituency of UBENIDE on 8th April, 2000 is null and void;

4. That this Honourable Court may be pleased to make such order or orders as it will deem fit."

The Electoral Act provides for election of members of the Legislative Council and for disputing elections. Nauru is divided into eight Constituencies, seven of them returning two members and the other, Ubenide, the constituency with which these petitions are concerned, returns four.

At the time of the election in the Constituency of Ubenide, the total number of electors on the roll was 885, of whom 774 voted and of whose votes 734 were formal. Arithmetic shows that 110 people on the roll did not vote, about one elector in 8: a much higher proportion than in the elections of 1995 and 1997.

Part VI of the Act is headed "Disputed Elections". In it are Sections 37 and 38: -

"37. The Court of Disputed Elections shall be guided by good conscience and the substantial merits of each case without regard to legal forms and

technicalities and is not bound by any rules of evidence.

38. The decisions of the Court of Disputed Elections are final and conclusive and shall not be questioned in any way."

Both petitions were lodged on the 16th of May 2000. On the 29th of November 2000 the then Chief Justice ordered that evidence be taken on commission and it was so taken by the then Registrar of the Supreme Court on 29 November and 1 December 2000. By consent of the parties, evidence on the two petitions was heard together.

When the Court sat on Friday the 2nd of November 2001, all the parties agreed that the evidence taken on commission be evidence at the hearing.

The Commissioner had reserved a decision on the admissibility of one document which Mr. Paul Aingimea, for the

petitioners, had sought to prove through David Adeang. It is a report sent by the Bank of Nauru to the President of the Republic who was then in Melbourne. Objection to its admissibility has been taken. I heard argument and admitted it, pursuant to S. 7(4) of the Banking Act: -

“(4) Nothing in this section shall prevent a Court in Nauru from requiring any person to give evidence or produce documents in any proceedings in that Court of any facts relevant in those proceedings which such witness could otherwise be required to give or produce.”

The relevant part of the document is a table of loans referred to the Bank on the morning of 2nd March 2000 by the A/Minister for Island Development & Industry (Aloysius Amwano). Forty names are listed.

The document being admitted, Mr. Paul Aingimea recalled David Adeang.

David Adeang said he could identify 30 or 31 of those listed as being residents in the Ubenide constituency from which Aloysius Amwano came.

I asked if any party wished to call any other evidence. None did. The evidence on the petitions consists therefore of the evidence taken on commission together with the report of the Bank to the President and the further evidence of David Adeang.

The obvious disadvantage to a Court having to make decisions based on evidence on commission, evidence taken before someone else, is that it has not had the advantage of seeing and hearing the witnesses, of being able to assess their worth. Fortunately on these petitions, there is no dispute on crucial facts.

The complaints in the petitions fall into four groups – that

the polling place at Uaboe (one of the four polling places in the Constituency of Ubenide) opened late and closed late, other irregularities in the polling (such as voters not marking their ballot papers in booths provided), that Aloysius Amwano had engaged in improper practices to influence voters in his favour (the approval of the loans) and that Bernard Dowiyogo had engaged in improper practices to influence voters in his favour (offering food and drink to some people using the polling place in Baitisi close to his house).

I shall consider each in turn.

Section 19(1) of the Electoral Act provides: -

“..... , every election shall be by ballot and the voting shall commence at one o'clock in the afternoon of polling day and shall close at six o'clock in the afternoon of the same day.”

That is a mandatory provision – “voting shall commence at one o'clock and shall close at six o'clock”.



The hours laid down for voting are one o'clock until six o'clock in the afternoon.

That is not what happened at Uaboe. The polling place opened late, about 1:30 p.m. and closed late about 6:30 p.m. The evidence of Mr. Darcy Philip, the Presiding Officer at Uaboe:

“On April 8, 2000 at the General Election I was appointed Presiding Officer for Uaboe District in the Constituency of Ubenide.

.....

“The polls opened at 1:30 p.m.

When I arrived before 1:00 p.m. the polling place was locked and the polling booths and furniture were outside. That is why the polling place opened at 1:30 p.m.

.....

Whilst we waited for the Domaneab to open there were over twenty people waiting outside the polling station.

I close the polling place at 6 p.m.

After 6 p.m., I closed the door to the Domaneab and there were four people inside the polling place.

The voters outside kicked the door down.

.....

I got up and opened the door and told people outside that I will allow a further 30 minutes to cast their votes because of the late opening of the polling place.

I closed the door to the polling place at 6:30 p.m.

Between 6:00 and 6:30 p.m. about 20 people came to cast their votes.”

In cross-examination: -

“At 6:00 p.m. when I closed the door there were people outside. But I allowed a number of voters to enter the polling place to vote.

Only those outside standing in the porch of the Domaneab were allowed in and did vote.”

In re-examination: -

“The people outside on the porch at about 6:00 p.m. were over 20 and were allowed in.

A few of about less than 10, were not allowed in.”

Could those 40 or more (over 20 waiting before 1:30 p.m. and 20 voting after 6 p.m.) votes have made a difference in the elections in Ubenide?

It is necessary to consider the system of voting. The system used is the Dowdall system, devised by a man of that name here in Nauru. It is set out in Regulation 3 of the Electoral (Electoral System) Regulations 1971. [I have found the regulations in the report of the decision of Thompson CJ – Misc. Cause No. 15/1997 (NLR 1969-1982 Part A, p.107 at pp112-113)]: -

“3. In respect of each electorate the Returning Officer shall –

(a) ascertain the total number of first preference votes, second preference votes and third preference votes and so on cast for each candidate and shall make a list of the total number of such

preference votes.

(b) give the value of unity to every first preference vote, one half to every second preference vote, one third to every third preference vote and so on, the value of each preference being the reciprocal of the number of the preference indicated by the elector.

(c) add the total number of the values of the various preferences for each candidate and make out and sign a statement thereof."

In short, the candidate who receives from the voter his 1st preference gets one unit, the candidate who receives from the same voter his 2nd preference gets $\frac{1}{2}$ unit, the candidate who receives from the same voter his 3rd preference gets $\frac{1}{3}$ unit and so on. The units and fractions of units for each candidate are added up. The candidate with the highest number of units is elected 1st; the candidate with the next highest number of units is elected 2nd and so on until there are elected the number of members required for that constituency.

This is the result of the count in Ubenide: -

“CONSTITUENCY OF UBENIDE

Total formal votes cast	734
Total informal votes cast	40
Total votes cast	774

<u>CANDIDATES</u>	<u>VALUE OF VOTES CAST</u>
1. MILTON JONATHAN BENJAMIN	124.739
2. FRACIS DETSIBANGA AMRAM	94.925
3. RENOS AGEGE	108.746
4. DAVID ADEANG	162.732
5. ALOYSIUS EDRICK IYOMOGO AMWANO	199.750
6. DARNARD YUNGINWERO DONGOBIR	76.906
7. KENNAN RANIBOK ADEANG	149.445
8. DEROG GIOURA	189.497
9. CHARLES LANZA RATABWIY	68.727
10. MARK DENNIS KUN	139.898
11. EDDY NELSON CONRAD SCOTTY	120.901
12. GAVIN DEKARUBE	91.203
13. FABIAN DOMINIC RIBAUW	127.139
14. BERNARD DOWIYOGO	219.955
15. LUI DATAR TOLVAI EOAE0	108.638
16. ROMYS EOBOB	134.206
17. DEMPSEY KEPPE	88.211
18. KEN VICTOR DETUDAMO	161.177

19. CECILIA LIMEN	95.324
20. JOSEPH LABEN HIRAM	178.516"

The fractions have been converted into decimals but no point was taken on that. More importantly, the results show that David Adeang came 5th, less than 16 units behind Joseph Laben Hiram and Kennan Adeang was 21 votes behind Joseph Laben Hiram.

More than 20 people were there to vote before 1:30 p.m.: we do not know how many of them went away and did not come back to vote. Probably most of them waited and voted after 1:30 p.m. or came back later. That is a guess. Perhaps some votes were lost to all candidates: we do not know how many did not vote or how would they have voted. I do not further consider these votes.

Some 20 people voted after the correct time for closing the

polling place.

If the polling place had opened on time and closed on time, would the result been the same or could it have been different? It is impossible to tell. It is not a matter only of subtracting 20 1st preferences, 20 units, but also of subtracting fractions of each of 20 votes down to 1/20. It is conceivable that Kennan Adeang may just have succeeded. David Adeang's chances are better than his father's: the gap between him and Hiram is narrower, less than 20. It is speculation: all that can be said is the either one or both of the petitioners may have been ahead of Hiram if votes had not been cast after 6 o'clock. All this is compounded by not knowing whether, because of the late opening of the polling place, some electors did not vote at all.

Mr. Richard Niall, for the Returning Officer, argued that I

cannot be satisfied that the result would have been different if those 20 votes had not been recorded: I cannot be satisfied that the 20 votes would have had any material effect.

He referred me to the decision of Donne CJ – Misc. Cause No. 13/2000, Paul Aingimea, Petitioner against the Returning Officer, Respondent. That was a petition arising out of the same elections. The petitioner had complained of a number of irregularities in the poll. His Honour found “ that irregularities amounting to breaches of the law occurred”. There had been “committed serious breaches of the requirements of section 22. Such breaches must bring into issue the votes which they cast and the validity of them”.

His Honour went on: -

“The Petitioner’s evidence while proving the breaches of the law, has failed to identify the miscreants to enable their votes to be considered. His case clearly founders on this lapse. There can be no recount of votes.”

Mr. Niall relied on this decision of Donne CJ and urged me to follow it, not to upset the election. The decision is of persuasive but not a binding authority. One hesitates long before differing from so experienced a judge. I have thought much before doing so. Yet surely His Honour has overlooked that if votes wrongfully cast and then counted could have affected the result of the election, should there be a fresh election? The answer must be “Yes”. That is the law.

“Failure to open or close the poll at a polling station at the correct time will not avoid an election provided that it can be shown that the result was not affected.” (15 Halsbury (4th Edition) page 658). Halsbury cites several cases in support of the proposition but none is available to me.

Earlier on page 658 is this proposition: -

“Where breaches of the election rules, although trivial, have affected the result, that by itself is enough to compel the court to declare the election void even though it has been conducted substantially in accordance with the law of as to elections.”

Halsbury cites several cases, the latest of which supports both propositions. It is Morgan v Simpson (1975 1 QB 151 especially per Lord Denning M.R. at 164).

The weight of authority and I venture to say common sense as well, are against Mr. Niall's submissions. The onus was on his client to show on the balance of probabilities that those included votes did not affect the result. He has failed to do so.

Mr. Jack Hammond, Q.C., for Aloysius Amwano, argued it would be terribly unfair if the election of the three members who were at the top of the poll were upset because the 4th member

may not properly been declared elected. It may be unfair on his client and the others but it would be even more unfair to let the election stand.

There will have to be a fresh election in Ubenide.

Having come to that conclusion there is not much I have to say about the second group of complaints. Undoubtedly there were irregularities which would result in declaring the election void. Having already found the election void, there is not much point in dealing with each of the other complaints.

The evidence suggests that the cause of the problems on the polling day was the failure to have sufficient voting compartments in the polling stations. Voters were issued with their ballot papers but then had to stand about, sometimes for long time, before a compartment was available in which to

to mark the ballot paper.

This was Mr. Batsiua's first election as Returning Officer. As with most of us doing something for the first time it was a learning experience. We make mistakes but hope to learn from them and hope to do better next time. From his evidence, I am sure this is Mr. Batsiua's intention. All I need say is that fairness of election is most likely to be achieved if the requirements and directions in the Electoral Act are strictly followed.

I come now to the complaints against Aloysius Amwano. These have given me much anxiety. Within a few weeks before the election, Mr. Amwano in the space of a couple of hours, used a stamp normally used only by H.E. the President to approve loans to 30 or 31 people who lived in his own constituency. One must suspect an attempt to influence voters. Mr. Hammond

argued that just because these people were residents did not mean they were enrolled as electors in Ubenide but the overwhelming chances are that they were. The suspicion is strengthened by the absence of any explanation for what looks on the face of it to be most irregular conduct. Mr. Amwano did not give evidence and there was no explanation for his failure to do so. However, two considerations make me pause. The first is that it happened four weeks – quite a time - before the election, the second that David Adeang could not say whether the President affixed the “approved” stamp as the President or Minister for Island Development & Industry. At the time, Mr. Amwano was A/Minister for Island Development & Industry: in any case Mr. Adeang could not say that Mr. Amwano did not have the authority of the President to use the stamp. Halsbury (4th Edition) says “clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient”. (Vol. 15 para 780).

Whatever suspicions I. may have, the allegations against Aloysius Amwano are not proved to the high standard of proof required.

Finally, I may consider quickly the complaint by Kennan Adeang against Bernard Dowiyogo. There is no evidence that any elector was offered food and drink. I notice that the polling place at Baitisi is described as "Polling Shelter vacant area opposite Bernard Dowiyogo's residence". The polling place was very close to Mr. Dowiyogo's house. There is nothing to show other than normal activity at the house.

The Court declares the election for the four Members of Parliament for the Constituency of Ubenide held on 8th of April 2000 to be null and void.

Robin Millhouse
ROBIN MILHOUSE, J.

A Certified True Copy
of the Original:

Sampath B. Abayakoon
SAMPATH B. ABAYAKOON
REGISTRAR, SUPREME COURT

