

AFU LEAH BILLY -V- Joses Sanga AND THE ELECTORAL COMMISSION

HIGH COURT OF SOLOMON ISLANDS

(F. O. KABUI, J.).

Civil Case No. 10 of 2002

Date of Hearing: 4th, 5th, 6th, 7th & 18th June & 9th July 2002Date of Judgment: 12th July 2002*Petitioner in person**Respondent in person**Mr J. Keniapisia for the Electoral Commission***JUDGMENT**

(Kabui, J.): The Petitioner was one of the candidates who contested the Parliament seat for East Malaita during the National Election held on 5th December 2001 throughout the country. The Petitioner polled 699 votes whilst the 1st Respondent polled 701 votes. The majority votes were 2 votes. This was a very close margin. The Petitioner decided to challenge the election of the 1st Respondent on a number of grounds. The Petitioner filed her Petition on 25th January 2002. The Petition contains 15 grounds upon which the Petitioner says the election of the 1st Respondent should be declared void. At the hearing of the Petition, the Petitioner decided to drop grounds 10-15 in her Petition. The remaining grounds are 1-9 hereunder set out-

1. **Your petitioner was a candidate at the above election.**
2. **And your petitioner states that the election was held on the 5th day of December 2001 when Joses Sanga the first respondent and your petitioner were candidates and the first respondent polled seven hundred and one (701) votes and your petitioner polled six hundred and ninety nine (699) votes and the first respondent has been declared the duly elected Member of Parliament for the said East Malaita Electoral Constituency.**
3. **The Second Respondent was the returning officer for the said constituency.**
4. **And your petitioner claims that S. 48 as read with S. 38 of the National Parliament (Electoral Provisions) Act 1980 was not complied with on the following grounds:**
 - (a) **At the counting of the votes at Atori Police Station, East Malaita, Special Constable John Loboau from Atori Police Station was authorized to open the ballot box of the first respondent from Namoiia Polling Station.**
 - (b) **The said Special Constable found that one ballot paper was placed in the keyhole of the ballot box and not inside the ballot box as it should have been.**
 - (c) **The Special Constable raised the issue of the validity of the vote cast with the second respondent.**
 - (d) **The second respondent decided that the ballot paper from the keyhole was validly cast and therefore was counted in the total number of votes cast for the first respondent for that constituency.**

Your petitioner avers that such ballot paper was not cast in accordance with the National Parliament (Electoral Provisions) Act 1980 and the second respondent should not have accepted the ballot paper as having been validly cast in favour of the second respondent.
5. **And your petitioner claims further that the Presiding Officer for Kwai Polling Station and his polling assistant wrongfully allowed the following persons, being persons under the age of eighteen (18) years, to vote:**

NAME	REGISTERED NUMBER	REGISTERED VILLAGE	DATE OF BIRTH	BIRTH REGISTRTRION
Peter Gaugela	16/22/151	Kwai	12.12.85	16358B
Anilafa Forasi	16/22/35	Kwai		5120B

Rita Rika	15/49/35	Busuone		
Tolimalau Lao	16/22/217	Kwai		

By reason whereof the said votes are void and ought now to be struck off the poll.

6. And your petitioners claims further that the Presiding Officer for Nafinua Polling Station and his polling assistant wrongfully allowed the following persons, being persons under the age of eighteen (18) years, to vote:

NAME	REGISTERED NUMBER	REGISTERED VILLAGE	DATE OF BIRTH	BIRTH REGISTRTION
Betty Kafo	16/22/151	Ulubala	23.6.84	5171B

By reason whereof the said votes are void and ought now to be struck off the poll.

7. And your petitioner claims further that the Presiding Officer for Atori Polling Station and his polling assistant wrongfully allowed the following persons, being persons under the age of eighteen (18) years, to vote:

NAME	REGISTERED NUMBER	REGISTERED VILLAGE	DATE OF BIRTH	BIRTH REGISTRTION
Oruta (Female)	15/22/78	Fouo	16.4.84	5133B
Brian Maela	15/22/48	Fouo	8.8.84	7122B
Agnes Sade	15/22/80	Fouo		
Wao Kennie	15/22/100	Fouo		
Joyce Gani	15/55/02	Fouo		
Heni Ketei	15/22/22	Fouo		

By reason whereof the said votes are void and ought now to be struck off the poll.

8. And your petitioner claims further that the Presiding Officer for Ngongosila Polling Station and his polling assistant wrongfully allowed the following persons, being persons under the age of eighteen (18) years, to vote:-

NAME	REGISTERED NUMBER	REGISTERED VILLAGE	DATE OF BIRTH	BIRTH REGISTRTION
Jimmy Dalo	16/30/79	Ngongosila	29.12.84	12654B
Bobby (Sade)	16/30/363	Ngongosila	04.08.85	10598B
Robinson Indu	16/30/152	Ngongosila	07.08.85	10922B
Joe Kafo	16/30/167	Ngongosila		
John Francis	16/30/168	Ngongosila		
Michael Esther	16/30/35	Ngongosila		
Mary Timothy	16/30/457	Ngongosila	27.5.84	4597B
Robert Malele	16/30/264	Ngongosila	17.12.84	

By reason whereof the said votes are void and ought now to be struck off the poll.

9. And your petitioner further claims that the fifth respondent failed to properly perform his duty under the National Parliament (Electoral Provisions) Act 1980 in that he permitted or acquiesced in an offence of personation in contravention of sections 74 and 75 of the said Act. Your petitioner relies on the following grounds:-

- (a) Linda Fisango from Canaan Village, East Kwaio, Malaita Province, attended at the Atori Polling Station and cast a vote in the name of Ruth Billy whose registered number was 15/43/12. Ruther Billy was registered to vote at Atori Polling Station.
- (b) On the Election Day Ruth Billy was not in her constituency but was in Honiara and therefore unable to cast her vote.
- (c) The said Linda Fisango was not permitted to vote at Atori Polling Station since that was not her allotted polling station and was indeed in a different constituency from the allotted polling station for her village.

- (d) **By representing herself as Ruth Billy she was given a ballot paper which was duly marked with the registered number of Ruth Billy and the said Linda Fisango cast that ballot paper in favour of the first respondent.**
- (e) **The fifth respondent took no action in respect of the personation in accordance with the National Parliament (Electoral Provisions) Act 1980. By reason whereof the said vote is void and ought now to be struck off the poll.**

The Procedure

I think the 2nd Respondent should be the Electoral Commission and not Mr. Mani as stated in the Petition. The Electoral Commission is set up under section 57 of the Constitution whilst its functions are set out in section 58 of that document. Exercising my powers under Order 30, rule 12 of the High Court (Civil Procedure Rules) 1964 "**the High Court Rules**", I would delete the words "**Wilfred S. Mani**" and substitute therefor the words "**The Electoral Commission.**" This amendment is cosmetic in nature and does not affect the rights of the parties in this Petition. By agreement of the parties at the trial, the trial procedure specified in Order 38 of the High Court Rules was varied to effect practical convenience of the conduct of the trial. The practical effect of the decision by the Petitioner to drop grounds 10-15 in her Petition was the reduction of the number of her witnesses. The number of her witnesses was also further reduced by the fact that some witnesses claimed by her had become witnesses for the Electoral Commission. The end result was that the Petitioner was only able to call 3 witnesses in support of grounds 1-9 in her Petition. The Petitioner called all her witnesses on the second day of trial except one. The last witness was in Honiara. The Petitioner applied for adjournment of the trial to allow her to get that remaining witness to Auki. At that point in time, the Petitioner was not sure how soon she would get her witness to Auki. I therefore suggested to the parties that the 1st Respondent could commence his case while awaiting the arrival of the Petitioner's last witness. The parties agreed to this suggestion. I made the suggestion on the authority of **Reef Pacific Trading Ltd and Joann Marie Meiners v. Price Waterhouse, Richard Anthony Barber and William Douglas McCluskey** (Civil Case No. 164 of 1994). Counsel representing the Electoral Commissioner, Mr Keniapisia, commenced his case and called his witnesses followed by the Respondent. The Petitioner finally called her witness and concluded her case.

The allegation of Personation

The allegation of personation is contained in ground 9 of the Petition. This allegation claims that the Returning Officer did not perform his duty properly under the provisions of the National Parliament (Electoral Provisions) Act (Cap.87) "**the Act**" in that he permitted or acquiesced in the contravention of sections 74 and 75 of the Act. The alleged facts were that Linda Fisango posed herself as Ruth Billy and voted at Atori Polling Station on 5th December 2001. The Petitioner claims that the Returning Officer took no action in respect of this alleged act of personation in accordance with the provisions of the Act and that the vote is void and should not have been counted. I think what the Petitioner means here is that the Returning Officer failed to act under section 40 of the Act. This section states,

..."(1) **If at the time a persons applies for a ballot paper, or after he has so applied and before the has left the polling station, a polling agent declares to the presiding officer that he has reasonable cause to believe that the applicant has committed an offence of personation and undertakes to substantiate the charge in a court of law, the presiding officer may order a police officer to arrest such person, and the order of the presiding officer shall be sufficient authority for the police officer so to do.**

2. A person in respect of whom a polling agent makes a declaration in accordance with the provisions of subsection (1) above shall not by reason thereof, be prevented from voting, but the presiding officer shall cause the words "Protested against for personation" to be placed against his name in the marked copy of the register of electors or portion thereof, and shall record the fact on a list to be called the protested votes list:

Provided that where a person in respect of whom such declaration is made, admits to the presiding officer that he is not the person he held himself out to be, he shall not be permitted to vote if he has not already done so, and if he has already voted the ballot paper shall be invalid and the presiding officer shall record the fact and the number of the ballot paper on a

list to be called the invalidated votes list, and such list shall be admissible in any legal proceedings arising out of the election.

(3) A person arrested under the provisions of this Act shall be dealt with in accordance with the provisions of the Criminal Procedure Code relating to the arrest and taking into custody of persons without a warrant”...

What this section means is that when a person who wants to vote tells the polling agent that he or she wants to vote, he or she can do so straightaway. But if that person is still at the polling station or has left it when the polling agent has good reason to believe that that person had personated another person when he or she voted, the polling agent will announce that belief to the Returning Officer. If the polling agent is prepared to testify in a Court of law to that fact the Returning Officer may order a police officer to arrest that person. If that person had voted, the presiding officer will enter against the name of that person the words, **“Protested against for personation”** in the marked copy of the register of electors or part of it. The presiding officer will also record that fact on a list to be called the protested votes list. If that person admits to the presiding officer that he or she is not the person he or she holds himself or herself to be he or she will not be allowed to vote. If however he or she has voted the ballot paper shall be invalid and that fact and the number of the ballot paper will be recorded on a list to be called the invalidated votes list. This list may be used as admissible evidence in any proceedings arising out of the election.

Was there evidence of Personation?

Afu Robeni gave evidence on this point. She said she was the polling assistant at the Atori Polling Station on 5th December 2001. She said there was no complaint from anyone about the personation of anyone at Atori Polling Station. She said she processed Ruth Billy before Ruth Billy voted. She described the procedure of voting in this way. First, she would ask for the name of the person wanting to vote and his or her village. If the name of that person were in the voters list, she would check if there was already ink mark on the finger. If she did not know the person well she would ask that person twice. If she did not have any doubt, she would put ink on the finger and allow that person to vote. She said in cross-examination that she had no doubt about Ruth Billy and allowed Ruth Billy to vote. She said Ruth Billy did look confident and so processed her to vote. Ruth Seo also gave evidence on this point. She said her maiden name was Ruth Billy. Her father's name is Billy. After she married in 1993 she changed her name to Ruth Seo. She said her mother is from Saufura village near Atori. Her father is from Canaan village in East Kwaio. She said she was in Ysabel Province in 2001. She said she did not register to vote on Malaita nor voted on Malaita on 5th December 2001. She said her parents lived in Honiara but went home and voted at Atori. She said her father adopted Linda Fisango in 1994 when she was 9 years old. She said there were 9 of them in the family, 6 being adopted children. Linda Fisango was one of the adopted ones. Linda Fisango confirmed the evidence of Ruth Seo in her evidence in Court. She said the name Ruth was given to her on being baptized on 19th April 1999. She produced her baptism card to confirm this fact. It is Exhibit 8. The name Ruth Linda appears on her baptism card. She said she adopted the surname Billy because Billy was her adoptive father. Rodney Faufaka also confirmed the evidence of Ruth Seo and Ruth Linda Billy. He said he helped to register members of his family in Honiara to vote on Malaita. He said he recalled filling in Form B with the name Ruth Billy in Honiara prior to the Election Day in 2001. The evidence on this point is unchallenged. In cross-examination by Mr. Keniapisia, Ruth Seo confirmed that Linda Fisango became known in the Billy family as Ruth Linda Billy or simply Ruth Billy. I therefore find that there is no evidence to support the allegation of personation. I dismiss this ground.

Validity of the Ballot Paper found in the keyhole

This is the allegation, which relates to the ballot paper, which was found in the keyhole of a ballot box at the Atori Polling Station before the counting of votes took place. The Petitioner alleges that the requirements of section 38 as read with section 48 had not been followed. This is ground 4 in the Petition. In brief, section 38 deals with the method of voting at an election whilst section 48 deals with the counting of votes by the Returning Officer etc. The identity of the ballot box which contained the disputed ballot paper was disputed in the course of evidence. Mr. Kaoni who was the Petitioner's counting agent at Atori Polling Station said that the ballot box, which had the ballot paper in the keyhole, belonged to the 1st Respondent. This version was supported by the evidence of Mr. Loboau who is a Special Constable and was present at the relevant time. However, the

Returning Officer, Mr. Mani, said the ballot-box could have been that of other candidates. On being cross-examined on this point by the Petitioner, he said he was sure of what he said because he saw the symbol side of the ballot-box. The Assistant Returning Officer, Mr. Siufimae, confirmed what Mr. Mani said to the extent that the ballot-box definitely did not belong to the 1st Respondent. However, he qualified it by saying that his concentration was focused more on the counting of the votes, as it was getting dark. Whose evidence I should believe? I have noticed that Mr. Mani and Mr. Siufimae whilst both were emphatic that the ballot-box did not belong to the 1st Respondent none, of them did say definitely which of the other candidates had his name on the ballot-box if they were so sure of that fact. I think they were mistaken as to the identity of the ballot-box. I am not saying for one moment that they were lying. Far from it. Whereas Mr. Kaoni was at the Atori Polling Station purposely to watch the counting of votes. He had nothing else to focus his mind on but the ballot-boxes, their contents and the counting of votes. I believe him when he said the ballot-box, which had the ballot paper in the keyhole, belonged to the 1st Respondent. Mr. Loboau said he saw the name of the 1st Respondent on the ballot-box. He said he was sure of this fact. He said his job was to look after the ballot-boxes and to open them for counting. I am sure his job would have easily enabled him to see and identify the ballot boxes including the one with the ballot paper in its keyhole. I therefore find that the ballot box, which had a ballot paper in its keyhole, belonged to the 1st Respondent. Apart from this, there is no dispute that the ballot paper was inside the keyhole. There is no dispute that the ballot paper was rolled and inserted inside the keyhole and sealed over with cello-tape. The seal had to be removed before Mr. Loboau removed the ballot paper. The Petitioner's argument is that the ballot paper was not inside the ballot box and therefore was invalid and should not have been counted. The 1st Respondent did not dispute the fact that the ballot paper was not inside the ballot box but says that fact does not affect the validity of that ballot paper adversely in any way because that ballot paper was cast in secret. He says it expressed the wish of the voter in a secret ballot without any tint of doubt. He says it was unfortunate that the keyhole is next to the slot for ballot papers. Obviously, the voter must have been confused by the two holes. The voter might have thought that there was a choice of holes. If the keyhole had been sealed then obviously the slot for ballot papers was the only choice. When the keyhole was measured in Court its depth was found to be three quarters of an inch. The keyhole being what it is does not permit the ballot paper to drop into the ballot box. Since the ballot paper was cast in secret it remained a secret ballot paper until it was removed, opened and counted. Section 38 (d) of the Act is pertinent to the method of voting as regards where the ballot paper should be placed in secrecy when voting takes place. Subsection (d) is in the following terms-

38.

...”(a)-----

(b)-----

(i)-----

(ii)-----

(iii)-----

(iv)-----

(c)-----

(d) an elector on receiving a ballot paper, shall go immediately into the screened compartment in the polling station, and shall there secretly record his vote by placing his ballot paper in the ballot box of his choice;

(e)-----

(f)-----

(g)-----“...

The crucial phrase in (d) is "by placing his ballot paper in the ballot box of his choice". The natural meaning of the words "in the ballot box" is "inside the ballot box." There can be no doubt about this. Any ballot paper that is not in the ballot box, that is, inside the ballot box is outside the ballot box. The 1st Respondent does not dispute this meaning. It is not disputed that the ballot paper that was found in the keyhole was good in all respects other than being in the keyhole. This is why the Returning Officer decided to accept it as a valid vote and proceeded to count it with the others in that ballot box. In terms of section 50 of the Act, any ballot paper which does not bear an official mark or on which anything is written or marked by which an elector can be identified other than the printed number shall not be counted. The problem was that the keyhole is also beside the official slot for ballot papers. To make matters worse, it was not sealed to prevent any voters mistaking it for the official slot for ballot papers. As a matter of common sense the keyhole should never be placed near the official slot for ballot papers to avoid confusion and mistakes in the

future. Clearly, the fact the ballot paper was not placed in the ballot box was a non-compliance with section 38 (d) of the Act cited above. Should the election be declared void for non-compliance in this regard for irregularity? Section 9 of the Act says that no election shall be invalid by reason of non-compliance with this Act if it appears that the election was conducted in accordance with the principles of this Act and that the non-compliance did not affect the result of the election. At this stage, I do not think the result of the election is affected by this act of non-compliance with regards to this one vote placed in the keyhole of the ballot box having been counted as valid because the 1st Respondent would still have a majority of one vote in his favour. (See **Morgan and Others v. Simpson and Others** [1974] 3 W. L. R.517 cited in **Evo v. Supa** [1985/1986] S.I.L.R.1.)

The voters who were under 18 years of age

This allegation of voters having voted whilst under the age of 18 years is set out in grounds 5-8 in the Petition. The number of alleged under age voters is listed according to the Polling Stations at which they voted on 5th December 2001. For the Kwai Polling Station, the number is 4. For the Nafinua Polling Station, the number is 1. For the Atori Polling Station, the number is 6. For the Ngognosila Polling Station, the number is 8. The total number of alleged under age voters is 19. To prove this allegation, the Petitioner called Rose Manunu Lebe, a nurse from the Nafinua Health Centre in the East Malaita Constituency to produce the birth dates of the alleged under age voters. The following are the names and the corresponding birth dates-

1. **Aline Forasi was born on 12th June 1984.**
2. **Jimmy Farobo was born on 29th December 1984.**
3. **Bobby Sade was born on 4th August 1985.**
4. **Oruta was born on 14th June 1984.**
5. **Bethy Kafo was born on 23rd June 1984.**
6. **Joyce Gani was born on 1st August 1985.**
7. **Wao Kenine was born on 27th May 1984.**
8. **Robert Malele was born on 17th December 1984.**
9. **Francis John was born on 9th March 1984.**
10. **Heni Ketei was born on 6th June 1984.**
11. **Rita Rika was born on 7th July 1984.**
12. **Brian Maela was born on 8th August 1984.**
13. **Agnes Sade was born on 20th May 1984.**
14. **Esther Michael was born on 11th May 1984.**
15. **Peter Gaugela was born on 12th December 1984.**

She was not able to produce the birth dates for Mary Timothy, Tolimalau Lao, Maeli Ata and Joe Kafo. She said that the birth dates she produced in Court were recorded in the ante-natal records of each mother who visited the Nafinua Health Centre each year. The birth date was recorded on the same day the child was born or soon after birth. From the information on the ante-natal records that the details in the birth certificate were recorded in the birth certificate. She said the practice was that three birth certificates were filled out at the Clinic. One was given to the mother, one was retained in the Clinic and the third one was sent to Kilu'ufi Hospital for onward transmission to Honiara for the Central Registry of Births. She said ants etc. had destroyed some of the records at her Clinic and so she was not able to locate the birth dates for Mary Tiomthy, Tolimalau Lao, Maeli Ata and Joe Kafo. Mr. Wale, the Chief Statistician for the Ministry for Health and Medical Services confirmed in Court that Aline Forasi, Jimmy Farobo, Mary Timothy, Oruta, Peter Gaugela, Bobby Sade, Brian Maela and Betty Kafo were under 18 years at the time of election. He said they had no records of the others, the reason being that the records had not been sent to them. The ante-natal birth records produced by Rose Manunu Lebe had not been challenged although the 1st Respondent said that there no birth certificates to prove that the alleged under age voters were all under 18 years when they voted. The fact is that the birth certificates are really the duplicates of the ante-natal records at the Clinic. Where the birth certificate cannot be found there can be no better substitute than the ante-natal record confirming the date of birth of any person in Solomon Islands. I accept the ante-natal records produced by Rose Manunu Lebe as the documentary evidence of the birth dates of the persons named in each of the ante-natal record produced by her in Court.

Did the alleged under age voters vote on 5th December 2001?

At the Kwai Polling Station, the Petitioner alleges that Peter Gaugela, Anilafa Forasi, Rita Rika and Tolimalau Lao did vote. I have not been able to locate the name Peter Gaugela in Exhibit 3 being the Register of Electors for Kwai/Faumamanu. I have however located Jeremiah Gaugela, Timothius Gaugela and Junior Gaugela all of whom did vote. However, I do not know whether Junior Gaugela is Peter Gaugela or not. I will say no more about Peter Gaugela for that reason. Anilafa Foroasi however voted. However, there is no evidence of his date of birth. I will also say no more about him for that reason. Tolimalau Lao did vote. However, like Anilafa Foroasi, there is no evidence of his date of birth. Rita Rika however did vote. (See Exhibit 3). At the Nafinua Polling Station, the Petitioner alleges that Betty Kafo did vote. I find that Betty Kafo did vote. (See Exhibit 4). At the Atori Polling Station, the Petitioner alleges that Oruta (female), Brian Maela, Agnes Sade, Wao Kennie, Joyce Gani and Heni Ketei did vote. I find that these persons except Oruta (female) did vote. (See Exhibit 7). Oruta Prudence did however vote but I doubted whether she was the same person and so I discounted Oruta. At Ngongosila Polling Station, the Petitioner alleges that Jimmy Dalo, Bobby Sade, Robinson Indu, Joe Kafo, John Francis, Michael Esther, Mary Timothy and Robert Malele did vote. I find that these persons did vote. (See Exhibit 5). For the purpose of this judgment, I would exclude Peter Gaugela, Anilafa Forasi and Tolimalau Lao for the reasons stated above. Maeli Ata and Mary Timothy are also excluded because there is no evidence to confirm that each of them is under 18 years of age. I do not accept the letter dated 31st May 2002 written by Mr. Wale as evidence of dates of birth in respect of each of the persons listed therein. It is hearsay evidence. Of the 15 persons listed above, only 11 are persons whose age I find to be under 18 years of age. These persons are as follows-

1. **Bobby Sade is 16 years and 3 months whose registration number is 16/30/363.**
2. **Betty Kafo is 17 years and 6 months whose registration number is 15/47/21.**
3. **Joyce Gani is 16 years and 3 months whose registration number is 15/55/2.**
4. **Wao Kennie is 17 years and 7 months whose registration number is 15/22/90.**
5. **Robert Malele is 17 years whose registration number is 16/30/264.**
6. **Francis John is 17 years and 9 months whose registration number is 16/30/168.**
7. **Heni Ketei is 17 years and 7 months whose registration number is 15/22/22.**
8. **Rita Rika is 17 years and 5 months whose registration number is 15/49/35.**
9. **Brian Maela is 17 years and 4 months whose registration number is 15/22/41.**
10. **Agnes Sade is 17 years and 7 months whose registration number is 15/22/71.**
11. **Esther Michael is 17 years and 7 months whose registration number is 16/30/275.**

The registration numbers in respect of Joyce Gani, Robert Malele, Francis John and Henry Ketei only were correctly cited in the Petition. The rest were incorrectly cited.

Identity of the under age voters

So far the identification of under age voters is by comparing their names and numbers in the voters list with the corresponding numbers stamped on the ballot papers cast on the Election Day. That is, if the numbers on the cast ballot papers match the same numbers in the voters list, it means the names against which those numbers are allocated in the voters list are the names of the persons who voted. There is however the question that do the names that appear in the ante-natal cards at the Nafinua Clinic match the names in the voters list? Surprisingly, they do, apart from slight misspellings of names due to typing errors. For example, Bethy Kafo, the name entered in the ante-natal card being born on 23rd June 1984 became Betty Kafo in the voters list. Similarly, Oruta, a female, was entered in the ante-natal card as being born on 14th June 1984 became Oruta Prudence on the voters list. It is possible that she must have been baptized later and given the Christian name Prudence. Heni Ketei who was born on 6th May 1984, became Henry Ketei on the voters list.

Did these persons vote for the 1st Respondent on 5th December 2001?

The Petitioner did not call the persons and others whom she alleges to be under 18 years of age when they voted for the 1st Respondent to give evidence. However, the Petitioner during the trial at Auki had requested the Returning Officer, Mr. Mani, to produce the marked voters' list for Kwai, Nafinua, Atori and Ngongosila Polling Stations and the ballot papers contained in the special envelopes. Events however took a different turn at the trial at Auki. The Petitioner was not able to

call Mr. Mani because Counsel Mr. Keinapisia objected. Counsel Mr. Keniapisia however agreed to produce the marked voters lists but not the special envelopes, which contain the ballot papers from the 1st Respondent's ballot boxes. The 1st Respondent also objected to the production of the special envelopes. The marked voters lists were produced and marked Exhibits 3, 4, 5 and 7. The Petitioner however maintained her wish to call for the production of the special envelopes later in the course of trial. Mr. Mani however was recalled to confirm that the registration number of each voter in the marked voters' list would also appear on the ballot paper cast by the voter as well as on the counter-foil so that the cast ballot paper could be matched with the registration number in the marked voter's list and the voter who cast the ballot paper could then be identified. The Petitioner at that point did not press for the production of the special envelopes. Just before her closing address, the Petitioner again called for the seal of the envelopes to be opened for a count of the votes cast but for another reason. The 1st Respondent and Counsel Mr. Keniapisia resisted the call on the ground that the production of the marked voters lists were sufficient to prove that voting by the alleged under age persons had taken place. I rejected her call because I thought she was asking me to order a recount of the votes cast at that stage of the proceeding, which I thought was premature. On writing my judgment in Honiara, I noted in the file that the Petitioner in fact sought the production of the special envelopes by subpoena. Being a layperson and ignorant of the proper procedure in this regard, the Petitioner gave in to Counsel, Mr. Keniapisia, on the question of who should have called Mr. Mani to produce the special envelopes and thereby the need to produce those documents got lost and confused in her mind. In my view, the production of the special envelopes, which contain the ballot papers, is a necessary step to proving which of the alleged under age voters did in fact vote for the 1st Respondent. I therefore called the parties again in Chambers to hear them on this matter. (See **Madalene Tong v. Robert V. Emery and John Sullivan**, Civil Case No. 32 of 1991). After hearing the parties, I ordered that the ballot papers cast for the 1st Respondent be produced by Mr. Mani as requested by the subpoena filed by the Petitioner on 31st May 2002. At the hearing in Chambers, none of the parties questioned the procedure I adopted in this case. For those who may have doubts in their minds, I say that a trial can be reopened in the interest of attaining justice. (See **Parao Tunboro v. Motor Vehicles Insurance (P. N. G.) Trust** [1984] P. N.G.L.R. 272 and **Jack Lundu Yalao v. Motor Vehicles Insurance (P. N. G.)** W. S. No. 922 of 1991 unreported). There was no pre-trial discovery and inspection of documents in this case for the simple reason that the Petitioner being a layperson did not know what to do. She went straight for the production of the ballot papers by way of subpoena. Again, the 1st Respondent and Counsel Mr. Keniapisia objected on the ground that the ballot papers were cast in a secret ballot and the code of secrecy must be maintained. The Petitioner, as I have said above, did not call the alleged under age voters to give evidence to say that they did in fact vote for the 1st Respondent. It might be that it was difficult for her to do so in view of the real likelihood that the persons she alleged to be under aged were the supporters of the 1st Respondent and could not imagine disallowing their votes for the 1st Respondent. Or it might be that it was too expensive to bring them to Auki and keep them for the duration of the trial. On the question of secret ballot voting, the 1st Respondent cited Lord Denning in a case, which he could not recall, in which Lord Denning described the history of the introduction of secret ballot voting in England. I then said the case that he cited must be **Morgan v. Simpson** cited in **Evo v. Supa and Returning Officer** [1985/86] S.I.L.R.1. In **Morgan v. Simpson** [1974] 3 W. L. R.517 at 523-25 Denning, M.R. said that the Ballot Act 1872 introduced the secret ballot system in England which later became the Representation of the People Act 1949. Stephenson and Lawton L. J.J. said the same in their judgments. In fact, in the Court below, Milmo, J. had ordered that the rejected ballot papers be produced for inspection. On this score section 84 of the Act speaks for itself on discovery and inspection of documents in election petitions. The proviso thereto seems to confirm that at the pre-trial stage any information obtained regarding the manner of voting by any elector must remain confidential until the vote has been declared by the Court to be invalid. I do not think as suggested by Counsel, Mr. Keniapisia, that the proviso is meant to maintain secrecy until the Court declares the vote invalid and then calls for a recount. No election petition can be properly determined without the relevant election documents being produced to the Court as evidence of disputed facts. As far as I can find, there is no law, which in blanket terms prohibits the production of relevant documents in an election petition trial, which will assist the Court to fulfill its duties under the Act. It took 22 days for the Electoral Commission to produce the special envelopes and thus the delay in the delivery of this judgment. In fact, the special envelopes were produced only 2 days ago. I inspected all the ballot papers cast for the 1st Respondent in all the 12 polling stations in the East Malaita Constituency. On the scrutiny of the ballot papers, I found that none of the 11 persons cited above who were under the age of 18 years did vote for the 1st Respondent on 5th December 2001 at the

Kwai, Nafinua, Ngongosila and Atori Polling Stations nor at any of the Polling Stations in the East Malaita Constituency.

I say this because none of the registration numbers that appear in the marked voters list against their names is the same as the numbers that appear on the cast ballot papers. That is to say that none of the persons alleged as being under 18 years of age in the Petition did vote for the 1st Respondent. There is no evidence to show that they did vote for the 1st Respondent. I did scrutinize the ballot papers more than once and the result was the same. The registration numbers allocated to the persons cited above which appear on the marked voters list are miles apart from the numbers that appear on the cast ballot papers for the 1st Respondent in all the 12 Polling Stations. There is no doubt about this fact. I was so amazed that I began to doubt the correctness of Mr. Mani's evidence that a voter can be identified by comparing the registration number on the marked votes list with the number on the cast ballot paper. In terms of section 38 (b) of the Act, before the polling assistant hands over the ballot paper to the voter, it must be marked with an official mark, the name, address and description of the voter called out, the name of the voter marked on the counterfoil, a mark be placed against the name of the voter in the copy of the voters list to show that a ballot paper has been received but without showing the number of the ballot paper which has been received. (Also see section 50 of the Act). So the ballot paper is given a number but the Act is silent on what the number stands for or represents. It may well be the voter's number in the voter's list or just an identification number. If it is the latter, then it is indeed a secret ballot for no one would ever know which candidate a voter has voted for in an election of this sort. Whichever is the case, however, the Petitioner in this case has failed to prove that the alleged under age voters in the Petition did vote for the 1st Respondent. I therefore find that whilst the 11 persons cited above are under the age of 18 years, there is no evidence to show that they had voted for the 1st Respondent. The declared result for the East Malaita Constituency therefore remains intact and valid. The Petition is therefore dismissed. I will in accordance with the requirement of section 82 (2) of the Act, certify to the Governor-General the decision of this Court. I have decided that each party should meet their own cost in the hearing of this Petition.

**Hon. Justice F.O. KABUI
JUDGE**