

## IN THE COURT OF APPEAL OF SIERRA LEONE

### ***BETWEEN:***

P.C. MOHAMED KAILONDO BANYA - APPELLANT  
KAILAHUN, LUAWA CHIEFDOM  
KAILAHUN DISTRICT

NATIONAL ELECTORAL COMMISSION - APPELLANT

PROVINCIAL SECRETARY, EASTERN PROVINCE - APPELLANT

MINISTER OF LOCAL GOVERNMENT &  
COMMUNITY DEVELOPMENT - APPELLANT

ATTORNEY-GENERAL & MINISTER OF JUSTICE - APPELLANT

### ***AND***

LAMIN VONGO NGOBEH - RESPONDENT

### ***CORAM:***

HON. MR. JUSTICE P.O. HAMILTON - J.S.C.

HON. MR. JUSTICE N.C. BROWNE-MARKE - J.A.

HON. MR. JUSTICE S.A. ADEMOSU - J.A.

### ***ADVOCATES***

OSMAN I KANU ESQ., SOLICITOR CASE FOR APPELLANT

C.F. MARGAI ESQ., AND R.B. KOWA ESQ., FOR RESPONDENT

**JUDGEMENT DELIVERED THE** 9<sup>th</sup> **DAY OF** March **2010**

***S.A. ADEMOSU - J.A.***

### **BACKGROUND**

On 17<sup>th</sup> January 2003 the 1<sup>st</sup> Appellant, the Respondent and two others namely Lamin Gbongay Ngobeh and Maada Fabundeh were candidates in Kailahun Paramount Chief Election and the result are as follows:-



Mr. Lamin Gbongay Ngobeh	-	189	-
Mr. Lamin Vonjo Ngobeh	-	642	586
Mr. Maada Fahbunde	-	72	-
Mr. Mohamed Kailondo Banya	-	899	1,050

Mr. Mohamed Kalondo Banya was declared duly elected as Paramount Chief of Luawa Chiefdom. He was recognized as such by His Excellency the President on Monday 27<sup>th</sup> January, 2003. Statutory consent in writing of the Attorney-General after being sought and obtained Mr. Lamin Vonjo Ngobeh (hereinafter referred to as the Respondent issued Writ of Summons dated 6<sup>th</sup> June 2003 against Mohamed Kailondo Banya (hereinafter referred to as the Appellant and four others namely, National Electoral Commission, the Provincial Secretary, Eastern Province, the Minister of Local Government and Community Development and Attorney-General and Minister of Justice, all of them hereinafter shall be referred to as the Defendants/Appellants for the invalidation of the election of the Appellant; Declaration that the Paramount Chieftaincy Election hereinbefore referred to was fatally irregular defective and vitiated and accordingly was and is invalid, null and void, and of no lawful effects.

It was against this background that the learned trial judge found in favour of the respondent of the Respondent on the 13<sup>th</sup> January, 2009 and granted all the reliefs prayed for.

This is an appeal from the judgement of Hon. Mrs. Justice A. Showers J. in the High Court upholding an election petition in which the Appellant - P.C. Mohamed Kailondo Banya won and declared elected as the Paramount Chief for Luawa Chiefdom Kailahun District on the 17<sup>th</sup> January 2003.



Being dissatisfied with the decision, the Appellant has appealed against the judgement and filed the following grounds of appeal:

- a) *The learned trial judge erred in law in her judgement that the defendant did not rebut the claim by the plaintiff that people of lower ages voted at the election nor did she take cognizance of the fact that the plaintiff failed to prove that the election was fraught with fraud and multiple voting. In her judgement at page 29, the learned trial judge had this to say: "The Plaintiff and his witness P.W.2 gave an instance of a Chiefdom Councillor whom they knew and who was their relation who had his name called, and 14 year old boy answered and voted for him. This evidence has not been controverted by the defence" In fact the Appellant did not only deny the allegation in his pleadings, but also led (D.W. 4) in evidence to rebut the allegation as indicated at pages 19-20 of the judgement" He (D.W.4) stated that it would not have been possible for an impersonation of the chiefdom councillors as the Town Chiefs and Section Chiefs of the Chiefdom were present and they all knew these people. He said all the candidates were present and they saw the person called out as Chiefdom councillors and none of them raised any objection to any of them.*
- b) *The Learned trial judge erred in law when she held that for Petitioner there was high level of unauthorized proxy, multiple voting and rampant impersonations of individual votes without any or any sufficient evidence substantiating these allegations and without the petitioner proving the said allegations in accordance with the required standard of proof.*
- c) *The learned trial judge erred in law when she relied on the Government guidelines as the basis of her Judgement after she had previously held that the said Government guidelines do not*



*have the force of law in the case in titled CC 800/2006 S. No. 80.  
Ngandi Tamba Amadu Sokoyama V.P.C. Sheku Amadu Tejan  
Fasuluka Sonsiama (unreported)*

d) *The judgement is against the weight of the petitioner's evidence.*

I propose to consider all the above grounds together as all of them can be said to be complaining about lack of proper evaluation of the evidence before the Court.

Pursuant to the Order of the Court the Counsel for the parties filed their synopsis of arguments.

After telling the court that he was relying entirely on his synopsis, Counsel for the appellant said in further elucidation of his arguments contained in his synopsis that the learned trial judge was of the view that there was multiple voting. He referred as to page 170 of the records where the relevant part runs as follows:-

*"The plaintiff has alleged that as a result of the use of the unauthorized list it has given rise to a high level of unauthorized proxy, multiple voting and rampant impersonation of individual voters. The Plaintiff and his witness P.W.2 gave an instance of a Chiefdom councillor whom they knew and who was their relation who had his name called, and 14 year old boy answered and voted for him. This evidence was not controverted by the defence who knows how many other instances of such a nature occurred during the elections" (emphasis mine)*

Counsel contended that the evidence was controverted and referred to the evidence of D.W.4 (who will hereinafter be referred to as the Appellant). The relevant part of his evidence reads as follows:-



*"The chiefdom councilors were the one entitled to vote in these elections when the houses were called each chiefdom councilor presented his document that qualified him to be a chiefdom councillor which were certified by the Provincial Secretary in the presence of us candidates ensuring that the person was entitled to be a chiefdom councillor. There was no objection made to any of the councillors called by or any of the Aspirants. It would not have been possible for any impersonation of the chiefdom councillor. The town chief and section chiefs of the chiefdom were present and they all knew these people. We the candidates and their representatives were also there".*

This is not all what about the evidence of D.W.3- Chief Sumaila Lansana Foday. Section Chief of Luawa Chiefdom. He said inter alia".

*"On Election Day we all assembled and I heard the Provincial Secretary called the roll of councillors. They were called so that in the presence of chiefdom councillors to give notice so that we could object to any of them or approve as the case may be. All four Aspirants were present. Yes we were given the opportunity to identify the chiefdom councillors. There was no objection to any chiefdom councillor. I was happy with the list" (emphasis mine).*

I have observed that under cross-examinations of the witness, it was never suggested to him that there was an instance of impersonation, and neither was the appellant confronted with the allegation that one chiefdom councillor by the name of M.S. Ngobeh was impersonated. Should the evidence of the Appellant which was not refuted be ignored by the learned trial judge where the appellant deposed as follows:



*"When these results were announced I was declared the winner. Mr. Lamin Vonjo Ngobeh congratulated me. The following morning he led a team of his supporters to my compound in the presence of many people, and congratulated me again, and promised to work me for the development of the chieftdom. Five months later I received a summons from him"*

Learned counsel for the appellant further contended and quite rightly as I have observed that through out the evidence in the lower court there was no evidence suggesting that the candidates were under any undue influence or duress to register their objection.

The general rule of pleading is that he who makes an assertion must prove it, if it is denied, or other wise it will be deemed untrue. Put it another way, if no affirmative evidence of an allegation is given, when it is contradicted, the negative will be taken as established. See *Catherwood v. Chaboud* (1823) 1 B & C, 150, 107 E.R. 56.

In paragraph 6 of the defence filed in the Lower Court the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants averred that there was none or no formal reports or protest by the plaintiff to them or any of them complaining of any intimidation, oppression of any voter, supporter or candidates before or during the election. After going carefully through the evidence adduced by the Respondent and his solitary witness, I am satisfied in my mind that it would be idle to contend that there was any affirmative evidence of any of the election offences pleaded. I would consider them to be bare assertions of election offences. It is trite law that the onus is on the Plaintiff to prove his case by preponderance of evidence.

Misdirection occurs when a judge misconceives the issue or summarizes the evidence inadequately or incorrectly for one side or the other or makes mistakes in the law applicable to the issue in the case. I have



taken the liberty to make some observations on the evidence adduced in the Lower Court because I know as general rule, when the question of the evaluation of evidence does not involve the credibility of witnesses but the complaints is as it is in instant case, is against the non-evaluation or improper evaluation of the evidence tendered before the trial court, an appellate court is in as good a position as the trial court to do its own evaluation.

Counsel for the respondent and even the trial judge made a heavy weather of the fact that the list of chieftom councillors used was not gazetted and this has formed the basis for invalidation of the Paramount Chief election in question overlooking the testimony of the respondent on page 56 of the records where he described the functions and responsibilities of the 2<sup>nd</sup> to the 5<sup>th</sup> defendants as follows: I know the 2<sup>nd</sup> defendant. He is the National Electoral Commissioner. His responsibility includes the supervision and conduct of election throughout the country, and make regulations for voters. The 3<sup>rd</sup> defendant is the Provincial Secretary Eastern Region. He is the representative of the 4<sup>th</sup> defendant in Local Government Affairs including election of Paramount Chief. The 4<sup>th</sup> defendant is the Minister of Local Government and Community Development".

As regards the 4<sup>th</sup> defendant the plaintiff/respondent went onto say that:

*"He is the Minister in charge of Local Government and Community Development including the election of Paramount Chief prior to the election it is the responsibility of the Minister to compile a list of councilors to be gazetted thereafter the councilors and the candidates would check if their names are in list in the gazette" (emphasis mine).*



Still on the testimony of the plaintiff/respondent. He stated further that when he complained to both the Provincial Secretary and the D.O and the Electoral Commission about the law and they said they would use the list as that was what the Government gave them to use. It is beyond argument that the Appellant had no control whether directly or indirectly over the 4<sup>th</sup> defendant. A case on the point is *Taylor vs. The Sheriff and Zizer* 1 (1968-69) A.L.R.S.L. 35 at page 42 where the Court of Appeal said *inter alia*:

*"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to person who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only the neglect of them, though punishable, not affecting the validity of the acts done".*

I do not think that we should lose sight of the fact that all the other defendants were all government officials who were concerned at the material time with the conduct of the said elections.

I see no reason why non-observance of a public duty imposed on them or the Minister over whom the appellant had no control whatsoever, should cause the appellant to suffer for what was not his making.

There is evidence that a few weeks after the election that a purported valid list of Chiefdom councillors of Luawa Chiefdom was first made publicly available having been published in the Gazette (Extra ordinary) issue Volume 134 No. 4 dated 21 January 2003. Plaintiff/respondent being in possession of the Gazette which was tendered as exhibit B in my



own opinion he was in a position to compare the list used with the ones in the Gazette in order to demonstrate the short-comings or discrepancy or variance between the two and not having done so the presumption would be that there is no discrepancy or variance between the two. In holding this view, I observe that the judgement of the Court did not indicate whether or not any use was made of the Gazette other than mere tendering it. This I regret to say does not take the plaintiff/respondent's case further, bearing in mind the principle of law that he who asserts must prove. The allegations that by the use of exhibit A. instead of Exhibit B exposed the elections to a high level of unauthorized proxy multiple voting and rampant impersonating would have been substantiated and taken the plaintiff/respondent's beyond the realm of conjecture and surmises had exhibit A and B. been compared.

The learned trial judge to a great extent founded her judgement on the use of exhibit A. I derive support for this view by what the learned trial judge said on page 170 of the records: She said "Counsel for the Defendant has strenuously argued that the candidates were given the opportunity to challenge the names of any chiefdom councillor before voting commenced. The question that I ask is, is that in compliance with the practice and procedure set out for these elections? The provisions is that the list should be published in the Sierra Leone Gazette, three times in not less than one month before the election takes place. I do not believe just after few minutes before the election commences gives the candidates and the chiefdom councillor's sufficient time to go through a total of over one thousand names (emphasis mine).

The plaintiff has alleged that as a result of the use of this unauthorized list it has given rise to a high level of unauthorized proxy, multiple voting and rampant impersonations of individual voters. The plaintiff and his witness P.W.2 gave an instance of chiefdom councillor whom they knew and who was their relation, who had his name called, and a 14 year boy



answered and voted for him. This evidence has not been controverted by the defence. Who knows how many other instances of such a nature occurred during the elections". (Emphasis mine)

Still continuing at page 171 of the records the learned trial judge opined inter alia thus:-

*"It is my view that the use of exhibit A is a serious flaw in the conduct of the said elections and it has rendered the whole procedure suspect and unreliable"*

At page 172 of the records the learned trial judge reiterated as follows:

*"However it is my view that the use of the unauthorized list of chiefdom councilors Exhibit A in the conduct of the elections was a serious flaw in the conduct of the elections. I believe the evidence of the plaintiff that there were multiple voting and impersonation of voters during the election. This was caused principally by the use of the unauthorized list of chiefdom councillors Exhibit A as result of which use there has been caused an irreparable flaw in the conduct of the election. The elections are therefore declared null and void". (Emphasis mine)*

With due respect to the learned trial judge, it seems to me that she allowed herself to be carried away by the absence of a gazetted list which was not the making of the appellant.

The law is settled that for a petitioner in an election petition to succeed in a petition founded on corrupt practices he has to prove beyond reasonable doubt that:



- 1) *That the respondent personally committed the corrupt or aided, abetted, counselled or procure the commission of the alleged act of corrupt practice.*
- 2) *Where the alleged act was committed through an agent. That the agent was authorized to act in that capacity or granted general authority.*
- 3) *More importantly that the corrupt practice or undue influence affected the outcome of the election and how it affected.*

The authority for this proposition is the Nigerian case of *Ofodile v Chiwuba* (1993) (1NWLR PT 268)151. It is observed that in the instant case, there is no where the alleged malpractice was proved conclusively against the appellant or any of the Defendant/Appellants. In my humble opinion, the Respondent has failed to prove beyond reasonable doubt that the purported corrupt practices or electoral malpractices which he alleged substantially affected the result of the election. I would add here that a heavy premium was placed on formalities to defeat the public good, and apparently defeat the wishes of the majority Luawa Chiefdom Councillors in deciding to cancel the election of the Appellant as the Paramount Chief of Luawa Chiefdom in Kailahun District.

The respondent complained that the voting exercise was marred by malpractice but only he and one witness testified as to what allegedly occurred during the voting. That testimony dwells on multiple voting, impersonation and so on. The learned trial judge must have disregarded and or did not adequately consider the testimony of the Provincial Secretary (D.W.1) in the person of Dr. Kai Moses Kpakiwa. At page 78 of the records where the witnessed inter alia deposed as follows:-



*"The Chiefdom councillors are elders of the chiefdom who form the Electoral College for the Paramount Chief Elections. They are known individuals in the District. We held a meeting at Kailahun Court Barray. Before the election took place, I gave instructions for the chiefdom councillors list to be read for both chiefdom councillors to know. My instructions were carried out. The purpose of reading the list was for the chiefdom councillors and the candidates to know the chiefdom councillors on the list. There was no objection from the candidates and the chiefdom councillor's to any name that was read out. (emphasis mine). When the list was read, there was no objection. I gave orders that the election should start. Before that the councillors were to sign a document which was a list of chiefdom councillors. There was no objection to the signing of the document as to any eligibility of any candidates".*

In cross examination of the witness, the witness is recorded to have said inter alia.

*"The Petitioner did not tell me that the elections were being conducted in the absence of a Gazetted list. No. I did not respond to him that if any one was dissatisfied he should go to Court. I was not under great pressure in conducting that election" (emphasis mine)*

It is to be observed that in spite of the clear and straight forward testimony of this important witness, the learned trial judge went on to accept the testimony of the respondent as the truth and then proceeded to explain or justify her conclusions even though D.W. 1 had denied that there was any complaint. The learned trial judge appeared to have been



satisfied with the evidence of the respondent and his witness (P.W.2) as the truth and went onto say at page 151 as follows:-

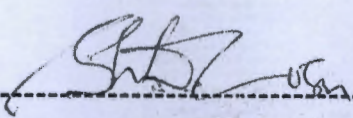
*"Such irregularities continued to the end of the voting and the Electoral Officers did nothing to stop it".*

The question to asked is: Could this have been true and correct in view of the unshaking evidence of the defence?

I have carefully considered the proceedings in the Court below. I am satisfied that if the learned trial judge had devoted more time to consider this election petition, she might have come to a different conclusion. I accept as a correction proposition of law that the plaintiff/respondent in the lower court was under an obligation to prove beyond reasonable doubt that the purported corrupt practices or electoral malpractices which he alleged substantially affected the results of the election. The law is settled that an irregularity affecting a minority of lawful votes would not upset the election of a candidate who secured the majority of lawful votes. See *Adeola v Owoade* (1999) N.W.L.R (PT 617) 30 I entirely agree with the learned Counsel for the appellant in his criticisms of the judgement of the learned trial judge, which is in effect that she merely glossed over the defence case.

I am absolutely satisfied in my mind, for the reasons stated above and on the arguments in this appeal that this appeal ought to be allowed. In the circumstances the proper order for me to make is that the Appellant Mohamed Kailondo Banya was duly elected as Paramount Chief of Luawa Chiefdom Kailahun District on the 17<sup>th</sup> January 2003. The result is that the judgement of (Showers J as she then was) is hereby set aside.



  
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**HON. MR. JUSTICE S.A. ADEMOSU - J.A.**