

Freetown
Oct. 14,
1963.

Cole Ag.C.J.

[SUPREME COURT]

ABDUL BAI KAMARA *Petitioner*
v.
BANGALI MANSARAY AND BRIAN WATKINS *Respondents*

[E.P. 12/62]

Election Petition—Amendment of petition—Whether amendment raises new and substantial ground—Publication of list of candidates by Returning Officer—Electoral Provisions Act, 1962 (No. 14 of 1962), ss. 21, 22, 62—House of Representatives Election Petition Rules (Vol. VI, Laws of Sierra Leone, 1960, p. 405), r. 60—Supreme Court Rules, Ord. XXIV, r. 1 (Vol. VI, Laws of Sierra Leone, 1960, p. 178).

Petitioner and first respondent were candidates for the House of Representatives in the election held in the Port Loko West constituency on May 25, 1962. Second respondent was the Returning Officer. First respondent was victorious, and petitioner filed an election petition on June 13.

Paragraph 3 (i) of the petition stated "That the Returning Officer failed to comply with section 21 of the Electoral Provisions Act (No. 14 of 1962) in that he failed to include in the lists of candidates published within the above-mentioned electoral area the name, address and occupation of the petitioner and of the persons by whom he was nominated."

On November 17, first respondent's solicitors requested further particulars from petitioner. These were supplied on December 17. On April 16, 1963, pursuant to an order of court, the testimony of second respondent was taken in a deposition. Second respondent subsequently left Sierra Leone for good. On September 25, J. E. R. Candappa, Esq., replaced Z. L. Khan, Esq., as petitioner's solicitor.

On October 8, petitioner sought to amend paragraph 3 (i) of his petition to read as follows: "That the Returning Officer failed to comply with the provisions of section 21 of the Electoral Provisions Act . . . in that (a) The publication in the Gazette of the list containing the full names and addresses and occupations of the candidates and of the persons by whom they were nominated was done on May 21, 1962, namely, four days before May 25, the first day appointed for the election; (b) he failed to include in the lists published within the electoral area the name, address and occupation of the petitioner and of the persons by whom he was nominated, thereby leading the electorate to believe that the petitioner was not a candidate. . . ."

Section 21 of the Electoral Provisions Act states: "The Returning Officer, not later than 10 days before the first day appointed for the election, shall cause to be published in the Gazette, and in such other manner within the electoral area as he may deem appropriate, a list containing the full names, addresses and occupations of the candidates, and of the persons by whom they were nominated."

Held, denying leave to amend as regards paragraph 3 (i) (a), (1) that two separate things are required to be done by the Returning Officer under section 21 of the Electoral Provisions Act, namely, (a) publication of the list of candidates and nominators in the Gazette, and (b) publication of the list in the electoral area; and, therefore,

(2) That petitioner's amended paragraph 3 (i) (a), in raising for the first time the question of publication in the Gazette introduced a new and substantial matter.

Cases referred to: *Maude and others v. Lowley* (1874) L.R. 9 C.P. 165 ;
The Lancaster Division Case (1896) 5 O'M. & H. 39.

John E. R. Candappa and *Emile C. Thompson-Davies* for the petitioner.
Berthan Macaulay Q.C. for the first respondent.

No appearance for the second respondent.

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COLE AG.C.J. When this petition came up for hearing on October 7 and 8, 1963, Mr. Candappa for the petitioner sought leave to amend the particulars of the petition by the substitution of fresh paragraphs 3 (i) and (ii).

The petition was dated June 13, 1962, and filed the same day. Paragraphs 3 (i) and (ii) of this petition read:

"3. And your petitioner says

- (i) That the Returning Officer failed to comply with section 21 of the Electoral Provisions Act (No. 14 of 1962) in that he failed to include in the lists of candidates published within the above-mentioned electoral area the name, address and occupation of the petitioner and of the persons by whom he was nominated.
- (ii) That the Returning Officer failed to comply with section 22 (2) (b) (ii) of the Electoral Provisions Act (No. 14 of 1962), thereby frustrating the will of the majority of the electorate, in that they may not have been able to elect the candidate they preferred."

The proposed amendments, which are contained in a " Notice of Proposed Amendment to Petition " dated October 8, 1963—well over a year from the date of the presentation of the petition—read:

" Paragraph 3 (i) of the petition to read:

1. That the Returning Officer failed to comply with the provisions of section 21 of the Electoral Provisions Act (No. 14 of 1962 in that (a) The publication in the Gazette of the list containing the full names and addresses and occupations of the candidates and of the persons by whom they were nominated was done on May 21, 1962, namely, four days before May 25, the first day appointed for the election ; (b) he failed to include in the lists published within the electoral area the name, address and occupation of the petitioner and of the persons by whom he was nominated, thereby leading the electorate to believe that the petitioner was not a candidate in nomination and affecting the fairness and the result of the election.

2. That the Returning Officer failed to comply with section 22 (2) (b) (ii) of the Electoral Provisions Act (No. 14 of 1962) in that he failed to specify in the notice of the election the full name and address and occupation of the petitioner as a candidate together with the description of the symbol which he had allotted to the petitioner and the full names, addresses and occupations of the persons who nominated the petitioner, thereby intimating to the electorate that the petitioner was not a candidate and thus misled the electors in such a manner as to render the election void."

At the time of the presentation of the petition and up to September 24, 1963, Mr. Z. L. Khan was the agent as well as solicitor for the petitioner. As from September 25, 1963, Mr. Candappa became his agent as well as his solicitor in place of Mr. Khan.

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On November 17, 1962, Macaulay & Co., solicitors for the respondent, addressed Exhibit "A" to Mr. Khan as follows:

"November 17, 1962.

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Dear Sir,

Election Petition No. 12/62—R. No. 2

Abdul Bai Kamara v. Bangali Mansaray and Brian Watkins

As you are aware, we act for the first respondent in the above election petition. We require the following particulars of the petition filed by you on behalf of the petitioner:

Paragraph 3 (1) of the petition

The place or places of publication of the lists referred to.

Paragraph 3 (2) of the petition

The particulars of the alleged breach of section 22 (2) (b) (ii)—whether there was a total non-compliance in the matter of giving notice, or whether the names, addresses and occupations of one or all of the candidates, together with the descriptions of the symbols, were not published.

Paragraph 3 (3) of the petition

The name of the Presiding Officer.

We shall be grateful for an early reply.

Yours faithfully,

(Sgd.) Macaulay & Co.

Z. L. Khan, Esq.,
Solicitor and Advocate,
23, Rawdon Street,
Freetown."

On December 17, 1962, Mr. Khan replied in Exhibit "B" as follows:

"Macaulay & Co.,
27, Tikonko Road,
Bo.

Dear Sirs,

Re Election Petition No. 12/62—R. No. 2

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In reply to your letter of November 17, 1962, regarding the above petition, I have pleasure in supplying you the following particulars:

Paragraph 3 (1)

Throughout constituency.

Paragraph 3 (2)

Non-publication in case of petitioner.

Paragraph 3 (3)

Please obtain from Election Officer, Tower Hill, Freetown.

Yours,

(Sgd.) Zinenuol L. Khan."

On April 9, 1963, this court ordered herein

“ that a judge or master of the Supreme Court doth examine upon oath Brian Watkins (Returning Officer), the second respondent herein, and that the depositions when so taken, together with any documents, or extracts therefrom, be filed in the Registry of the Supreme Court before the trial of the above-entitled petition ; and that either the petitioner or the respondents be at liberty to read and give evidence on the trial of the said petition of any such depositions.”

In consequence of this order the evidence of the second respondent was taken by the deputy master and registrar on April 16, 1963. These depositions were, by consent, put in evidence and marked “ D.” It is seen that during the taking of those depositions Mr. Khan appeared for the petitioner and Mr. Berthan Macaulay appeared for the first respondent.

Mr. Berthan Macaulay has objected to paragraph 3 (i) (a) of the proposed amendment on the ground that it introduces an entirely new issue and should not be granted. He added further that if this particular amendment were to be granted his client would not only be taken by surprise but would be embarrassed since the most material witness who could give evidence on behalf of his client to meet the averment has left Sierra Leone for good and could not be brought back without great expense. He added further than in Exhibit “ C ” it is clearly stated by the second respondent that he was leaving Sierra Leone for good on April 20, 1963. Mr. Candappa, on the other hand, submitted that the amendment in question did not introduce any new charges, nor did it seek to bring in charges which were not pointed at by the petitioner. He added that the purport of the proposed amendment was to clarify or particularise the grounds of the petition. He submitted further that second respondent in his depositions had categorically stated that the fact of the nominations in respect of the electoral area in question was subsequently published in the “ Gazette.” That was an irregularity which was before the court and the court could not shut its eyes to it.

There are no expressed provisions in the Electoral Provisions Act (No. 14 of 1962) regulating amendment of election petitions or particulars. Section 62 of the Act, however, provides as follows :

“ (1) Subject to the provisions of this Act and without prejudice to any power to make Rules under the Courts Act, the Chief Justice may from time to time make, amend or revoke Rules for regulating the practice and procedure to be observed on election petitions, and subject to such Rules, the procedure at the trial of an election petition shall as near as circumstances will admit, be the same, and the court shall have the same powers, jurisdiction, and authority as if it were trying a civil action ; and witnesses shall be subpoenaed and sworn in the same manner, as near as circumstances will admit, as in the trial of a civil action in the Supreme Court, and shall be subject to the same penalties for perjury.

“ (2) Until other provision is made under this section, the House of Representatives Election Petition Rules, as in force immediately before this Act came into force, shall, with any necessary modifications and adaptations, be deemed to have been made under this section and may be amended or revoked by Rules made under subsection (1) of this section.”

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No new rules under section 62 (1) of the Act have yet been made and so the House of Representatives Election Petition Rules, P.N. 97 of 1951 (Vol. VI, Laws of Sierra Leone, 1960, p. 405), apply.

I have carefully examined these rules and I find no specific provision therein relating to amendment of petition or particulars. Rule 60, however, provides that—

“where no provision is made by these rules, the procedure, practice and forms from time to time in force in the Supreme Court, so far as they can conveniently be applied, shall be in force in relation to the trial of election petitions under the Ordinance.”

Order xxiv, r. 1, of the Supreme Court Rules provides that—

“The court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

Where the application for the amendment is made at the hearing, as was done in this case, the court will not readily allow an amendment the necessity for which was abundantly apparent months ago and then not asked for; nor where the party applying to amend could with reasonable diligence have discovered the new facts. In Halsbury's Laws of England, Vol. 14 (3rd ed.), p. 278, para. 494, it is stated with regard to amendment of particulars of an election petition as follows:

“If a party wishes to give evidence of any circumstances not mentioned, or insufficiently mentioned, in his particulars, leave to amend the particulars may be asked for before or at the trial. The practice of the court in dealing with such an application has not been absolutely uniform, but the course generally pursued has been to allow instances not mentioned or insufficiently mentioned in the particulars to be given in evidence if the matter is substantial and if it appears that the failure to furnish the particulars in due time has been bona fide. An affidavit to that effect should be filed by the petitioner's agent. In granting leave the court will consider whether the respondent will be prejudiced by such leave, and if it is of opinion that the respondent ought to have time to be enabled to meet such evidence the court will grant an adjournment for that purpose, and the court may also in its discretion award the respondent the costs entailed by such evidence in any event. The court will not allow an amendment of particulars at the trial when such amendment really amounts to an amendment of the petition.”

In the case of *Maude and others v. Lowley* (1874) L.R. 9 C.P. 165, it was held that a petition against the election of a town councillor cannot, after the expiration of the 21 days limited by section 13 (2) of the Practices (Municipal Elections) Act, 1872, for its presentation, be amended by the introduction of a substantially new charge. The case of *The Lancaster Division* (1896) 5 O.M. & H. 39 establishes the same proposition. It is my view that section 62 (1) of the Electoral Provisions Act (No. 14 of 1962) should be read together with section 59 (1) of the same Act, which provides the time within which a petition shall be presented. I am of the opinion that the words “Subject to the

provisions of this Act” in section 62 (1) of the Act do limit and restrain the power of the court in the exercise of the powers and jurisdiction conferred by that subsection.

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Does the amendment sought under paragraph 3 (1) (a) of the “ Notice of Proposed Amendment of Petition ” raise a new and substantial ground so as in effect to make the petition a new petition? It is said that it is merely expanding and makes more plain that which has been already expressed in the original petition. In order to determine this the provisions of section 21 of the Electoral Provisions Act (No. 14 of 1962) should be considered.

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That section provides as follows:

“ The Returning Officer, not later than 10 days before the first day appointed for the election, shall cause to be published in the ‘ Gazette,’ and in such other manner within the electoral area as he may deem appropriate, a list containing the full names, addresses and occupations of the candidates, and of the persons by whom they were nominated.”

It would appear that two separate things are required to be done by the Returning Officer under this section, namely: (1) publication in the “ Gazette ” not later than 10 days before the first day appointed for the election of the list in question; (2) publication within the electoral area in such manner as the Returning Officer should deem appropriate not later than 10 days before the first day appointed for the election of the list in question.

It is my view that each act is separate and independent and non-performance by the Returning Officer of either act would constitute an irregularity. The averment contained in paragraph 3 (1) of the original petition is confined only to the alleged non-compliance with that limb of section 21 of the Act relating to publication within the electoral area of the list in question. Exhibits “ A ” and “ B ” support this view. The first time that an averment was made by the petitioner complaining about the publication of the list in question in the “ Gazette ” was in the amendment sought. In my view, that is introducing a new and substantial matter. That being the case, the authorities already referred to above by which I am bound preclude me from granting the amendment sought.

I now refer to Mr. Candappa’s submission that the irregularity now complained of is before the court and the court cannot shut its eyes to it. He referred to the depositions of the second respondent taken by the deputy master and registrar—Exhibit “ D.” I have carefully perused these depositions. The only reference I could find made by the witness to any publication in the “ Gazette ” is at pages 1 and 2 of Exhibit “ D ” where he said:

“ With reference to the first ground of the petition the notice required by section 21 of the Electoral Provisions Act, No. 14 of 1962, was published by me at the place of receipt of nomination, which was my District Office in Port Loko, on May 8, 1962, which was nomination day, and subsequently in the ‘ Sierra Leone Gazette ’ and at various places within the Port Loko West constituency.”

How this piece of evidence can be said to put at issue the regularity or irregularity of the publication of the list in question in the “ Gazette ” I fail to see. The “ Gazette ” in question was not even put in evidence, nor was any evidence led as to whether the list in question was published in the “ Gazette ” within 10 days before the first day appointed for the election. I find on the

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evidence before me that, apart from the amendment sought, the issue as to publication in the "Gazette" of the list in question has never been raised before. As I have already stated, I find the amendment sought under paragraph 3 (1) (a) of the notice a substantial and new matter. There is no evidence before me that the failure to raise this new issue in due time has been bona fide.

Furthermore, to grant this particular amendment would result in hardship and embarrassment to the first respondent, the principal witness in respect of the new issue, Mr. Brian Watkins, having left Sierra Leone for good.

For the reasons already given I refuse that part of the application which relates to paragraph 3 (i) (a). The others appear to be and are, in my view, clarification of the original grounds of the petition. I am disposed to grant those and hereby do so. The costs of the application will be paid by the petitioner to the first respondent in any event.

[SUPREME COURT]

Freetown
Nov. 25,
1963.

Cole Ag.C.J.

THE COMMISSIONER OF POLICE Appellant
v.
QUINCI BATTITSTA Respondent

[Magistrate Appeal 45/63]

Criminal Law—Failure to comply with conditions of fishing licence—Whether condition ultra vires Fisheries Act (Cap. 195, Laws of Sierra Leone, 1960)—Fisheries Act, ss. 2, 3 (1), 6 (2), 10 (1) (a), 10 (1) (c), 13.

On April 25, 1963, respondent appeared before the Senior Police Magistrate charged with navigating a fishing vessel in Yawri Bay east of the western tip of Banana Island, thereby violating the conditions in his licence, contrary to section 10 (1) (a) of the Fisheries Act.

Section 6 (2) of the Fisheries Act provides: "A licence shall be in the prescribed form and may be issued subject to such conditions as the licensing officer may think fit to impose by indorsement thereon."

The Senior Police Magistrate dismissed the charge and acquitted the respondent, holding that section 6 (2) did not give the licensing officer the power to restrict respondent's right of navigation. The acting Attorney-General appealed.

Held, allowing the appeal, that section 6 (2) of the Fisheries Act does give the licensing officer the power to restrict a licensee's right of navigation.

Kanja A. Daramy (Ag. Senior Crown Counsel) for the appellant.

Edward J. McCormack for the respondent.

COLE AG.C.J. On April 25, 1963, the respondent appeared before the Senior Police Magistrate charged as follows:

"That he, on or about April 21, 1963, at Yawri Bay in the Western Area of Sierra Leone, being the director of the Union Fishing Company, who was on board the motor fishing vessel F.N. 21, was found navigating in Yawri Bay, to wit, east of the westernmost tip of Banana Island, thereby violating or failing to comply with the conditions in his licence.