Johnson v. NEC [2005] LRSC 50 (16 December 2005)

Sando Dazoe Johnson, Senatorial candidate of Bomi County of the City of Monrovia, Liberia COMPLAINANT/APPELANT Versus The National Elections Commission (NEC) by and thru its Chairman, Counsellor **Frances Johnson-Morris**, the Election Magistrate and Election Workers of Bomi County, also of the City of Monrovia, Liberia RESPONDENTS/APPELLEES

APPEAL

HEARD: DECEMBER 6, 2005 DECIDED: December 16, 2005

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

The Appellant in this case is Mr. Sando Dazoe Johnson, one of the fourteen (14) candidates that contested for the senatorial positions for Bomi County in the General and Presidential Elections held in Liberia on Tuesday, October 11, 2005. At the close of voting day, the ballots were counted and the result of each polling place was placarded in conspicuous places for public viewing.

There were ninety-eight (98) polling places in Bomi County and the total result from all ninety-eight (98) polling places were announced in Tubmanburg by the Elections Magistrate on October 1, 2005. According to the results announced, Mr. Lahai Gbabye Lansanah was declared Senior Senator and Mr. Richard Blamah Devine was declared Junior Senator.

The Appellant being dissatisfied with the results announced by the Elections Magistrate in Bomi County wrote a letter of Complainant to the National Elections Commision (NEC) signed by himself and Alfred Boimah Anderson, another aspirant for the senatorial position in Bomi County on the letter head of the argument that aspirant Alfred Boimah Anderson abandoned his complaint since he did not follow up to have his case heard, at NEC, nor did he appeal from any decision of NEC to this Supreme Court. Our opinion in this matter will therefore be restricted to the claim of Mr. Sando Dazoe Johnson.

The complaint of Mr. Johnson is summed up in the letter aforestated which think necessary to quote verbatim, as follows:

National Patriotic Party
Bomi County, Liberia

October 15,2005
The Honorable Chairperson
Francis Johnson-Morris
National Elections Commission
16th Street Sinkor
Monrovia, Liberia

Hon. Commissioner:

We present our compliments and herewith bring to your attention that the Declaration of Primary Tally results for the Senate, Bomi County which was announced on Friday, October 14, 2005, at the hour of 10:41 a.m. which placed Boimah Anderson of the NPP at 2,997 votes obtained and Sando Dazoe Johnson of the NPP at 4,523 votes obtained are not corresponding with the results gathered from our monitors from the 98 pooling

centers in Bomi County. We received further information that some of our votes were with at the pooling centers.

Also, of grave importance, the total number of registered voters of Bomi County is 38,524 while tally results are showing 45,597. Honorable Chairperson, from where did the additional votes come and why? We are disturbed by this revelation.

Consequently, we are respectfully requesting your noble office to conduct a RECOUNT of the ballots from the 98 pooling centers in Bomi County for the Senate results in order to give the benefit of the doubt to the public and ourselves .

With sentiments of the highest esteem, we remain.

Professionally yours,

Sando Dazoe Johnson
ASPIRANT

Alfred Boimah Anderson
ASPIRANT

Although the letter of complaint of Mr. Johnson is dated October 15, 2005, it appears that NEC received it on October 18, 2005. Counsellor Joseph Blidi, Hearing Officer of NEC conducted investigation into the complaint and made ruling dated October 27, 2005, denying and dismissing the complaint. The said ruling was subsequently reviewed and upheld by the Board of Commissioners of NEC on November 14, 2005.

In rulling on the matter, the Hearing Officer consider the issue: "whether or not the facts and circumstances in this case warrant a recount of the votes of the ninety-eight (98) polling centers in the Senatorial Election of Bomi County held on October 11, 2005?" the hearing officer held that "The Complaint failed to produce evidence sufficient to prove the allegations set forth in his complainty". As stated above the Board of Commissioners of NEC confirmed the ruling of the Hearing Officer on November 14, 2005. Thereafter the Complainantt through his legal counsel, announced an appeal from the final ruling of NEC to this Supreme Court.

The Appellant then filed his Bill of Exceptions containing twelve counts which was approved by the Chairman of NEC. We consider counts 1, 2, 4, 6, 7, and 8 of the Appellant's Bill of Exceptions germane to the determination of this case and therefore quote them as follows:

"1. Because Appellant says that the Commission committed serious reversible error when you dismissed Appellant's Complaint of error in the tallying of the votes from the 98 polling centers in Bomi County such that the total votes he won at the various centers were different from and did not correspond to the final figures announced."

"2.And also Appellant says the Commission committed reversible error when it denied Appellant's request for a recount, and proceeded to uphold and confirm the Magistrate and other workers in Bomi County."

"4. Appellant also says the Commission committed serious reversible error when it refused and failed to order an actual physical recount of the votes on the ground in Bomi or at the central counting centers but only made a ruling based on the mere denial of the Bomi County Elections Magistrate, which is contrary to the Elections Laws."

"6. Appellant says the Commission showed bias and prejudice in its ruling when it held that Complainant presented no witness to corroborate the figures contained in his computer generated documents, thereby concluding that Appellant failed to produce evidence set forth in his complain. For this, the ruling must be reversed and overruled.

7. Appellant says the Commission is guilty of reversible and prejudicial error when in the ruling it is acknowledged that there were errors in the figures, that is, there is variance between the actual number of votes received! (17)and the figure recorded for and ascribed to candidate Lahai G. Lassanah at the Court House Polling Station (71) but the Commission ignored this and attributed it to mere "transposing error."

"8. Appellant says the Commission was also in error when it concluded that there was no error in recording of votes for Appellant Sando Dazoe Johnson and Richard Devine, just by mere accepting at face value the statement of the Election Magistrate without ordering a physical recount of all votes cast for all candidates at all of the polling stations."

During argument before this Court, Appellant's Counsel presented and argued a single issue: "Whether or not Appellant is entitled to a recount of the votes cast on October 11, 2005, for the Senator race in Bomi County?"

He maintained that his client has no qualm or problem whatsoever with the results announced at each of the ninety-eight (98) polling places throughout Bomi -County, but that the problem arose when the various results were tallied and announced by the Elections Magistrate in Bomi County. Complainant's Counsel contended that the results from the ninty-eight (98) polling places in favor of his client do not represent and correspond with his client's tally of what the Elections Magistrate had announced; that his client's figure was understated, while those of the two persons declared winners were overstated. He also further argued that Appellant is not claiming that figures published at any given polling center were wrong. He stated that Appellant was present and accepts those figures that were placed on the wall on voting day; but that he, however, objects to the final votes tallied in Tubmanburg and announced by the Elections Magistrate on October 13, 2005. He informed this Court that the results tallied and published by NEC supervisors on polling day on site were:

"Sando Jolmson 4,554 votes, Richard Devine 4,546 votes, Lahai Lasannah 4,778 votes"

but when the Magistrate announced the final results in Tubmanburg on October 13, 2005, the results were:

"Sando Johnson 4,523 votes, Richard Devine 5,403 votes, Lahai Lassanah 5,198 votes."

Therefore, the Appellant, through his counsel is demanding a recount of the ballots because according to him, "there was a mistake in tabulating or compiling the results from each polling place thereby producing a final result different from the true calculation."

For the NBC, its lawyers presented and argued two issues. NEC's first issue is "Whether or not Mr. Sando Dazoe Johnson, a Senatorial Candidate on NPP ticket has a standing to contest the result of the elections as an individual, absent the political party which nominated him?" Lawyers for Appellee NEC answered this question in the negative and maintained that Mr. Sando Dazoe Johnson, not being an independent candidate was nominated to the National Elections Commission by the NPP. They further argued that '"the NPP having accepted the Senatorial Elections result of Bomi County as evidenced by its failure to file any post election contest or complaint within the statutory period, Mr. Johnson as an individual has no legal standing to challenge the election results ....." They cited for our reliance a recent case:Morris Dukuly vs. NEC decided by this Court during the

March Term, AD. 2005. NEC's lawyers also cited Article 83© of the 1986 Constitution of Liberia.

The second issue raised and argued by NEC's lawyers is "Whether or not the facts and circumstances of this matter warrant a recount of votes cast at the ninety-eight (98) poling centers in Bomi County?" NEC's lawyers again answered this question negative. They argued that the Complainant/Appellant in answering question from the Elections Magistrate in Bomi County during the investigation said "I had my agents all over Bomi, except Tubmanburg."; that in answering similar question from the Hearing Officer, the Complainant again said that "I had party representatives at most of the polling centers and the said NPP representatives signed the tally sheets without objection." The NEC lawyers contended therefore, that the Appellant's Party representative having been present at nearly all the polling centers and signed the tally sheets without objections, it is without legal reasoning to do a recount of votes in the entire ninety-eight (98) polling centers in Bomi County as demanded by the Appellant.

From the facts and circumstances presented, there are two issues considered by this Court for the determination of this case, they are:

1. Whether or not the Appellant is entitled to a recount of "the votes cast on October 11,2005, for the senate race in Bomi County?

2. Whether or not the Appellant, as an individual, has standing to challenge the result of the senatorial election in Bomi County in which he participated as a candidate/ contestant on the ticket of the NPP?

It is interesting to note that the counsels for both Appellant and Appellee also raised and argued the first issue we have stated above. In fact, for the Appellant, this is the only issue which his counsel raised in his brief and argued before us.

In disposing of the first issue, we must keep in mind the cardinal principle governing election disputes, that is, he who challenges an election result must overcome a strong presumption in favour of the validity of the election process and results. 26 AM JUR 2d, Elections, Section 439. In other words in elections, the presumption is that the official is legitimate, he acted properly, the process is free, fair, and transparant and the result is credible. So, one who says that the election process is not fair, and transparent the result is not credible has the burden to establish his cause. Applying this principle to the case before us, we see that, it is Appellant who alleged that his "votes were tampered with at the polling centers", and further alleged that the Elections Magistrate in Bomi County understated his votes and inflated the votes of his adversaries. He, therefore, had the burden to have sustained the proof.

Our law, Section 25.5(2), 1 LCLR requires that the party who has the burden establishes his allegation by a preponderance of the evidence. After this is done then the burden shifts on the defendant or the accused.

Let us now see whether the Appellant in this case met the aforementioned standard of proof by preponderance e of evidence.

Firstly, we observe that the Appellant's complaint filed with NEC alleged incorrect statement of votes in his favor. He also alleged that some of his votes were tampered with at the polling centers and therefore demanded recount of the ninety-eight (98) polling centers. Bomi County. This was the complaint filed before NEC and this was the complaint that NEC investigated and dismissed (See Appellant's letter of Complaint quoted herein above).

But we noticed a sharp change in the position and contention of the Appellant when the matter reach the Supreme Court. In the Appellant's brief filed before this Court, even thou he raised and strenuously argued that he is entitled to a recount of the votes caste in the senate race in Bomi County, he now maintains that he has no qualm with each of the result from each of the ninety (98) polling centers in Bomi County. The Appellant specifically stated in paragraph 4, page 3 of his brief that "Appellant was present and therefore accepts the figures announced and published at each individual polling center...." Now, how can it be, that the Appellant will complain that some of his votes were tampered with at the polling centers and, instead of providing evidence in this connection, deviates and categorically state that he was present and therefore accepts the figures announced and published at each polling center? This is a clear contradiction.

Secondly, the Appellant also stated in his letter of complaint that the votes announced for him by the Elections Magistrate in Bomi County do not correspond to the number of vote gathered by his monitors at the ninety-eight (98) polling centers in Bomi County. But we see from the records of the hearing conducted by the Hearing Officer of NEC that the Appellant alone testified. None of his monitors referred to in his letter of complaint testified to substantiate and buttress his claim. Might we take it at face value that the complaint of the Appellant is true and correct without any corroboration? Certainly not. Under the circumstance, we conclude that the Appellant's word is as good as that of the Elections Magistrate of Bomi County who denied his complaint. Therefore, the Appellant did not sustain the burden of proof by preponderance of evidence.

Thirdly, the Appellant in attempt to establish his case before the Hearing Officer, presented documents (computer prints) prepared by Appellant himself. We gather that these documents were supposed to· contain correct and accurate votes cast at the ninety eight (98) polling" centers in Bomi County indicating actual votes cast in favor of the Appellant which he said were understated. But here again the Appellant, to the mind of this Court, failed to give proof by preponderance of evidence when he provided documents (his own documents) of only eighty (80) of the ninety-eight (98) polling centers in Bomi County. The Appellant did not produce documents covering eighteen (18) polling centers; even though he said in his complaint that he had monitors at all of the ninety-eight (98) polling centers and that the total result gathered from his monitors in his favor was different from what was announced by the Elections Magistrate in Bomi County. As we see, it was incumbent upon the Appellant to have produced documents of the results, according to him, that were gathered by his monitors in all of the ninety-eight (98) polling centers in Bomi County to substantiate his claim that he obtained a total vote of 4,554 votes. But this Appellant woefully failed to do. Instead, the records show (and the Appellant does not deny) that some of his party representatives at the poling centers in Bomi County signed the tally sheets without objection. Based on these shortcomings, contradictions and inability of the Appallant to produce prima facie evidence in his own behalf, as pointed out herein above, it is our view this has pointed out heat the burden of proof did not shift to the Appellee.

In a related matter, it was reported that seventy-one (71) votes, instead of seventeen (17) votes, were cast in favor of Lahai Gbaybye Lassanah, one of the senatorial aspirants of Bomi Coun. The Hearing Officer considered this as a "transposing error" and said that error was corrected. We do not think that this issue has any effect on the matter before us because the seventy-one (71) votes in question were initially to have been cast in favor of Mr. Lassanah and as stated earlier, the error was corrected and Mr. Lassanah was given the difference of fifty-four (54) votes and he still emerged as the senior senator elect, based on NEC's report. It is clear that Mr. Johnson does not have any particular problem with votes

cast in favor of Mr. Lassanah. His problem seems to be with votes cast for Mr. Richard Blamah Devine, since the Appellant claims that according to his own tally he should have been the junior senator elect, the position declared for Mr. Devine. We further think that the issue of the seventy- one (71) votes does not affect the case before us because even if seventy-one (71) votes were to be added to the number of votes announced by NEC in favor of Appellant Johnson, this will still not make him a winner. Our Statute on Regulations on Complaint and Appeals, Part III Section 7.4 provides:

" In order to accept and consider a post-election contestation complaint, the NEC must find that the errors alleged were not harmless and that they were proved to have affected the result of the election".

Thus, the Hearing Officer of NEC having found that the issue of the seventy-one (71) votes was a mere transposing error that did not affect the result of the election and that such error w as corrected, we will accept the account of the Hearing Officer who had firsthand knowledge of the matter. Under the Administrative Procedure Act, t is provided that the Court shall enter a decree enforcing the final ruling of an administrative agency unless the court finds that such ruling was void or invalid for fraud or that compliance has occurred. Findings which are made by the agency with respect to questions of fact shall be conclusive on the Court. Section 82.9(2), Administrative Procedure Act. The second issue in this case is whether or not the Appellant as an individual has standing to challenge the result of a senatorial election in which he participated as a candidate or contestant on the ticket of the NPP?

As stated earlier, NEC's lawyers argued that the Appellant in this case does not have standing as an individual to bring an action protesting election results when he was not an independent candidate, but rather participated in the election on the ticket of NPP, a political party.

In the case: Morris Dukuly vs. National Elections Commission, a pre- election matter decided by this Court less than three months ago, this is what we, in a unanimous decision said:„

"standing to sue, by defination, is the party's right to make a legal claim or seek judicial enforcement of a duty or right. Black's Law Dictionary, Standing to sue, 7th edition (2001). The purpose of the law of standing is to protect against improper Plaintiffs. The doctrine of standing ensures that the court will have the benefit of real adverse parties in cases. The question whether a party has standing to participate in a judicial proceeding is not simply a procedural technicality but, rather involves the remedial rights affecting the whole of the proceeding. 59 Am Jur 2d, Section 30. And, it has been held that one must not only have an interest, he generally must be the real party in interest.

We see that the Appellant in this case is an aspirant for a political office whose name was endorsed and submitted by a political party. A political party under Article 78 & 79 of the 1986 Constitution is an association. An Association, in keeping with our Statute can sue and be sued in own name. This means that the Political Party can bring an action, an action can be brought against it in its own name. Section 5.1 LCL Revised, Civil Procedure Law, Page 65 provides that unincorporated association may sue anti be sued in a court.

Our Associations Law is direct to this point at Section 2.5 when it states that:

"A corporation is a leg entity, considered in law as a fictional person distinct from its shareholders or members, and with separate rights and liabilities. The corporation is a proper plaintiff in a suit to assert a legal right of the corporation and a proper defendant in a suit to

assert a legal right against the corporation; and the naming of a shareholder, member, director, officer or employee of the corporation as a party to a suit in Liberia to represent the corporation is subject to a motion to dismiss if such party is the sole party to sue or defend, or subject to a motion for misjoinder if such party is joined with another party who is a proper party and has been joined only to represent the corporation."

This Court is bound to take cognizance and judicial notice of its own opinion under the doctrine of stare decisis unless such opinion has been recalled. The above quoted position and holding of this Court in the Morris Dukuly caseh as not been recalled and is quite applicable in the present case before us. As we see it, the question of standing to bring a suit is the same, whether in a pre- election or post-election matter. We therefore confirm our opinion in the Morris Dukuly case and further hold that the Appellant in the present case before us, having participated in the senatorial elections on NPP ticket, has no standing to protest the election result as an individual. The political party which is an association under our law is the proper party to have brought the action for wrongdoing if any.

The Appellant's counsel agreed, during argument before us, that the Regulations On Complaint and Appeals, Part ll, Section 5, promulgated by NEC and passed into law by the National Transitional Assembly (NTLA) to govern the 2005 Presidential and Senatorial Elections was applicable in his client's case. In other words, his contention was that under the said Regulation his client has the right as an individual to file a complaint in his own name.

The Regulation in question stat that:

"Any person, including any election participant, who is aggrieved by an action or decision, or the omission of an action or decision, by the NEC or any electoral official under direction or supervision by the NEC, may submit a complaint to the NEC in accordance with these regulations"

While we certainly agree that there may arise a situation necessitating a person or individual voter to file a complaint against an election worker, i.e., in the event where an individual voter was not allowed to vote or his vote was not counted, we do not agree, that a candidate or contestant whose name was endorsed and forwarded to NEC by a Political Party qualifies under the foregoing provision of the Electoral Statute to bring action against NEC protesting election result in his own name rather than in the name of the Political Party to which he belongs. Furthermore, we see that Part I, Section 2 of the same Electoral Law relied on by the Appellant define "Candidate" or "Contestant" as "a person duly nominated by a political party or by a coalition or alliance or an individual who has satisfied the legal requirements to stand for election as an independent candidate." In the case before us, it is not disputed that the Appellant was nominated by a political party. Thus, it should have been the political party and not the person, Sando Dazoe Johnson, who should have brought the complaint of wrongdoing, if any, against the Elections Magistrate in Bomi County. Although we see that the letter of complaint was written on the letter head of NPP, Bomi County, this does not make NPP a party complaint in the case before us because Mr. Johnson is not the official representative of NPP to file the complaint.

The most important authority on the issue under review is found in Article 83© of our Constitution which states:

“Any party or candidate who complains about the manner in which the election were conducted or who challenges the result thereof shall have the right to file a complaint with the Elections Commission” (Emphasis Ours)

We here note that the Constitution specifically names only a party, meaning political party and a candidate who has been defined by the Elections Law to mean an independent candidate (and not just any person as the Appellant wants us to believe) to be the ones with standing to protest election results. So even if there were a statutory provision which says otherwise (and we do not think so), the constitutional provision would prevail, under the doctrine of supremacy of the Constitution.

Before concluding this Opinion, we are constrained to point out certain lapses of NEC which tend to delay and impede the expeditious hearing and determination of elections matters by this Court as required by law. The Bill of Exceptions and Notice of Completion of Appeal in this case were approved by the appropriate officer of NEC on November 24, 2005, and were filed with the Clerk of the Supreme Court on the afternoon of November 25, 2005. The Clerk of Court sent out citations for the hearing of the matter on Friday, December 2, 2005, and instructed the parties to file their respective Briefs by mid-day on December 1, 2005. Appellee NEC was requested to have the full records of this matter presented to the Court by noon on December 1, 2005, as required by law. Only Appellant filed his Brief on the afternoon of December 1, 2005.

When the case was called for hearing on the morning of December 2, 2005, Counsel for Appellee NEC requested the Court to postpone the hearing for a period of one week in order to enable Appellee to send up the records of the investigation and prepare and file its Brief, due to alleged very heavy work load of the lawyers at the NEC. This request was made in spite of the clear provisions under Article 83 of the Consitution and of the Elections Law and Regulations that full records in the case on appeal from appeal from the NEC were to be filed with the Clerk of the Supreme Court not later than seven days after the filing of the Notice of Appeal at NEC; and further that the Supreme Court shall hear and determine such an appeal not later than even days after the full records from NEC has been received by the Clerk of Court under the circumstances, and at the request of Counsel for Appellee NEC, the Supreme Court ordered NEC to file the full records and its Brief with the Clerk of Court not later than Monday morning, December 5, 200 , and the case was reassigned to be heard on Tuesday morning, December 6, 200 , at 1o:oo a.m. Appellee NEC then filed its Brief on Friday, December 2, 2005.

When the case was again c lied for hearing on Tuesday, December 6, 2005, it came to the attention of this Court that NBC had merely filed some and not all of the records from its investigation of the case; that even ,those scanty records filed are not the same in all of the files before the Justice; and that no transcript of the investigation before the Hearing Officer of NEC as well as the full Board of Commissioners were available for review by the Supreme Court. For this reason, the Supreme Court ordered a one- hour recess so that Counsel for Appellee NEC would go back to its Office and bring the required records for review of the matter by the Supreme Court. It was not until almost two hours later when the Supreme Court was able to resume the hearing of the matter, at which time Counsels for Appellee NEC had still not brought the transcript of the records below, but merely a few other bits of evidences upon which NEC had is its Ruling affirming the Hearing Officer's dismissal of the Complaint of Appellant. In response to queries from the Court, Counsel for Appellee NEC explained that they did not have sufficient time to transcribe the records from the tape recording of the investigation to written form; further that certain original records were locked up by UNMIL and not available to them. With a certain degree of reluctance, but at the request of both Counsels for Appellant and Appelle , the Supreme Court decided to proceed with the hearing of the appeal.

The Constitution of Liberia Article 83(c) thereof requires NEC to "forward all the records in the case to the Supreme Court" within seven days after receipt of the Notice

of Appeal, after which the Court must hear and determine the matter within seven days thereafter. This Court understands the constitutional requirement to mean that the NEC must supply to the Court all the records of an investigation into elections complaints, including the filed papers, a verbatim transcript of the trial or hearing and tangible exhibits as well as copy of its ruling or decision, and all matters of evidence upon which the NEC bases its final decision. Additionally the Court believes that the said full records should be certified by the NEC to be true and correct.

Also, under Section 6.2(1) of the Elections Law, it is provided that NEC shall "render a determination" and that such "determination shall be accompanied by a summary of the investigation and the reason for it". Clearly, NEC did not act in accordance with the above quoted constitution and statutory provisions. We must sound a note of warning that while the urgent nature of elections matters has necessitated to have proceeded with this case at this time, this Court henceforth will henceforth not accept any derogation on the part of NEC. This means that in future matters, if there be any, NEC will have to act strictly within the Constitution and statutes governing the appeal process to this Court.

WHEREFORE and in view of what we have stated above, we hold that the Appellant in this case did not establish his cause in keeping with the standard provided under our law. We also hold that the Appellant whose name was endorsed and forwarded to the NEC by the Political Party, NPP, does not have standing to bring an action in his own name rather than in the name of the political party to which he belongs. This Appeal is therefore denied and dismissed with costs against the Appellant. AND IT IS HEREBY SO ORDERED.

COUNSELLOR M. WILKINS WRIGHT OF THE WRIGHT & ASSOCIATES LAW FIRM APPEARED FOR APPELLANT. COUNSELLORS KARMO G. SOKO SACKOR AND YAMIE Q. GBEISAY OF THE NATIONAL ELECTIONS COMMSSION (NEC) APPEARED FOR THE APPELLEE.