Freetown
July 21,
1961

Ames P.
Marke J.
Luke Ag.J.

[COURT OF APPEAL]

PA SHEKA KANU AND OTHERS . . . . . *Appellants*

v.

SULAY SEISAY . . . . . *Respondent*

[Civ. App. 43/60]

Claim for declaration that election of respondent as Paramount Chief invalid—Evidence—Whether sufficient evidence that respondent was direct grandson of Bai Orthernip.

Plaintiffs' writ sought a declaration that the election of the defendant as Paramount Chief was invalid and an injunction restraining him from functioning as Chief. The Supreme Court held that it had no jurisdiction, and plaintiffs appealed to the West African Court of Appeal, which held that there was jurisdiction and remitted the suit for hearing. At the hearing, the trial judge allowed defendant to amend his defence. From this interlocutory decision, plaintiffs appealed to the Court of Appeal for Sierra Leone and the Gambia, which again sent the case back to the Supreme Court for determination. The Supreme Court gave judgment for defendant, and plaintiffs appealed.

At the trial, the main issue was whether defendant was a descendant in the male line of Bai Orthernip. A witness for the defendant, Alhaji Souri, testified: "I know defendant. I knew his father Kaba Seisay. I knew him as a child. I knew his mother. I did not know of their marriage. The father of Kaba Seisay was Nana Seisay. I do not know him. . . . He told me that his father was Nana Seisay and that he had died in the war. He told me Nana's father was Bai Komp Orthernip . . . Defendant is my son-in-law."

Plaintiff's second ground of appeal was: "That the learned trial judge wrongly admitted in evidence the evidence of the second defence witness, Alhaji Souri, in so far as it purported to prove that the defendant was the direct grandson of Bai Orthernip."

Held, allowing the appeal, that the testimony of Alhaji Souri was insufficient to prove the descent of the defendant from Bai Othernip. (Ames P. dissenting.)

Note: This decision was reversed by the Judicial Committee of the Privy Council on April 1, 1963. (Privy Council Appeal No. 2 of 1962.)

Case referred to: *In re Berkeley* (1811) 4 Camp. 401 ; 171 E.R. 128.

James E. Mahoney for the appellants.
John H. Smythe (Solicitor-General) for the respondent.

MARKE J. This is an appeal from a judgment dismissing the plaintiffs/appellants' claim that the election of the defendant/respondent as Paramount Chief of the Bonkolenken Chiefdom be declared invalid as he was not descended from a ruling house of that chiefdom, and for an injunction restraining the defendant/respondent from so acting as Paramount Chief of Bonkolenken Chiefdom.

The main issue in this case is to be found in paragraph 3 of the amended statement of defence. According to the plaintiff/appellants the defendant/respondent "was not and is not a descendant in the male line nor the full brother of any Paramount Chief who has [sic] previously been recognised as a Paramount Chief of the Bonkolenken Chiefdom or of one or other of the

Bonkolenken Yele, Masakong, Mayopo, and Polo Chiefdom which was in 1956 amalgamated to form the present Bonkolenken Chiefdom."

The defendant/respondent in his defence asserted that he was a descendant in the male line of Bai Komp Orthernip, deceased, who was recognised as Paramount Chief of the Bonkolenken Yele Chiefdom.

This was the issue before the court and though the onus was on the defendant/respondent, his counsel, however, allowed the plaintiffs/appellants to begin.

I propose, however, as did the trial judge, to begin with the defendant/respondent's case before considering that of the plaintiffs/appellants'.

The first witness for the defence was defendant/respondent himself who gave a geneological tree of the Orthernip family. According to him—and this was common ground—Orthernip *I.* was followed by Nana Seisay, who in turn was followed by Kaba Seisay as Paramount Chief of Bonkolenken Chiefdom. The defendant/respondent deposed that Kaba Seisay was his father and that his father was dead. I may at once say in passing that the probative value of this evidence to prove whether this witness was a son of Kaba cannot be very high.

This witness went on to say that Fenti Seisay, one of the 13 plaintiffs/appellants and another man went to call him: "to go back to Yele and the Chieftaincy is now with our house." He went to Yele with the three men and was put up for election as a member of the Orthernip family and afterwards elected. He also referred to a sacrifice of two cows made on his behalf. As to the sacrifices he said:

> "A sacrifice was made for me. Two sacrifices in the house. Fenti Seisay took part, also *Ansumana Kanu. Pa Sheka Kanu* was there. Ansumana killed a cow. Sheka Kanu killed the second cow. It was for me."

Of these four names mentioned, only the names of Pa Sheka Kanu and Fenti Seisay appear among the names of appellants in this appeal. The plaintiffs/appellants as to this sacrifice said:

> "Before the election there was a sacrifice—cow killed. We all took part. We offered sacrifice. We offered a sacrifice in our house. Defendant offered a sacrifice in his house. I was present. Sheka Kanu was taking part. I do not know if Ansumana's cow was slaughtered."

The next witness for the Defence was Alhaji Alimami Souri. He deposed:

> "I know defendant. I knew his father, Kaba Seisay. I knew him as a child. I knew his mother. I did not know of their marriage. The father of Kaba Seisay was Nana Seisay. I do not know him. . . . He told me that his father was Nana Seisay and that he had died in the war. He told me Nana's father was Bai Komp Orthernip. . . . Defendant is my son-in-law."

The next witness was Farouk Falla, whose evidence was not satisfactory and highly suspect.

The fourth defence witness, Rogue Malim gave evidence that his name was a Poro title, and that he was head of the Poro of which defendant was member. He said that the Chief (that is, defendant/respondent's) father, was Kaba Seisay. That he knew Nana Seisay and knew when Nana Seisay was going to war.

The plaintiffs/appellants answer to this was a total denial of the claims of Sulay Seisay (defendant/respondent): or to use the words of the learned trial judge in his final judgment (p. 32),

> " but the defence is that so far as the plaintiffs are aware there was no Nana, no Kaba and the defendant simply came from some other area and made a completely spurious claim to eligibility for the chieftainship."

The learned judge in his judgment found Sulay Seisay the defendant/respondent " by far the most lucid and forthcoming of the witnesses called in the case," whom he said, " was supported by Alhaji Alimami Souri, an old gentleman of impressive bearing." It is clear that the learned trial judge based his findings on the evidence of these two witnesses before deciding against the plaintiffs/appellants.

Against that decision the plaintiffs/appellants have appealed on the following grounds, that is to say,

1. That the learned trial judge misdirected himself in holding that the defendant's claim to the chieftaincy of the Bonkolenken Chiefdom was not met with any strong protest.

2. That the learned trial judge wrongly admitted in evidence the evidence of the second defence witness, Alhaji Souri, in so far as it purported to prove that the defendant was the direct grandson of Bai Orthernip.

3. That the learned trial judge applied wrong principles in relation to the burden of proof.

4. That the learned trial judge gave insufficient consideration to the plaintiffs' case.

5. That the judgment is against the weight of evidence.

As regards the first ground of appeal, the plaintiffs/appellants in their statement of claim pleaded that they objected to the administrative officer present conducting the election as to the qualification of the defendant but that that officer failed to adjudicate upon their objection. The defendant in his statement of defence pleaded that three of the plaintiffs protested against his eligibility to stand for election. The protest, it was pleaded, was handed to the Acting Commissioner, Northern Province, who in turn passed the matter to the Tribal Authority. The Tribal Authority decided in favour of the defendant. But all these were allegations in pleadings which in no case amounted to an admission. These allegations in the pleadings not having been admitted, I am of the opinion that evidence should have been led on them if they were considered of such importance to have been made a ground of appeal. But no evidence having been given of this protest: I feel that the learned trial judge was right in saying that there was no such protest.

As regards the second ground of appeal the plaintiffs/appellants' complaint is that the learned trial judge was wrong in giving probative value to the evidence of Alhaji Alimami Souri and even making it one of the grounds for arriving at his decision in view of the fact that:

(1) Alhaji Alimami Souri was deposing so far as his evidence went as to the ancestry of Sulay Seisay, what he said he had been told by Kaba ; and

(2) that apart from Kaba's own statement as to his descent there is no evidence establishing his relationship aliunde.

As to the first ground of complaint the evidence of Alhaji Alimami Souri is that Kaba told him that his father was Nana who had died in a war. From

the decision in the *Berkeley Peerage* case, before Alhaji Alimami Souri's evidence can be accepted as evidence of the lineage of Kaba, there must be evidence of Kaba's lineage apart from his own statement.

This brings us to the second ground of complaint. On a review of the evidence, Sulay Seisay, the claimant, gives a geneology of the Orthernip house in which he mentioned Kaba's name. That evidence, coming as it does from the claimant himself who, as must be presumed, was speaking after making inquiries in a matter in which he was primarily concerned, cannot be of much probative value.

Sulay Seisay stated that two of the plaintiffs went to call him to stand for the chieftaincy. In the absence of any evidence that those two plaintiffs were the agents of the other eleven plaintiffs, their action in going to induce the defendant to stand for the chieftaincy can bind only themselves.

Then there were the sacrifices—the killing of cows. Both sides, from the evidence, killed cows and offered sacrifices apparently on the same day and most probably on the same spot as each side knew what the other side was doing.

There was the evidence of Farouk Falla, whose evidence the learned trial judge, who saw the witness and observed his demeanour, described as not satisfactory and highly suspect both as to its contents and as to the manner of telling.

This leaves us with the evidence of Rogue Malim. He said that the Chief's father was Kaba Seisay. That Kaba Seisay's father was Nana, who died in the war when this witness was a young man. But in cross-examination he admitted that he was too young to have gone to the war. This witness went on to say that he was head of the Poro Society and that Sulay Seisay was a member of his house. The learned trial judge did not make any specific reference in his judgment on the evidence of this witness.

But this witness, nevertheless, fails the test set up in the *Berkeley Peerage* case: that is, "You must by evidence dehors the declarations connect the person making them with the family." That connection has not been proved here and on the authority of the *Berkeley Peerage* case, I am unable to say that Sulay Seisay has successfully proved his descent from Orthernip.

Before leaving this ground of appeal, there is a further matter that ought not to be overlooked. Alhaji Alimami Souri deposed: "I know the defendant. I knew his father, Kaba Seisay. I knew him as a child. I know his mother. I did not know of their marriage." The plaintiffs, in paragraph 3 of the amended statement of claim, pleaded: "The defendant was and is not a descendant in the male line nor the full brother of any Paramount Chief, etc." I underline the words "nor the full brother of any Paramount Chief."

The only witness who makes the barest reference to this is Alhaji Alimami Souri, but he qualifies his evidence by saying, "I do not know of their marriage." The question then arises—Is there any evidence that Sulay Seisay was the issue of the marriage of his parents? I have been unable to find any such evidence on the record. If he was the issue of a marriage, one would have expected, in view of the pleadings, such evidence to have been led on behalf of Sulay Seisay, or some explanation given why such evidence was not forthcoming. Although this was not a specific ground of appeal, and was not argued before us, as the court is seised of the whole case the court is therefore entitled to express an opinion on it.

It seems to me that the learned trial judge did not have present in his mind the test in the *Berkeley Peerage* case, and that he slipped in giving such high probative value to the evidence of Alhaji Alimami Souri in establishing the descent of Sulay Seisay from Kaba Seisay. In view of what I have said this ground of appeal, in my opinion, succeeds.

Ground 3. As to this ground I am satisfied that the learned trial judge applied the correct principles in a case where both counsel did not appear sufficiently vigilant in determining who should begin. In spite of this, the learned trial judge kept clearly in his mind on whom the burden of proof lay. I feel that there is no merit on this ground.

This also applies to the fourth ground of appeal.

As regards the fifth and last ground of appeal, I will allow this ground for the reasons I have stated in considering ground two of this appeal.

For the reasons stated I would allow this appeal. The appellants will have the costs of this appeal and of the court below. Costs to be taxed.

LUKE AG. J. I concur with my brother Marke J. In agreeing, these are my reasons. I feel the main ground in this appeal which needs consideration is ground 2. The defendant upon whom as the learned trial judge rightly found in his judgment the burden of proof rested did not discharge it. He had to prove that he was a direct descendant in the Orthernip *I* line. To prove it he called as his witness Alhaji Alimami Souri, who declared what he had been told.

In order that it should have the probative value proof aliunde should be given. This, although not so mentioned by the court below, could have been said to be supplied by Rogue Malime. But it fell short of what is required in the *Berkeley Peerage* case by the decision of Eldon L.C. when he said that the witness should also prove he is a relation of the family.

For these reasons I say the appeal should be allowed with costs.

AMES AG. P. I regret that I differ from the opinions of my two brethren as to this appeal.

This is the third occasion on which this suit has come before a court of appeal. The writ, which was issued in February of 1959, sought a declaration that the election of the defendant/respondent to a certain chieftancy was invalid in law and an injunction restraining him from functioning as chief. The Supreme Court held it had no jurisdiction and the plaintiffs/appellants appealed to the West African Court of Appeal, which held that there was jurisdiction and remitted the suit for hearing and determination.

At that hearing, the plaintiffs asked for judgment on the state of the pleadings. The trial judge allowed the defendant to make an eleventh hour amendment to the defence.

The plaintiffs then appealed against that interlocutory decision to the short-lived Court of Appeal for Sierra Leone and the Gambia, which was the successor to the West African Court of Appeal. The appeal failed, and the suit was once more sent back to the Supreme Court for hearing and determination. This has now been done, and judgment given for the defendant with costs. There are five grounds of appeal, namely:

> " 1. That the learned trial judge misdirected himself in holding that the defendant's claim to the chieftancy of the Bonkolenken Chiefdom was not met with immediate and strong protest.

"2. That the learned trial judge wrongly admitted in evidence the evidence of the second defence witness, Alhaji Souri, in so far as it purported to prove that the defendant was the direct grandson of Bai Komp Orthernip.

"3. That the learned trial judge applied wrong principles in relation to the burden of proof.

"4. That the learned trial judge gave insufficient consideration to the plaintiffs' case.

"5. That the judgment is against the weight of the evidence."

As to ground 1, the learned trial judge's judgment does not mean that there was no protest against the defendant/appellant; there was, and there still is, as these successive appeals show. What the learned judge meant was that there was no strong and immediate protest, when the defendant/respondent first put himself forward as a candidate. There is evidence that there was no such protest at that time and there is also evidence that two of the plaintiffs/appellants themselves at that time went to call him to stand as a candidate. Furthermore, there is evidence that they had taken part in the sacrifice made by the defendant/respondent (this was denied by the appellants' witnesses).

The main argument before us was in reference to the second ground of appeal. The defendant/respondent had to prove his descent from the house of Orthernip. One of his witnesses, Alhaji Alimami Souri, gave evidence that he had been a friend of Kaba Seisay, the defendant/respondent's father, and that this same Kaba Seisay had told him that his father was Nana Seisay, who had died in the war of 1898, and that Nana Seisay's father was Bai Komp Orthernip.

It was argued before us that there must be evidence aliunde to connect Kaba Seisay's family with the Orthernip house. The *Berkeley Peerage* case (4 Camp. 401) was cited as the authority for this proposition. This case is usually cited in textbooks in connection with the admission in evidence of declarations as to pedigree; for example, Phipson, 9th ed., at p. 322, states: "The declarant's relationship must be shown aliunde and cannot be established by his own evidence."

Actually, however, the point was not in issue in that case. It was apparently assumed to be so, and it was one of the premises of the first question propounded for the opinion of the judges. Lord Mansfield's opinion included a dictum to that effect and Lord Eldon recalled the opinion of the judges in the *Banbury* case. The *Berkeley* case was concerned with the admissibility of depositions and declarations made post litem motam (and with entries in family bibles).

Now what is it that the evidence aliunde had to show in the instant case? That the declarant, Kaba Seisay, was in the male line of Bai Komp Orthernip? I think not. If it were, it would be proof aliunde of the declarant's declaration. In my opinion, all that was required was proof aliunde of the relationship of the declarant to the defendant.

I find evidence as to that in the evidence of Alhaji Souri, to whom the declaration was made, and in that of the witness, Rogue Malime, who said that when he was a boy he knew Bai Komp Orthernip; that he had helped to build his compound, that he knew Nana Seisay as one of his sons; that Orthernip had children "in a number of compounds"; that the defendant/respondent's father was Kaba Seisay; that he was born at Makump where the

witness was also born; that the father of Kaba Seisay was Pa Nana, the son of Orthernip; that Pa Nana died in the war; that he (the witness) was then a young man, too young to go to war.

As to ground 3, it is clear that, on the pleadings, the defence should have started. Counsel for both sides overlooked this and the plaintiff started, but the judge dealt with the question of burden of proof on the basis that the onus was on the defendant. I see nothing wrong in that.

As to the other two grounds of appeal, it is sufficient to say that in my opinion, the learned trial judge did give sufficient consideration to the plaintiffs' case and that the judgment was not against the weight of evidence.

My brother Marke considers the question of legitimacy. Did the respondent prove his legitimacy? With respect, I do not think that the question arose. Reading the pleadings and the evidence it seems to me that all references to relationship are references to legitimate relationship. It is true, as my brother has pointed out, that the witness, Alhaji Alimami Souri said: ". . . I knew the defendant. I knew his father, Kaba Seisay, I knew him as a child. I know his mother. I did not know of their marriage. . . ."

I do not know what this meant exactly. It could mean that they were married before he knew them: he knew them by repute as the parents of the defendant. It could be a hint that defendant was illegitimate: but if it was meant for the latter, I should have expected it to be pounced upon by the other side in cross-examination to make this meaning clear. But it was not mentioned in cross-examination.

I would dismiss this appeal with costs.

Freetown
July 22,
1961

Ames P.
Bankole
Jones J.
Marke J.

[COURT OF APPEAL]

SIAKA P. STEVENS AND C. A. KAMARA-TAYLOR . . *Appellants*

v.

REGINA . . . . . *Respondent*

[Cr. App. 26/61]

Criminal law—Libel—Conspiracy to publish defamatory libel—Trial—Submission of no case—Whether conviction for conspiracy could be upheld after quashing conviction for libel—Effect of acquittal of one of two persons charged with conspiracy—Whether trial judge exercised discretion as to sentence properly.

Appellants were each convicted in the Supreme Court by a judge sitting alone on two counts of libel and two counts of conspiracy to publish defamatory libel, to which they had pleaded not guilty. The first appellant (Stevens) appealed against all his convictions. The second appellant (Kamara-Taylor) appealed against his conviction on the conspiracy counts and also against his sentences.

The allegedly libellous material was contained in the copy of a letter addressed to "His Excellency the Governor, Fort Thornton, Freetown," which came to the attention of Patrick Patnelli, Assistant Editor of the "Daily Mail" newspaper on January 18 or 19, 1961. At the bottom of the copy (Exh. A) appeared the initials "C.A.K.T." and below them was typed "C. A. Kamara-Taylor for Working Committee." At the side was a rubber stamp impression, "All People's Congress—Sierra Leone." Stevens is Leader of the All People's Congress (A.P.C.).