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headman continues to be there: and he is now recognised not as a Tribal Ruler of the members of the tribe, but as the headman of them; here plain headman, although in every other section where he is mentioned he is styled "Tribal Headman."

Similarly in former section 2 (2), added by No. 14 of 1926, "any person" recognised was recognised as "tribal ruler of any tribe resident in Freetown," and not ruler. It now is recognised as "the headman of any members of a tribe resident in Freetown."

These changes were made by No. 48 of 1932, which repealed and re-enacted the earlier Ordinances.

One does not know why "Chief" and "Alimamy" were omitted and one cannot speculate; (otherwise one might think that chief was as inappropriate as headman is appropriate to various immigrants into the Colony from the tribal homeland, and that Alimamy is a religious office).

One notices that as long as the person recognised was the Tribal Ruler it was he "acting with the headmen or with the representatives of the sections of his tribe" who were the rule-making authority, and the rules had to be confirmed by the Governor, and they then became law. When the Tribal Ruler became Tribal Headman, the Governor in Council became the rule-making authority, although the Tribal Headman continues to have the duty of enforcing them.

In my opinion the present Ordinance is of the same mind as that which it repealed and re-enacted, namely, designed to improve and give legal force to a system of administration by the tribes resident in the Colony, who have endeavours to that end, on a tribal basis and for their own benefit.

I agree respectfully with the learned judge that "any person" in section 2 (2) is limited to any person of the tribe.

I would dismiss the appeal.

Freetown
Nov. 7,
1961

Ames Ag.P.
Benka-Coker
and Wiseham
C.JJ.

[COURT OF APPEAL]

HON. PARAMOUNT CHIEF T. S. M'BRIWA . . . . *Appellant*

v.

TUBERVILLE AND OTHERS . . . . *Respondents*

[Civ. App. 67/61]

Tort—Action for assault, false imprisonment, malicious prosecution and conspiracy—Action against members of Native Court—Whether defendants were persons "engaged in the public service"—Whether judge correct in holding for defendants on ground not raised in statement of defence—Protectorate Ordinance (Cap. 60, Laws of Sierra Leone, 1960) ss. 4, 38—*Native Courts Ordinance (Cap. 8) s.* 1—*Sierra Leone (Constitution) Order in Council, 1958 (P.N. No. 68 of 1958) s.* 1 (5) (*b*)—*Sierra Leone (Constitution) Order in Council, 1961 (P.N. 78 of 1961) s.* 107 (3).

The District Commissioner of Kono District instructed the President of the Gbense Native Court (first respondent) to issue a warrant for the arrest of the appellant, and that appellant be prosecuted for an offence contrary to section 15 of the Tribal Authorities Ordinance. Appellant was arrested on September 16, 1960, and taken before the Native Court, where he was charged

with four separate offences against section 15. At the direction of the District Commissioner, the case was tried the same day and resulted in appellant's conviction on three of the four counts, with a sentence of six months' imprisonment on each count, the sentences to run consecutively. The case was reviewed by the Assistant Commissioner, who altered the sentence to one of six months' imprisonment with hard labour, saying, " there is in reality only one charge against the accused." After appellant's release from prison on January 15, 1961, the record of his conviction was reviewed in the Supreme Court by writ of certiorari, and the conviction was quashed. Appellant thereupon sued the President and other members of the Native Court for assault, false imprisonment, malicious prosecution and conspiracy in the Supreme Court. The trial judge held for the defendants on the ground that they were persons " engaged in the public service " and were, therefore, protected from suit by section 38 (ii) of the Protectorate Ordinance.

Held, dismissing the appeal, (1) that the President and members of a Native Court are persons " employed or engaged in the public service " within the meaning of section 38 (ii) of the Protectorate Ordinance (Cap. 60); and

(2) that the trial judge was not wrong in giving the respondents the benefit of a statutory defence, even though they had not relied on it in their statement of defence.

The court also said, obiter, that the trial judge was wrong in holding as a matter of law that it was within the competence of the District Commissioner to instruct the President of the Native Court to issue a warrant for the arrest of appellant and that it was within the competence of the President to issue it.

Case referred to: *In re Robinson's Settlement* [1912] 1 Ch. 717.

Berthan Macaulay for the appellant.
Zinenool L. Khan for the respondents.

AMES AG. P. This is an appeal against a judgment of the Supreme Court given in exercise of its original jurisdiction. The appellant issued a writ against six persons, claiming £25,000 damages for assault, false imprisonment, malicious prosecution and conspiracy. The first and second persons named in the writ were District Commissioners. They were not served, and the suit was proceeded with against the remaining four, who are the respondents in this appeal, and it ended in the dismissal of the appellant's claim.

The appellant was (and still is) a member of the House of Representatives and the leader of a political party. The District Commissioner, Kono District, instructed the President of the Gbense Native Court, who is the first respondent, to issue a warrant for the arrest of the appellant, and his prosecution for attempting to undermine the lawful power and authority of Paramount Chief Kaima Keindo, contrary to section 15 of the Tribal Authorities Ordinance, then Cap. 245 and now Cap. 61. The appellant was arrested on September 16, 1960 (the warrant was not put in evidence), and taken before the Gbense Native Court. He was charged with four counts of offences against section 15.

The District Commissioner had told the President of the court that the case should be tried that same day, which the President and the other three respondents had agreed to do. The trial was completed the same day. It resulted in the appellant's conviction on three of the four counts, with a sentence of six months' imprisonment on each count consecutively. The appellant was taken to the Assistant Commissioner also on the same day, who upon a review of the case altered the sentence to one of six months' imprisonment with hard labour, saying that " there is in reality only one charge against the accused."

The appellant was then taken to prison and released on January 15, 1961. After his release, steps were taken which resulted in the record of his conviction being removed into the Supreme Court by writ of certiorari, where the conviction was quashed. The appellant then issued the writ in the Supreme Court.

There are six grounds of appeal.

I will start by considering first ground (b). It was:

> "(b) That the learned trial judge erred in law in holding that the 3rd defendant was a person engaged in the public service within the meaning in section 38 (2) of the Protectorate Ordinance, Cap. 60; the learned judge's ruling was and is inconsistent and contrary to section (1) (5) (*b*) of the Sierra Leone (Constitution) Order-in-Council, 1958 P.N. 68 of 1958, and section 107 (3) of the Constitution—P.N. 78 of 1961. And in the alternative, the learned trial judge was wrong in adjudicating upon a matter of special defence which was not relied on by the defendants, nor apparent in the defendants' statement of facts in their statement of defence."

The part of the judgment to which this refers is this:

> "But even if I was called to do so, I would say that when the 3rd defendant signed the warrant he did so as President of the Native Court, under the order of a District Commissioner and therefore became a protected person against whom no action, suit or other proceedings can be brought. Section 38 (2) of the Protectorate Ordinance, Cap. 60."

Here the learned judge set out section 38 (2) and then continued:

> "No one can pretend to deny that the President of a Native Administration Court, who in this case on the evidence was appointed as such by a Provincial Commissioner, is a person engaged in the public service, and I do not accept any suggestion that he acted otherwise than bona fide."

The learned judge set out only (ii) of section 38. I think that the whole section should be set out. It is as follows:

> "38. No action, suit, or other proceeding shall be brought against—
>
> (i) any District Commissioner in respect of any act or order bona fide performed or made by him in the execution or supposed execution of the powers or jurisdiction vested in him;
>
> (ii) any person employed or engaged in the public service, acting under the orders of a District Commissioner, in respect of any act bona fide performed by him in the execution of any order given as aforesaid to any such person.
>
> Provided that every act or order by a District Commissioner, if in excess of his powers of jurisdiction, may be revised, altered, amended, or set aside by the Provincial Commissioner or the Governor."

That Ordinance has no definition of the term "public service." Nor has the Interpretation Ordinance, Cap. 1. Mr. Macaulay, for the appellant, argued that the definition of "public service" included in the 1958 Constitution and the 1961 Constitution of Sierra Leone applies. In the latter, it is to be found in section 107. It will be seen, however, that it only applies to the interpretation of that Constitution.

Section 1 of the Native Courts Ordinance, Cap. 8, provides that the Ordinance shall be read and construed as one with the Protectorate Ordinance.

By section 4 of the latter the Governor-in-Council is empowered by order to "divide the Protectorate into provinces, and to subdivide provinces into districts, as he may deem most convenient for judicial and executive purposes."

I agree with the learned judge that the President of the Native Court, when he issued the warrant of arrest was within the meaning of paragraph (ii) of section 38. He was acting under the orders of the District Commissioner and so is entitled to the protection of the section if he acted with bona fides. The other three members, who with the President formed the court, pursuant to the District Commissioner's instructions were likewise protected. The learned judge found it to be a fact that they acted with bona fides, and there was evidence to support his finding.

As to the last part of this ground (b) about not pleading this special defence, the case of *Re Robinson's Settlement* [1912] 1 Ch. 717, *per* Buckley L.J. at p. 728) shows that in some circumstances a court may properly give effect to a statutory protection, although not pleaded.

This really disposes of the appeal. There are, however, one or two other matters which were argued before us and in the court below which call for comments.

Grounds (c), (d) and (e) were argued in an endeavour to show that the trial in the Native Court was a nullity and to justify a claim for false imprisonment. Ground (f) complained that the verdict was against the weight of evidence and it was argued that there was sufficient evidence of conspiracy.

Grounds (c) and (d) complain that the judge erred in not considering whether stopping the appellant from cross-examining a witness was a denial of justice, and in holding that the President, being a brother of the Paramount Chief, Kaima Keinde, was not in itself a ground for vitiating the trial. Ground (e) complains that the learned judge erred in holding that the Native Court did not exceed its jurisdiction in imposing these sentences of six months, consecutively, and in treating the charge as separate counts.

As to (e) I agree with the learned judge that the charge constituted four separate counts. It is clear that they were so understood by the appellant, who called them charges in the plural whenever he mentioned them in the court below. The Native Court did not exceed its jurisdiction.

As to (c) the learned judge found that the court was properly constituted and that no member showed by word or deed any bias, nor was there any outside interference with its deliberations. This is his finding on the evidence of the appellant and the counter-evidence. He does not comment on the note in the record made by the Native Court clerk that after two questions in cross-examination of one witness against the appellant, the further cross-examination was "closed by Court President," without its being stated why. When cross-examined about it, the President denied having done it.

As to (d) the learned judge disapproved of the President adjudicating in a matter in which his brother was the Paramount Chief mentioned in the charge, but held that it was no ground for awarding damages for false imprisonment. I would have put my disapproval in stronger terms.

As to (f) and the allegation of conspiracy, the statement of claim makes no averment about it. Mr. Macaulay sought to show its existence from various portions of the evidence; but the exposition seem to me to be far-fetched and unreal.

Ground of appeal (a) complained that the learned judge wrongly exercised his discretion in allowing an amendment to the defence. That was an interlocutory decision which cannot be appealed against now. I did not understand how the argument that it was wrong affected this appeal: and so I shall content myself by saying that I agree with Mr. Khan that the cases, which are referred to in the 1957 White Book, show that the amendment could quite properly have been allowed.

Much was said in the court below and before us about whether or not the Native Court was the prosecutor. The argument was based on how the Native Court clerk headed his notes of the proceedings; he headed them "Gbense N.A. Court *v.* Hon. T. S. M'Briwa." There was evidence that the prosecutor was the Tribal Authority, and that the incorrect heading in the clerk's note book was a mistake which Native Court clerks frequently make. The Assistant District Commissioner was in as good a position as the court clerk to know who was the prosecutor and he headed his review "Gbense T.A.'s *v.* Hon. T. S. Mbriwa" (T.A. meaning Tribal Authority, as he said). The learned judge found the fact to be so.

The Assistant Commissioner said:

> "There is a relationship between the Tribal Authority and the Native Court. The members of the court are elected by the Tribal Authority which includes the court President and court members. It is usual for members of the court to be elected from members of the Tribal Authority. I have known cases, however, where some such members are not members of the Tribal Authority."

This may possibly be the cause of the court clerk's mistake. It must be remembered that the respondents are illiterate, and so may not have known how the court clerk headed his notes of the proceedings.

The learned judge appears to have held as a matter of law that it was within the competence of the District Commissioner to instruct the President to issue a warrant of arrest and of the President to issue it. The law, however, is very clear that in the first instance the ordinary process is to be an oral summons, as provided in section 28 of the Native Courts Ordinance, Cap. 8. There is nothing in the evidence to show any good cause in law for the issue of a warrant. Mr. Khan sought to justify it by an argument based on section 6 of the Tribal Authorities Ordinance; the argument was unsound. However, section 38 (1) of the Protectorate Ordinance protects a District Commissioner acting in the supposed execution of his power or jurisdiction. This may be the "good reason," mentioned by the learned judge, for not proceeding with the suit against the first and second defendants. The remaining defendants are protected for the reasons already given.

I would dismiss the appeal.