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CR. APP. 8/2010

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

MOHAMED SHERIFF KAMARA - APPELLANTS
JOHN LITTLE KAMARA
MORRIS ABDUL MOMOH
EMMANUEL LAMIN BANGURA

AND

THE STATE - RESPONDENT

CORAM:

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

HON. MR. JUSTICE E.E. ROBERTS - J.A

HON. MRS. JUSTICE V.M. SOLOMON - J.A

SOLICITORS

C.F. EDWARDS ESQ. FOR THE APPELLANTS

GERARD SOYEI ESQ. PRINCIPAL STATE COUNSEL FOR THE RESPONDENT

JUDGMENT DELIVERED THIS 29th DAY OF November, 2012

HAMILTON J.S.C.

This is an appeal against the judgment of the High Court delivered by the Hon. Mr. Justice S.A. Ademosu J.A. on the 23rd May, 2008.

The accused persons (hereinafter referred to as the Appellants) were charged on a six (6) count indictment of Robbery with Aggravation, Wounding with Intent and Wounding. Counts 1 and 2 were Rubbery with Aggravation Contrary to *Section 23(1)(a) of the Larceny Act, 1916* as repealed and replaced by *Section 2 of Act No.16 of 1971*, Counts 3 and 5 Wounding with Intent Contrary to *Section 18 of the Offences Against the Persons Act 1861* and Counts 4 and 6 Wounding contrary to *Section 20 of the Offences Against the Persons Act, 1861.*

The appellants were found guilty on Counts 1, 2, 3 and 5 and not guilty on Counts 4 and 6. They were convicted and sentenced accordingly. It is against this conviction and sentence that the appellants have now appealed to the Court of Appeal.

The facts of this case could be summarized as follows: On 6th May, 2007 Zainox Sesay closed the door of his house and went to bed with his family. After about mid night his wife Koma Sesay woke him up saying that thieves have entered their house. There was light in the house but it was not bright and clear enough. There was moon light outside which penetrated into his room through the window. When he got up he saw four (4) people at the far end of his bedroom standing wearing black overalls from neck to foot but their faces were not covered. He then asked his wife as to how they entered the house since the doors were closed. One of them then replied you are asking how we came in we are here to kill you. He then rushed at the person who said these words and gripped him. He then realized it was the 4th Appellant as he was in front. They then struggled to the parlour and he then fell over some chairs. There were flashes of light on his eyes and so tried to protect his eyes with his hands. There was a heavy blow on his head with a cutlass and blood started oozing from his head. Later his wife shouted that she has got hold of him and he get up and discovered it was the 4th Appellant.

Later he saw one of them standing and so grabbed his feet drew them and he fell down. He then dragged him to the veranda from the parlour when his slippers fell off his feet. It was then he knew it belongs to the 1st appellant as he used to wear them since he has doubled toes. Whilst he was dragging him someone shouted on PW_1 to leave the 1st Appellant. He was hit on the hand heavily resulting in PW_1 having a broken hand. He then leaned on the balusters bleeding heavily on his head. Later he heard his wife shouting that she has been hit with a cutlass. He then struggled to the parlour to see what help he can give to his wife. On his way to the parlour he was hit on the head with a cutlass and he fell to the ground. He then heard his wife called the names of the four appellants with whom he is familiar.

They all then rushed out of the house leaving one hammer, a pick axe, an axe and a touch light. Later some people came to his help. He then instructed his wife to collect a plastic bag containing the sum of Le5,000,000/00 million in his room but she returned telling him that it was

not there. He also lost a nokia phone valued Le350,000/00. Later he was taken to the hospital for treatment.

It was against this background that the appellants were charged on a six (6) counts indictment as follows:-

Count 1

Statement of Offence: Robbery with Aggravation, contrary to Section 23(1)(a) of the Larceny Act 1916 as repealed and replaced by Section 2 of Act No.16 of 1971.

Particulars of Offence: Mohamed Sheriff Kamara, John Little Kamara, Morris Abdul Momoh and Emmanuel Lamin Bangura on 6th May, 2007 at Freetown in the Western Area of Sierra Leone being armed with a cutlass and an axe robbed Zainox Sesay of the sum of Five Million Leones, one Nokia Mobile Phone of the value of Le350,000/00, all property of the said Zainox Sesay.

Count 2

Statement of Offence: Robbery with Aggravation, contrary to Section 23(1)(a) of the Larceny Act, 1916 as repealed and replaed by Section 2 of Act No.16, 1971.

Particulars of Offence: Mohamed Sheriff Kamara, John Little Kamara, Morris Abdul Momoh and Emmauel Lamin Bangura on 6th May, 2007 at Freetown in the Western Area of Sierra Leone being armed with a cutlass and an axe robbed Kama Sesay of one Nokia Mobile Phone, of the value of Le100,000/00, property of the said Kama Sesay.

Count 3

Statement of Offence: Wounding with Intent, contrary to Section 18 of the offences against the Persons Act, 1861.

Particulars of Offence: Mohamed Sheriff Kamara, John Little Kamara, Morris Abdul Momoh and Emmauel Lamin Bangura on 6th May, 2007 at Freetown in the Western Area of Sierra Leone wounded Kama Sesay with intent to do her grievous bodily harm.

Count 4

Statement of Offence: Wounding with Intent, contrary to Section 18 of the offences against the Persons Act, 1861.

Particulars of Offence: Mohamed Sheriff Kamara, John Little Kamara, Morris Abdul Momoh and Emmauel Lamin Bangura on 6th May, 2007 at Freetown in the Western Area of Sierra Leone maliciously wounded Kama Sesay.

Count 5

Statement of Offence: Wounding with Intent, contrary to Section 18 of the offences against the Persons Act, 1861.

Particulars of Offence: Mohamed Sheriff Kamara, John Little Kamara, Morris Abdul Momoh and Emmauel Lamin Bangura on 6th May, 2007 at Freetown in the Western Area of Sierra Leone wounded Zainox Sesay with intent to do him grievous bodily harm.

Count 6

Statement of Offence: Wounding with Intent, contrary to Section 18 of the offences against the Persons Act, 1861.

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Particulars of Offence: Mohamed Sheriff Kamara, John Little Kamara, Morris Abdul Momoh and Emmauel Lamin Bangura on 6th May, 2007 at Freetown in the Western Area of Sierra Leone maliciously wounded Zainox Sesay.

The appellants were tried by a Judge and Jury and convicted on four (4) Counts out of the six (6) Counts. They were convicted on counts 1, 2, 3 and 5. The 1st , 2nd and 3rd Appellants were sentenced to 10 years imprisonment on Counts 1 and 2 and 5 years imprisonment on Counts 3 and 5. The 4th Appellant was sentenced to 20 years imprisonment on Counts 1 and 2 and 5 years imprisonment on Counts 3 and 5.

It is against this conviction and sentence that the Appellants have now appealed to the Court of Appeal on the following grounds:

1. *That the Learned Trial Judge failed or did not consider at all the defence of Alibi raised by the accused persons.*

2. *That the Learned Trial Judge erred in law in failing to address the issue of identification raised by the Defence Counsel on behalf of the accused persons.*

3. *That the Learned Trial Judge failed to consider or did not consider at all the defence of the accused persons in their respective statements.*

4. *That the Judgment is against the weight of the evidence.*

In considering the grounds of appeal it is but right that grounds 1, 3 and 4 ought to be considered together as they touch and concern the defence of the appellants, that is the defence of Alibi and the general defence raised by the appellants in their respective statements.

Counsel for the Appellants in his synopsis argued that the Learned Trial Judge reviewed the evidence of the prosecution except that of PW5 and PW6 and that of DW1 and DW2 who were defence witnesses whose evidence were not reviewed in the summing up. He submitted that the

evidence of DW1 raises the defence of Alibi on behalf of the 1st and 2nd Appellants which ties up with the evidence of DW1 which ought to have been disproved by the prosecution but which they failed to do. Counsel further submitted that the alibi raised by the 3rd Appellant was buttressed by the evidence of DW2 which evidence the prosecution failed to cross check or investigate that the 3rd Appellant slept at "Hill Cot Road Car Wash".

On the defence of the Appellants as contained in their statements, Counsel for Appellants submitted that the Learned Trial Judge did not review the defences but only mentioned them as Exhibits B, C and D, in the summing up without directing the jury on the defence. The Learned Trial Judge in commenting on Exh. A in his summing up to the jury said that 1st Appellant admitted going to Complainant's house but Counsel submitted that this is not so as the 1st Appellant never admitted going to the Complainant's house on the day of the incident but that he has been a visitor earlier on in the Complainant's house.

In Exh. A lines 7 to 14 the 1st Appellant said:

> *"Q – You said you have been going to the Complainant's house before when last did you go to the Complainant's house?*
>
> *A – It has taken about three years when I last go to the Complainant's house".*

Counsel for the appellants finally submitted that the Learned Trial Judge never put forward fully the defence of the Appellants for a proper consideration by the jury.

Counsel for the State/Respondent submitted that the Learned Trial Judge in his summing up did consider the alibi raised by the Appellants sufficiently for the benefit of the jury. Counsel further submitted that the prosecution did lead evidence in rebuttal of the alibi raised by the defence and stated that the statements of the Appellants were mentioned by the Learned Trial Judge and the evidence of PW1, PW2 and PW3 did disprove the alibi raised by the defence.

On ground three (3) Learned Counsel for the State adopted the arguments and submissions relating to ground one (1) Counsel Submitted that the jury's attention was expressly drawn to

Exhibits A, B, C and D which were the statements of the Appellants and once the exhibits were mentioned in the summing-up the Learned Trial Judge did not omit the rebuttal of the defence of all the appellants. He submitted that the mentioning of Exhibits A, B, C, and D to the jury that they should consider them in arriving at their decision was enough since there is no specific formula or wording in a summing-up provided the rules are not breached and the Learned Trial Judge in this case did not breached any rule.

The Learned Trial Judge in the course of his "Summing-up" at Page 59 lines 13 to 31 of the records wrote:

> *"PW4 Abu Julius Kamara – on 7th May he obtained a statement from the 1st Accused. Exhibit A is the statement. Exhibit A makes interesting reading because the accused said amongst other things at page 3 lines 15 to 21. He attributed the allegations against him to a grudge against his guardian – Madam Yella Momoh. He admitted going to Complainants house and that he had been at peace with them.*
>
> *Exhibit B – John Little Kamara alias little made on 8/8/09 Exhibit C Morris Abdul Momoh dated 8/5/09.*
>
> *Exhibit D Emmanuel Lamin Bangura Exh. D dated 12/5/09.*
>
> *Exh. 3 Neneh Conteh – only Momoh she was able to recognize. Now agrees she did not mention the name of the 2nd accused.*
> *PW5 Dr. Rashida Kamara*
> *DW1 John Kamara*
> *DW2 Alfred Thompson*
> *They are all about the age of 25 years. I ask that you give them an opportunity to come. The main objective of punishment is reformative. I am sure you will take into consideration the fact that they are all the first three of them are school going children. You are a father. We are appealing to your conscience. Sentence as follows:……."*

The above quote was first cross checked with the hand written notes of the Learned Trial Judge and found to be exactly the same as in the typed written record.

Section 197(1) of the Criminal Procedure Act 1965 (Act No.32 of 1965) provides:

> *"When, in a trial by jury, the case on both sides is closed the Judge shall sum up the law and evidence in the case".*

The above quoted summing-up contained in page 59 lines 13 to 31 of the records provided no guidance or proper direction to the jury nor was the evidence especially that of PW5, PW6, DW1 and DW2 summed up by the Learned Trial Judge as is required by *Section 197(1) of the Criminal Procedure Act, 1965. In Fofana v. The State [1974-82] SLBALR 100 at 101 Beccles-Davies J.A.* (as he then was and of blessed memory) faced with this similar type of summing-up on appeal in allowing the appeal said:

> *"It is difficult to know how the trial judge put across such a badly presented case ..... to the jury as his "summing-up (Notes on)" ended abruptly ..... The jury were entitled to the assistance of the Judge because of the type of evidence that was adduced in this case. Had they got it they might not have arrived at the verdict which they did ....."* see also *Harrison v. Reginam 1967-68 ALR S.L. 119.*

In my humble opinion this portion of the summing-up by the Learned Trial Judge as contained in page 57 lines 13 to 31 when properly read is difficult to be considered as a summing up and therefore amounts to a misdirection to the jury.

Counsel for the Appellants did contend that the Learned Trial Judge failed to put the case for the defence adequately and sufficiently to the jury. The defence of the appellants he said was an alibi. They claimed they were somewhere else at the time of the incident, that is, "at Jesus is Coming International School (JICIM) and Hill Cot Road Wash Car" which was buttressed by the evidence of DW1 and DW2. The entire claim of the Appellants is that they were somewhere else. It is a well known principle of law that a Judge in his summing up is bound to put the case for the defence however weak or stupid it may be to the jury – *see: R v. Dinnick (1909) 3 Cr.*

App. R. 77. *In* R v. Kwabena Bio (1949) 11 WACA 46 at 50 the Learned Chief Justice Harragin in his judgment said:

> *"It has been reiterated so often by this Court that defence however stupid must be considered by the trial judge for what it is worth".*

It is trite law that it is the duty of the trial judge to put specifically to the jury the essential and important aspect of the defence however weak or stupid that defence may be. S*ee:* R v. Barima (1945) 2 WACA 49. It has been held in a long line of cases that such an omission will be fatal. *See:* R v. Mills *(1955)* 25 Cr. App. R 138; R v. Murtagh (1955) 39 Cr. App. R. 72.

The defence of the Appellants being an alibi, the Learned Trial Judge should have explained to the jury what an alibi was and further directed them on the burden of proof when such a defence is raised by the Appellants. In fact there can be no conviction unless the jury when properly directed rejects it. *See:* R v. Thomas Finch (1916) 12 Cr. App. R. 27.

In my humble opinion the Learned Trial Judge should have treated the defence of alibi put forward and further directed the jury on this point more adequately. The failure of the Learned Trial Judge to do so did result in a miscarriage of justice.

In the result therefore grounds 1, 3 and 4 is upheld.

As regards ground (two) 2 since grounds 1, 3 and 4 have been exhaustively dealt with, I do not think it necessary to consider ground two (2) in any detail. However, suffice it to say that the Learned Trial Judge omitted in his summing up to direct the jury fully on this aspect of identification of the Appellants. Considering the inconsistencies in the prosecution's evidence especially that of PW3 who said that one of the assailants was veiled.

The Supreme Court of Nigeria in Archibong v. The State (2006) 14 NW LR 349 at 356 Mustapher J.S.C. said:

"Whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused which the defence alleges to be mistaken, *the*

Court must very closely examine and receive with great caution the evidence alleged before convicting the accused on the correctness of the identification" (Emphasis Mine).

Considering the summing-up as it is contained in the records, it is my humble opinion that *Section 58(2) of the courts Act 1965 (Act No.31 of 1965)* could not be safely applied in this case.

In the result, the conviction of the Appellants is therefore quashed and the appeal is allowed. The sentence is therefore set aside.

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

I AGREE:.....

HON. MR. JUSTICE E.E. ROBERTS - J.A.

I AGREE:.....

HON. MRS. JUSTICE V.M. SOLOMON - J.A.

REF: POH/HJ