CR. App 9/2020

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

MICHAEL AMA MOHAMED KAMARA - APPELLANT

AND

THE STATE - RESPONDENT

CORAM:

HON. JUSTICE JAMESINA E. L. KING J.A. (PRESIDING)

HON. JUSTICE M. J. STEVENS J. A.

HON JUSTICE M. P. MAMIE J.A.

COUNSEL:

Y. Williams Esq, Y. Gborie Ms. & J. Noldred (Ms.) for the Appellant

J. A. K. Sesay Esq. & A. J. M Bockarie Esq. for the State

JUDGMENT DELIVERED THIS 4 TH DAY OF OCTOBER 2022

Background

The Appellant, Michael Ama Mohamed Kamara appeals against a Judgment of the Hon. Justice Komba Kamanda J.A. dated 21st July 2020. He was convicted of rape, contrary to section 6 of the Sexual Offences Act, 2012, Act No. 12 of 2012 after a full trial by the Learned Trial Judge sitting as a Judge alone, and sentenced to 10 (ten) years imprisonment. By an Amended Notice of Appeal filed on 31st

March 2021 the Appellant has appealed against his conviction on the following grounds:

1. That the Learned Trial Judge erred in law and misdirected himself when he proceeded with trial by judge alone contrary to the provisions of sections 143, 144 and 145 of the Criminal Procedure Act 1965 of the Laws of Sierra Leone;
2. That the Learned Trial Judge having correctly stated the law in regard the proof when he opined at pages 4-5 of his Judgment to wit "*that .....such burden of proof rest squarely on the prosecution in line with the cardinal principle in criminal cases in our jurisdiction. The case of Woolmington V. DPP AC 462 is instructive on this point*" [sic] the Learned Trial Judge erred in law and in fact when he intimated at page 6 of his judgment that the Appellant ought to have "*.....produced the phone numbers at the Police and asked that they be verified when the incident was fresh*";
3. That the Learned Trial Judge having correctly stated the extant law in Sierra Leone in respect of the corroboration of evidence in his judgment that "*The issue of corroboration is very important in the instant case. In my view it is a matter of law. In essence the prosecution can only succeed in proving their case where the evidence of the victim is corroborated by other evidence. In essence the law as stated in Cap 31 of the Laws of Sierra Leone in this regard still remain good law*" the Learned Trial Judge erred in law when he proceeded to convict the Appellant in the absence of any evidence corroborating the evidence of PW1 and
4. That the verdict was unreasonable or cannot be supported having regard to the evidence before the court.

1st Ground of Appeal

On the first ground of appeal, Counsel for the Appellant submitted that the Appellant was tried by judge alone, however he was to be tried by the Court with a jury consisting of twelve men unless upon election of the Appellant, or upon application of the Attorney-General for a Court order to the contrary, and there was no evidence on record that the exceptions were satisfied. He submitted that there was an erroneous mode of trial as it was contrary to sections 143, 144, & 145 of the Criminal Procedure Act 1965. He further submitted that the Appellant had a right to be tried by the Court with a jury of his peers and the absolute disregard of this without being lawfully dispensed with, did not merely constitute procedural impropriety, but also

resulted in a breach of the principles of natural justice and amounted to a miscarriage of justice. In support of his submission he relied on Sierra Leone Court of Appeal case of *Regina v Manyei Alias Kuloyorkor, Bawoi and Sheriff Alis Seifa (1970 – 71) ALR SL at page 58*, where the error was far less serious than the error in this case, as the application for trial by judge alone in that case was granted but Counsel who applied had no authority to do so, as it was the preserve of the Attorney-General, the entire process was declared a nullity.

In the current case, he submitted there was not even a semblance to comply with the statutory provision. Other authorities he referred to on strict compliance with mandatory statutory requirements in criminal cases included *Secretary of State for Defence v. Warn (1968) 2 All E.R. at 303, Francis Omosaye v. The State SC 198/2012 (2014) LPPELR-22059 (SC), Aiah M'Bekay v. The State CR. App. 4/2011 (2019), Bockarie v. the State (Cr. App7/2000) 2008 SLCA 1.* He also referred to *Amnesty International Fair Trial Manual 2nd Edition (2014)* at page 118 on the scope of fair hearing, that it encompasses all the minimum procedural and other guarantees of fair trial set out in international standards, including compliance with national procedures consistent with international standards. He also referred to the case of *Rasaki A. Salu v. Madam Towuro Egeibon (1994)* LPELR – 2997 (SC) in support of his submission that the denial of a fair hearing was a breach of one of the rules of natural justice.

In response, Counsel for the Respondent submitted that the Court assumed jurisdiction upon arraignment and conceded that the prosecution should have applied for an order for trial by judge alone instead of by Judge and jury pursuant to section 144(2) of the Criminal Procedure Act, 1965 as repealed and replaced by section 3 of the Criminal Procedure (Amendment) Act, 1981 Act No. 11 of 1981. He however submitted that such mode of trial is however made as of course, not as of right, and the Appellant had no say in it. He submitted that failure to obtain the order would not and could not have occasioned any injustice to the Appellant, nor could it have breached the principles of natural justice. He submitted that any procedural error will only amount to a nullity in the proceedings and the Court can order a re-trial. He referred to the case of *Samuel Lomba v The State*, a Supreme Court decision Crim App No. 1/81 the appeal was dismissed when there was a failure to comply with procedure in empanelling jurors. In Court of Appeal, the court agreed that the trial was a nullity but the Supreme Court said that the trial and subsequent conviction were

not a nullity and the judgment of the Court of Appeal was set aside and substituted with an order dismissing the appeal.

Counsel further referred to the provision of section 7 of the Court (Amendment) Act, Act No. 21 of 1966 which gives this Court the power to dismiss ground 1 if this Court is of the opinion that no substantial miscarriage of justice has occurred.

In reply Counsel for the Appellant submitted that section 7 above did not apply to the instant case as this was not an appeal against acquittal or discharge and this was a case where the Accused and not the State is appealing.

This Court has considered the written and oral submissions of both Counsel on the first ground of appeal. It is not in dispute and it is apparent from the records that trial of the Appellant was done without seeking and obtaining an order for his trial by judge alone as required by law. The mode of trial of the Appellant in this matter for the offence of rape which is not punishable by death ought to have been by a court with a jury as provided in section 143 of the Criminal Procedure Act, 1965 and could have only been tried by Judge alone, if the Appellant had elected for such a trial or an order obtained to that effect under sections 145 and 144 of the Criminal Procedure Act. The Appellant never elected to be tried by Judge alone and the issue is what was the effect of the trial which proceeded without the necessary order obtained?

Section 144(2) of the Criminal Procedure Act, 1965 as repealed and replaced by section 3 of the Criminal Procedure (Amendment) Act, 1981 Act No. 11 of 1981 provide as follows:

> *"(2) Notwithstanding anything contained in section 143, in any case where a person is charged at any sessions of the High Court with a criminal offence not punishable by death the Attorney-General and Minister of Justice, or Director of Public Prosecutions, if he is of the opinion that the general interest of justice would be served thereby, may make an application to the Court for an order, which shall be made as of course , that any person or persons shall be tried by the Court with the aid of assessors, or by a Judge alone, instead of by a Judge and Jury".*

From the above section, the application is made after the AGMoJ or the DPP is of the opinion that the general interest of justice would be served. It is only after this requirement is fulfilled then the next step is pursued which is an application to the court. Even though there is no requirement in the section for the

requirement to be fulfilled in writing, in practice however there is a written application submitted to the court which Counsel relies on when making the application to the Court. It is only when these conditions are fulfilled that the order shall be made "as of course". As such the application cannot be waived, it is mandatory and has to be done by the person statutorily mandated to do so. As a court of record, the application and its outcome should be recorded. This is evidence that it was made and the order granted.

In the case of *Regina v Manyei Alias Kuloyorkor, Bawoi and Sheriff Alis Seifa* supra, the Court of Appeal considered the above provision in section 144(2) in deciding whether counsel, a member of the bar who was not a law officer with a fiat of the Attorney General to conduct a private prosecution of a criminal case was competent to make the application. Counsel in this case actually applied for the order for a trial by judge alone, there was no objection to his application and the trial went on by judge alone. Later, Counsel for the defence then raised the objection that the trial was a nullity in that only a law officer, namely the Attorney-General or a person to whom he could delegate his powers could make such an application. The trial judge stated a case for the Court of Appeal to rule on this point. The Learned Justices of the Court of Appeal concluded that the Attorney –General had made no application to change the mode of trial and private counsel had no authority to make the application under s.144(2) of the said Act. They respectively opined at p. 61 & 63 as follows:

> *"The section, which takes away the right of an accused person to be tried by a jury, must not be lightly used..... No private lawyer is competent to make an application under s. 144(2) even if he is armed with the Attorney-General's fiat to prosecute in a case."*
>
> *".... The right of the accused to be tried by his peers can only be taken away if the Attorney-General forms an opinion that in the interest of justice the trial should be before a judge sitting alone..... and an application should be made for such a mode of trial..."*

Under Section 23 of the Constitution of Sierra Leone, Act No. 6 of 1991, an accused person is vested with a fundamental right to a fair hearing, which includes adherence to all the procedural guarantees provided by law in relation to his or her trial. In this case, the omission or failure to adhere to the procedural guarantees in section 144(2) in particular to be tried by a Judge alone after the necessary statutory procedural steps are taken violates the Appellant's right to a fair trial.

It is also important to consider Counsel for the Respondent's submission that section 58 of the Court's Act as amended by section 7 of the Court (Amendment) Act, Act No. 21 of 1966 to see whether this procedural failure can be cured.

The said section provides as follows:

> *"7. Section 58 of the principal Act is hereby amended by the addition at the end thereof of the following new subsection-*
>
> > *"(6)(a) On an appeal against the acquittal or discharge of the accused or defendant the Court of Appel may, notwithstanding that it is of the opinion that the question of law raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.* (emphasis mine)
> >
> > *(b) Subject and without prejudice to the provisions of paragraph (a), the Court of Appeal may-*
> >
> > > *(i) affirm or alter the decision appealed against;*
> > >
> > > *(ii) except in case where an accused has been acquitted of a criminal offence punishable by death, reverse the decision appealed against;*
> > >
> > > *(iii) order a retrial of the accused or defendant...."*

Subsection (6)(a) set out above and relied on by the Respondent is inapplicable to the instant case as the Appellant in this matter was not acquitted or discharged, he was convicted.

Both Counsel made submissions on the law and fact in respect of grounds 2, 3 & 4 and cited relevant authorities. There was a procedural error in the trial and there is merit in ground one of the appeal. We do not think it necessary to make a finding on the other grounds of appeal.

Conclusion

In view of the foregoing, ground one (1) of the Appellant's appeal succeeds. Taking into consideration the gravity of the offence the Appellant has been accused of, and in the interest of justice for both the victim and the Appellant, the Appellant should face a fair trial of the offence he is charged with. This Court therefore makes the following orders.

1. The judgment of Hon. Justice Komba Kamanda J.A. dated 21st July 2020 is hereby set aside and the verdict and sentence quashed accordingly.
2. Consequently, the matter is remitted to the High Court for trial of the Appellant for the offence.
3. Bail granted to the Appellant by this court shall continue on the same conditions.

HON. MRS. JUSTICE JAMESINA E. L. KING J.A (PRESIDING) .....

HON. MR. JUSTICE M. J. STEVENS J. A. I AGREE .....

HON. MR. JUSTICE M. P. MAMIE J.A. I AGREE 4/10/202