Privy Council Appeal No. 22 *of* 1960

Cyril Bunting Rogers-Wright - - - - - - *Appellant*

v.

Abdul Bai Kamara - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH DECEMBER 1962

Present at the Hearing:
LORD MORTON OF HENRYTON.
LORD KEITH OF AVONHOLM.
LORD PEARCE
[*Delivered by* LORD PEARCE]

The appellant is a barrister who carried on a legal practice in Sierra Leone. The Supreme Court of Sierra Leone by a judgment dated the 19th February 1959 ordered that the appellant's name be struck off the Roll of Court. The West African Court of Appeal dismissed an appeal by him. From that dismissal he appeals to their Lordships' Board.

The order of the Supreme Court of Sierra Leone was made pursuant to powers conferred on it by section 26 of the Legal Practitioners (Disciplinary Committee) Ordinance (Cap. 118).

The main purport of that Ordinance was to establish a disciplinary committee to enquire into allegations of professional misconduct. Procedure is there laid down by which complaint may be made to the disciplinary committee who may hear witnesses on oath and must make a report to the Supreme Court if a prima facie case of misconduct is made out. The Court then considers the report and after hearing submissions may admonish or suspend a practitioner or strike his name off the Roll of the Court.

Section 26 however gives the Court power to deal with complaints without any previous enquiry by the Committee. It reads as follows:—

> " 26 (1) Notwithstanding that no enquiry may have been made by the Committee the Supreme Court shall have power for reasonable cause to admonish any legal practitioner or to suspend him from practising within the jurisdiction of the Supreme Court during any specified period or may order the Master to strike his name off the Roll of Court.
>
> (2) Any application to the Supreme Court to exercise the powers under subsection (1) shall be made by motion in accordance with the Rules of Court."

Order 39 rule 4 of the Supreme Court Rules provides:

> " Every notice of motion to set aside remit or enforce an award or for attachment or to strike off the rolls shall state in general terms the grounds of the application; and where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion."

The respondent (hereafter referred to as " the applicant ") served notice of motion on the 9th June 1958 supported by 13 affidavits. The grounds were set out in the following terms:—

> " 1. The respondent (the present appellant) was engaged and paid to act, and did act, as the legal representative of the complainants (including

the applicant) against Paramount Chief Bai Sama, Santigie Koroma and Santigie Kamara at and for the purpose of an Inquiry held by Sir Harold Willan a Commissioner . . . to inquire into the conduct of the said Paramount Chief Bai Sama and the said Santigie Koroma and the said Santigie Kamara which inquiry was held at Mapeterr in the Loko Massama Chiefdom from the 9th to the 22nd November 1956. Between the 3rd and the 9th November 1956 the respondent solicited and obtained from the said Paramount Chief Bai Sama a sum of money to wit £750 for the purpose of influencing his own (i.e. the respondent's) conduct as the legal representative of the said complainants at the said Inquiry in a manner favourable to the said Paramount Chief Bai Sama and the said Santigie Koroma and the said Santigie Kamara.

2. The respondent failed to give receipt for any of the money received as aforesaid from the said complainants and the said Paramount Chief Bai Sama."

The second charge related to a breach of professional rules and was of little importance compared to the first.

The substance of the applicant's case was as follows. The applicant and his fellow complainants were antagonistic to Chief Bai Sama. They were known as " strikers " because in token of their grievances they refused to pay their taxes. They engaged the appellant (hereinafter referred to as such throughout although in the Court of First Instance he was the respondent) and paid him £400 to represent them and to endeavour to establish various allegations of misconduct against Chief Bai Sama at the forthcoming Government enquiry into his conduct.

Some days before the enquiry opened the appellant sent for the Chief Bai Sama who came to him at Port Loko with a retinue of six persons. The appellant told him that he would lose his Crown if he did not pay the appellant £1,000. A further meeting was arranged. On the 8th November, the eve of the enquiry, the Chief with his retinue went to the appellant at Bakolo and tendered £500. The appellant was not content with this sum and a further £250 had to be fetched to satisfy his demands. On receipt of £750 he promised to help the Chief.

The Chief in reliance on this arrangement dispensed with his own legal representative and when the enquiry opened on the following day he was surprised to find that the appellant was representing the strikers. As a result he had to ask for an adjournment in order to re-engage his own lawyer. Although one small complaint was proved against the Chief nothing subversive of good government was found against him and he did not lose his Crown. The applicant's notice of motion was not launched until June 1958. His explanation of the delay was that he did not know the full facts until February 1958.

If a bribe was thus received by the appellant from the Chief, the order of the Supreme Court was clearly right.

The appellant's case was a complete denial. He had, he said, no interview with the Chief and never received any money from him. He was not at Port Loko when the first meeting was alleged since he had by then gone back to Freetown where he lived. Nor did he leave Freetown again until the morning of the enquiry. It followed that he could not have had either the first meeting with the Chief alleged to have taken place at Port Loko or the second meeting alleged to have taken place at Bakolo on the eve of the enquiry. In support of the latter alibi he called a magistrate's clerk who proved that he was in the Police Magistrate's Court at Freetown at 4 on the eve of the enquiry. Since it would take three hours to get by road to Bakolo, this clearly disproved the applicant's evidence that the appellant was in Bakolo at 3.30 p.m. on that day; but it did not disprove the possibility of the appellant having the alleged interview with the Chief later that evening. The appellant contended that the whole case was a plot by the applicant to ruin him. The applicant and he were both concerned in politics and until 1958 they were members of the same political party. Early in 1958 however the applicant changed his political allegiance. From that date the applicant was a political opponent

of the appellant and there were also said to have been incidents between them which led to bad feeling. Hence, it was contended, sprang the motives which led to the preferment of a concocted charge in 1958 relating to affairs about which the applicant must (if it were true) have known in 1956.

This defence, however, had not yet been put forward when the motion came before the Court on 13th November 1958. No affidavits had been filed by the appellant in answer to the full affidavits filed five months before in support of the motion.

The appellant's counsel took objection to the Court hearing the motion without a preliminary enquiry by the disciplinary committee, in the absence of compelling reasons for taking such a course; he contended that reasonable cause must be shown to justify the procedure under section 26. The Court (the Chief Justice of Sierra Leone and Wiseman C.J. of Gambia) held that reasonable cause need not be shown for taking the procedure laid down by section 26 as opposed to the normal enquiry before the disciplinary committee. The words " for reasonable cause " in their view related to the words which followed, viz. " to admonish " and did not relate to the word " enquiry ". They ruled that the motion should proceed. That ruling was attacked in the West African Court of Appeal and again before their Lordships' Board. It was argued by analogy with English procedure in respect of solicitors' misconduct that the Court ought not to enquire (save in exceptional cases) without a preliminary enquiry by the Committee. But section 26 imposes no fetter on the Court, and in their Lordships' view the Court were entitled to rule as they did.

After the preliminary objection had been overruled Counsel for the applicant sought to deliver five further affidavits correcting or amplifying matters previously deposed to in the thirteen affidavits filed in June. Counsel for the appellant contested this on the ground that the fresh affidavits were out of time and that any corrections could be made when the deponents were in the witness box. The Court allowed the appellant's objection to the five new affidavits. The appellant did not file or make any application to file evidence and the case proceeded on the 14th November. As each affidavit filed by the applicant was read the deponent was cross-examined by the appellant's counsel.

On the 7th day of the hearing (20th November) when seven of the applicant's witnesses had already been cross-examined, the appellant served fourteen affidavits, thus presenting his case for the first time. The admissibility of these affidavits was considered on 24th November and on 25th November the Court ruled on them. On that date three further affidavits on behalf of the appellant were served on the applicant. The applicant's counsel rightly contended that the affidavits were out of time but that they could be filed by leave as a matter of indulgence subject to terms. He relied on the cogent observations of Wigram V.C. in *East Lancashire Railway Company v. Hattersley* 8 Hare 72 at page 85.

By now it had become quite clear that the whole issue was a direct conflict on a question of fact with a number of witnesses on either side. The Court pointed out that had the appellant put forward his affidavits at the proper time, namely before the motion came on for hearing " it would have become apparent that the Court was faced with conflicting evidence and could not arrive at the truth without hearing oral evidence and would have wished to hear the witnesses for both sides, in other words the case could not be decided on affidavit evidence and is the sort of case that should have been transferred to the witness list . . . we feel that we ought somehow to assimulate the position now to what it would have been then. It is too late now to say that the hearing shall be on oral evidence pure and simple; for one thing we do not wish to have the witnesses recalled for a full examination as if they had not given evidence, for another the respondent " (the present appellant) " is anxious to have his affidavits in and counsel for the applicant does not oppose that request subject to some requests of his own. One of them is that the affidavits of the respondent shall be limited to those already delivered. Nothing has been said to the contrary. The request is granted.

Another is that he shall be at liberty to put in affidavits in reply. This is strenuously opposed . . . We do not think that that rule (Order 39 rule 4) precludes an applicant from putting in affidavits in reply not, we would say, merely to confirm the affidavits put in initially but to meet statements of fact in the affidavits of the other side which are not already dealt with in the initial affidavits.

We think in the circumstances that the right course would be to say to the applicant that he may call any witnesses he wishes strictly in reply and shall deliver to the respondent affidavits in reply to help the respondent in his cross-examination."

The applicant then delivered nine affidavits in reply. There was much argument on whether those affidavits were properly in reply and the Court ruled on them.

It is difficult for the appellant to criticise with success the procedure which was followed as a result of his own failure to put forward his case at the proper time. The appellant was a practitioner of experience and experienced practitioners appeared for him. They must have been perfectly well aware that the proper method of procedure was for affidavits in answer to be filed before the motion came on for hearing; and, if in spite of the five months which had elapsed since the applicant's affidavits were filed, the appellant wished to file evidence which he had not yet prepared, to ask for an adjournment for that purpose. Their Lordships have no doubt that the Court would, with suitable rebuke, have allowed such an adjournment. The appellant preferred, probably for tactical reasons, to probe the strength of the applicant's witnesses before finally committing himself by filing his evidence—indeed part of his evidence when filed dealt with the evidence given by the witnesses during the first few days of the hearing. Much of the difficulty of the case resulted from that tactical move. Moreover the appellant never asked that the motion should be turned into a witness action. Their Lordships' Board agree with the view expressed by the West African Court of Appeal " that a procedure designed for a chancery motion was ill fitting and cumbersome when applied to an enquiry under the Legal Practitioners (Disciplinary Committee) Ordinance, but the fact remains that the applicant's motion was well founded according to the Law of Sierra Leone and that the respondent's counsel, and he had many helpers, at no stage made any application for the matter to be taken out of the ambit of Order 39 once the preliminary objection to the jurisdiction had been overruled."

When the hearing was ultimately concluded the Court having seen and heard the witnesses gave a very full and careful judgment dealing with the whole of the evidence. They unhesitatingly believed the Chief and various witnesses supporting the applicant's case and they disbelieved the appellant and certain of his witnesses. Those findings cannot be successfully assailed before their Lordships' Board unless there be some misdirection or some wrongful exclusion of evidence that vitiates them and demands a new trial.

The appellant relies on the following matters.

It is contended that the Supreme Court misdirected itself in refusing to treat the evidence of the Chief and his retinue as that of accomplices in a quasi criminal transaction and that this misdirection vitiated their findings. Sir Barclay Nihill Ag. P. in giving the judgment of the West African Court of Appeal said " In this aspect of the case the learned Judges anchored themselves to the House of Lords' decision in *Davies v. D.P.P.* [1954] A.E.L.R. 508 and in fact came to the conclusion that it would be wrong to label any of these witnesses as accomplices. We think that the reasons given for this conclusion are sensible and sound. No one in Bai Sama's party had any criminal intent. They thought and were induced to think by the respondent " (the present appellant) " that if they secured the services of the eminent Mr. Wright in some way or other he would see them through their trouble. To press that there is an analogy between this and participation as principals or accessories in an actual crime is in our opinion not possible." Their Lordships agree with those observations.

It is further contended on behalf of the appellant that although in general the Supreme Court correctly directed itself as to the high degree of proof which the applicant must establish in this case, yet it misdirected itself when dealing with the alibi set up by the appellant in respect of the interview on the day before the enquiry. It is argued that the Court used words which wrongly put on the appellant the onus of showing that it was not possible for him to have been present at the alleged interview with the Chief and his retinue. Their Lordships view, which concurs with that of the West African Court of Appeal, is that the words properly read in their context give no grounds for such criticism. The Supreme Court were in effect pointing out that a true alibi consisted in proof that it was impossible for a person to be present at the same time in two places far removed, whereas in the present case the proof that the appellant was in Freetown at 4 p.m. did not conflict with the possibility of his presence in Bakolo (which could be reached in three hours by motor car from Freetown) at the interview with the Chief that evening. The Court went on to add, " There is no evidence that he slept the night of the 8th in Freetown and it appears to us a serious lacuna in the set up of an alibi." The comment is fair and it shows no error with regard to the onus of proof.

The more substantial arguments before their Lordships' Board deal with the exclusion of evidence.

It is said that as a result of the procedure adopted and of the Court's rulings as to evidence made on the 25th November and the 5th December, highly material evidence was wrongly excluded. One term of the ruling of the 25th November was that the affidavits of the appellant should be limited to those already delivered. The appellant raised no objection at the time to that term. There was nothing in that ruling which prevented a further application to the Court if some unforeseen event should render it fair that some fresh evidence should be admitted. In fact a further application was made on the 4th December to put in a further affidavit by Bangura, a watchman, for the purpose of controverting the evidence of Seidu Seisay, the independent witness to the first interview with the Chief when the appellant asked for £1,000 subsequently reduced to £750. The Court on the 5th December allowed this. In the Court of Appeal an application was made to introduce three further affidavits with the object of controverting the evidence of Seidu Seisay and complaint was made that these three affidavits were excluded by the general ruling given on 25th November. But these three affidavits were never mentioned in the application made on 5th December. Had the appellant then asked for them to be admitted, there is no reason to think that the Court would not have allowed them to be introduced in the same way as it allowed the affidavit of Bangura for the same purpose.

The general ruling of the 25th November, followed by a particular ruling on 5th December, excluded a subsequent affidavit of Mr. Nelson Williams the Secretary General of the official Opposition Party, the political party of which the applicant was formerly a member and which he left early in 1958. He deposed to political quarrels and a threat by the applicant to ruin the appellant. Much of it is hearsay. It also exhibited a tape-recording to which reference will be made later. Those rulings also excluded an affidavit of the appellant, but this had no value beyond exhibiting a letter from a Chief Alikali Modu who gave evidence for the applicant. This letter was supposed to indicate the existence of a plot. By consent of the applicant's counsel it was admitted as the appellant's exhibit on 10th December.

An affidavit of Newland Kanu was excluded but not because of the general ruling of 25th November. It was sworn on 22nd August 1958 and if it was regarded as an important part of the appellant's case it is hard to understand why it was not served with the appellant's other evidence on 20th and 25th November. A special application was made with regard to this affidavit on the 15th December. It was conceded that much of it should be struck out as hearsay. Paragraph 8 however remained relating to an interview when the Chief admittedly called on the appellant and (according to the Chief's subsequent account which the appellant denied) asked for a receipt for the

£750. Paragraph 8 contains no account of what was said on the matter in dispute but referred to the installation of a tape recording machine before the interview. It did not however exhibit or identify the tape recording. Thus paragraph 8 was not of great value. Kanu disappeared and could not be produced for cross-examination. The appellant's counsel said " In view of Kanu not having been found, to avoid delay, I, like Mr. Millner, leave it to the Court's discretion to say whether his affidavit should be read at all, if any parts are left in." The Court in its discretion ruled that since there was no opportunity of testing its veracity by cross-examination of the deponent, the admissible portions should not be read.

Their Lordships are unable to find that any of the above exclusions were unjustifiable or that the Court failed to exercise a proper discretion in ruling upon them.

There remains the more difficult question whether two tape recordings were improperly excluded.

One of the applicant's witnesses Kanoko Kargbo when asked in cross-examination said that he went to the appellant's office and repeated to him the story which he had heard from the applicant namely that the appellant had received £750 from the Chief. When further asked in cross-examination if he believed the story, he said that he did believe it. He denied that he had said (at the appellant's office) that he " did not believe it because it was impossible for it to happen without the strikers knowing it. I told him that I believed it."

The appellant's counsel then wished to play over to the witness a tape recording of the interview for the witness to identify his voice on it. The applicant's counsel objected to its being played at that stage on the ground that proof must be given of how the recording was made since it might not be a recording of the witness's voice. "At a later stage " said the applicant's counsel " the witness may be recalled after the other side succeeds in putting the document in."

The Court's ruling on 24th November was as follows:

> " The mechanical evidence is on a par with Adama or Yoro " (two witnesses who were present at that interview): " if they could not be called to contradict the witness Kanoko it would not be possible to have the mechanical evidence to contradict him; but, as in their case, this point must wait for argument and decision at the appropriate stage. This consideration inclines us to the view that the record should not be played now.
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> " We appreciate Mr. Macaulay's point that he wishes to play the record for the purpose of the witness identifying his voice. But if it were to be played, the witness would be asked: Is it your voice saying this and that and the other? and notes would have to be taken of everything whether admitted or denied by the witness or attributed by him to another person, with the result that what is on the record would go down in the notes of the Court. We must assume that the witness will be truthful and admit his voice, but unless notes are taken of the words he admits to be in his voice, there will be no useful purpose served. It is not possible to limit him to merely saying I can hear my voice here and there. It may not be intended, but the result will be that the Court will be hearing evidence either affirming or contradicting the witness's version of what he said. It would be on a par with interposing Adama or Yoro to give evidence on what the witness Kanoko said; which cannot be done at this stage, if it can be done at all—a point left for decision when the time comes.
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> "Another point which must wait for decision at the appropriate time is whether the recording can be put in evidence as having been faithfully made etc., subject of course to the primary point of whether it is permissible for the respondent to adduce evidence to contradict the witness's version of what he said. There will be no prejudice to the respondent if the record is not played now. If later he succeeds in having it in evidence, Mr. Millner has said that the witness may be recalled.
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> " We are of opinion that the record should not be played now."

Thereafter no specific application was made to put the recording in evidence.

In their Lordships' view the Court were right in ruling that the evidence should not be played at that time.

The question as put to Kanoko related merely to his belief in the truth of the charge and his belief was not a matter on which evidence could be called in rebuttal since it did not relate to the subject matter of the case. (See for instance *Elton v. Larkins* 5 Car. & P. 390.) The Court however based its ruling on broader grounds, not dependent on the form of the question. Assuming that the question related to a previous statement by the witness inconsistent with his present testimony and relative to the subject matter of the case, the stage had not been reached at which rebutting evidence could be called. It would be confusing and undesirable for evidence in rebuttal to be interposed during the cross-examination of a witness. Were such a practice allowed, it might be used *in terrorem* to intimidate a nervous and honest witness. Nor is it any hardship to the side which has evidence in rebuttal to be unable to interpose it during the cross-examination, since, if true, its effect has greater force when the witness has persisted in denying it throughout cross-examination. The witness is entitled to have the alleged statement put to him in detail. If he denies it, then, at the proper time, the rebutting evidence may be called to prove the statement.

It is plain that the recording, even if it had been put in, would have had no effect on the result. Kanoko was one of the strikers and his affidavit related to the engagement of the appellant by the strikers and their payments of fees to him. Only in cross-examination was he asked about his conversation at the appellant's office. It appears from the excluded affidavit of Nelson Williams which has been read to their Lordships that a tape-recording was made of a conversation of several persons including Kanoko on the occasion in question. The deponent exhibits that recording, states that he made a copy and that from the copy he made a transcript of " the statement of the said Kanoko Kargbo in the said recording as interpreted by the said Adama Bangura ". That transcript contains no questions or observations by others but is set out as a soliloquy. It takes the form of a witness's proof. It says inter alia " During the enquiry I was mostly at Bakolo. I used to go to Daar-es-Salaam only on very rare occasions. I never saw P.C. Bai Sama or Santigi Koroma or Tigida or any of the P.C.'s (paramount Chief's) people going to Mr. Wright at Bakolo. At that time, we did not want to see any of that kind of people at all. All the time Mr. Wright was at Bakolo, I did not see him go alone to Petifu or any other place at Lokomasama, except when we all used to go to the inquiry and back again. As I know that Mr. Wright had no time to go any other side hence, I say I do not know when their money matter could have passed between him and P.C. Bai Sama." That evidence could add little or nothing to the evidence given by the appellant and his witnesses that he was so surrounded by strikers that the Chief could not have come to him as alleged. Their Lordships are clearly of opinion that it would not have affected the finding of the Court expressed as follows:—" It was a lull period between the two enquiries. The general picture painted by respondent's case, that his residence was guarded at night, that he was surrounded by strikers and working late every night, that it was impossible for the Chief and party to come and see him without being observed, is not accurate so far as the relevant nights from the 3rd to the 9th November are concerned."

There is thus no substance in the complaint of the Court's refusal to allow the recording to be played during the cross-examination of Kanoko.

The Court also excluded a tape-recording of a conversation when the Chief went to the appellant's office in February 1958, fifteen months after the important events in the case. There had been no reference to the occasion in the Chief's first affidavit. Nor did the appellant refer to it in his affidavit in answer. The affidavit of Newland Kanu however (which was sworn on 22nd August and served in November and which as above set out was subsequently disallowed owing to his disappearance and the consequent impossibility of testing it by cross-examination) referred to the deponent having helped to fix up a recording machine prior to a visit of the Chief to

the appellant's office in February 1958; but the affidavit did not exhibit the recording. The Chief in an affidavit in reply said " 4. I agree that I went in in February 1958 to Mr. Rogers-Wright's office. I was not accompanied by Newland Kanu. I there and then asked him for a receipt for the £750 which I gave him. He made excuses and did not give me any receipt." He adhered to this when cross-examined. No affidavit has ever been produced exhibiting that recording but on 4th December the appellant's counsel asked to be allowed to produce evidence to prove the recording.

On the 5th December the Court ruled on the point as follows:—" In regard to Bai Sama's paragraph 4 in his affidavit, having regard to our last preceding Ruling and what is stated in the arguments, we think that the respondent may when he comes as a witness, give the conversation in chief, but should not be allowed to offer any other evidence on that conversation." Later when the appellant gave evidence he denied that there had been any mention of a receipt or of £750 and said that the interview was concerned with various other matters.

The question for their Lordships is whether the Court could properly so rule in its discretion on 5th December. It is contended that so to rule was to exclude improperly evidence of vital importance which might have shown that the Chief was untruthful and the appellant truthful in their respective accounts of that interview, and that this evidence might have turned the scale in the appellant's favour.

The question whether a receipt or the £750 was mentioned in February 1958, was undoubtedly relevant although it occurred many months after the events on which the real issue turned.

On 5th December when the ruling was made the situation stood thus. The appellant was in mercy. He had (deliberately as it would appear) refrained from putting in his evidence at the proper time. When at length he filed it out of time he was put on terms (to which he raised no objection) that he should be confined to the seventeen affidavits delivered by 25th November. He had always been aware of the existence of that conversation of February 1958 since he himself had been present. Yet he himself did not refer to it in his affidavit sworn on the 19 November 1958; nor did he or Newland Kanu exhibit the tape-recording as either of them might have done.

In spite of this however their Lordships are of opinion that the patience and fairness which the Court consistently displayed would have led them to make a concession to the appellant on this point had they believed that the tape recording would give any valuable guidance to the Court in deciding the real issue in the case.

By 5th December the case had been proceeding for upwards of three weeks. The Court had heard twelve witnesses cross-examined. Seven of these had sworn that they had actually been present at the vital interview in 1956 which the appellant claimed had never taken place. Their Lordships cannot think that the truth or untruth of the Chief's account of a subsidiary interview which took place fifteen months after the event could or should have been a deciding factor. The Chief was an old man, and indeed the appellant's counsel strongly urged his old age as a reason for not trusting to the stability of his memory. If it were shown that he did not mention the £750, it would not disprove his story on the real issue in the case. Even if it seemed that he was deliberately lying about this interview, that would certainly show that he was prepared to embroider his case and it might even show that he would have been prepared to invent the whole case, but that did not dispose of the other six witnesses. In the event the Court later heard corroboration by an independent witness Seidu Seisai of whose truth they had no doubt. But even viewed on 5th December it was reasonable for the Court to consider that the conversation of one witness in 1958 was of little importance when they had so much evidence of the events in 1956 which were really in issue.

Their Lordships therefore are of opinion that the Court were entitled to rule as they did. They agree with the West African Court of Appeal when it said—" Neither can we say that in any of the many orders made during the

course of the proceedings did the Judges in the Court below commit any error in law—for the most part it was a matter for their discretion, and from the record it is evident that they did attempt to maintain a fair balance between the parties and were prepared to give indulgence to the respondent where they thought it was essential to his defence."

Finally it was contended that, even if no misdirection of any kind was shown, the West African Court of Appeal erred in not allowing the excluded evidence to be introduced as new evidence in the appeal under Rule 30 of the West African Court of Appeal Order-in-Council 1948 which reads as follows:—

> " 30. It is not open, as of right to any party to an appeal to adduce new evidence in support of his original case; but for the furtherance of justice the Court may, where it thinks fit, allow or require new evidence to be adduced—. . . A party may, by leave of the Court allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegations."

The Court of Appeal held that the excluded evidence was not " new evidence " within the ambit of the rule. In their Lordships' view the words " new evidence " do include evidence tendered and refused in the Court below. They think it clear however that had the Court of Appeal considered that the evidence was " new evidence" they would have exercised the discretion which rule 30 gives them and refused to admit it. Their Lordships see no adequate ground for admitting it.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The costs of the appeal will be paid by the appellant.

(86766) Wt. 8004/82 90 1/63 Hw.

In the Privy Council

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ABDUL BAI KAMARA

DELIVERED BY

LORD PEARCE

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1963