

IN THE SUPREME COURT OF SIERRA LEONE

IN THE MATTER OF SECTIONS 18(1), 20(1), 23(1), 124 AND 127 OF THE
CONSTITUTION OF SIERRA LEONE, 1991 AND OF SECTION 74 OF THE
COURTS ACT, 1965

AND

THE CRIMINAL PROCEDURE ACT, 1965

AND

IN THE MATTER OF AN APPLICATION FOR THE UNCONDITIONAL RELEASE
OF 10 ACCUSED PERSONS AWAITING JUDGMENT IN THE CASE OF:

THE STATE

VS

1. ABRAHAM LAVALY
2. INAH JAMES
3. ADETUNJI DESMOND COLE
4. BAKIE MINAH
5. EVERTON FAULKNER
6. ABU BAKARR KAMARA
7. ISMAIL DAINKEH
8. ISATA OSAIO KAMARA
9. SHARKA KPANABUM
10. ABDUL MUTALID KAMARA

AND

IN THE MATTER OF:

1. ABRAHAM LAVALY - PLAINTIFFS
2. INAH JAMES
3. ADETUNJI DESMOND COLE
4. BAKIE MINAH
5. EVERTON FAULKNER
6. ABU BAKARR KAMARA
7. ISMAIL DAINKEH
8. ISATA OSAIO KAMARA

9. SHARKA KPANABUM
10. ABDUL MUTALID KAMARA

AND
THE STATE

- RESPONDENT

CORAM:

HON MR JUSTICE N C BROWNE-MARKE, JUSTICE OF THE SUPREME COURT
HON MR JUSTICE E E ROBERTS, JUSTICE OF THE SUPREME COURT
THE HON MS JUSTICE V M SOLOMON, JUSTICE OF THE SUPREME COURT
THE HON MS JUSTICE G THOMPSON, JUSTICE OF THE SUPREME COURT
THE HON MR JUSTICE A S SESAY, JUSTICE OF THE SUPREME COURT

COUNSEL:

MS TUMA JABBUE for the Plaintiffs

MR. CALVIN MANTSEBO for the Defendants

JUDGMENT DELIVERED THE 3rd DAY OF AUGUST, 2020

BROWNE-MARKE, JSC

THE ACTION

1. The Plaintiffs have applied by way of Originating Notice of Motion filed on 15th March, 2017 for the determination of several questions, and for various reliefs and Orders which are stated on the face of the Motion paper. The questions posed or raised go to the root of a citizen's right to be tried for a criminal offence, to conclusion, speedily and fairly.
2. They are as follows:
 - (1) Whether the Constitution of Sierra Leone, 1991 (hereafter, "The Constitution") or any law in existence in Sierra Leone, permits any Judge, who is not a Sierra Leonean, and who is a foreigner on contract to the Government of Sierra Leone, in this case, The Hon Mr Justice M A Paul, who was the trial Judge in the above mentioned criminal case, to deliver judgment at the expiration of his contract?
 - (2) Whether the failure of the said Honourable Judge to deliver judgment in the said criminal case before the expiration of his contract in July, 2014, and the non-renewal of his contract does not mean, in effect,

that judgment will never be delivered in the said case? And, if this is indeed the case, does not the failure to do so amount to a denial or violation of the rights of the accused persons herein, enshrined in sections 18(1), 20(1) and 23(1) of the Constitution, and, also their inherent rights under the Criminal Procedure Act, 1965 - hereafter, CPA, 1965 - and at Common Law, that judgment ought to be delivered on the Indictment in respect of which they were charged? And if such failure amounts to deprivation or violation of the above-mentioned rights of the accused persons herein, should not this Court, being the highest Court in the land, grant redress to the accused persons?

- (3) Whether the Constitution permits any person or authority to deprive ad infinitum, a person charged in an Indictment in a criminal trial of his or her freedom of movement within the boundaries of Sierra Leone, or, to go out of Sierra Leone, which is guaranteed by section 18(1) of the said Constitution?
 - (4) Whether the Constitution provides for an accused person to be subjected to inhuman or degrading treatment by taking away their dignity and respect as set out in section 20(1) of the said Constitution?
 - (5) Whether the Constitution provides for a person who is charged with a criminal offence "to have" - these words were, in my view left out - his/her hearing conducted indefinitely in accordance with section 23(1) of the said Constitution?
3. The Plaintiffs claim that if the answers to the questions posed in sub-paragraphs (1), (3), (4) and (5) supra, are NO; and if the answer to the question posed in sub-paragraph (2) is YES, then the Plaintiffs will seek the following further reliefs:
- (1) That the Plaintiffs be set free/released unconditionally and be discharged accordingly.
 - (2) That the Plaintiffs passports seized or taken away from them, be returned immediately, and that the following bank accounts be unfrozen, immediately:
 - (i) Eco Bank - 5101162950117 - Abraham Lavalay
 - (ii) Guaranty Trust Bank - 201/3110184/1/59/0 - Abraham Lavalay
 - (iii) Rokel Commercial Bank - 01-6002208 - Abraham Lavalay
 - (iv) Union Trust Bank Leone account - 217-25538-01 - Abraham Bockarie Lavalay

- (v) Union Trust Bank dollar account - 215-25538-01 - Abraham Bockarie Lavalay
 - (vi) Zenith Bank - 6020112399 - Bakie Minah
 - (vii) Eco Bank - 5101160501151 - Bakie Minah
4. The Plaintiffs claim that their action is brought in this Court in two capacities, viz;
- (1) As citizens of Sierra Leone
 - (2) As accused persons who by a criminal *action* (sic) brought against them by the State by an Indictment dated 2nd July, 2013, in respect of which, trial was completed but judgment was not delivered as the trial Judge who was a foreign Judge on contract left Sierra Leone with the entire Court records since July, 2014; with the said trial Judge denying the accused persons bail throughout the entire trial and leaving the accused persons to indefinitely languish in prison, whilst he left the shores of Sierra Leone without delivering judgment, and with the entire Court records and exhibits, *which action, or inaction* contravenes, or, is inconsistent with the democratic principles enshrined in the Constitution.

PLAINTIFFS' JOINT AFFIDAVIT

5. The Originating Notice of Motion is supported by the affidavit of the 1st Plaintiff, Abraham Lavalay, deposed and sworn to on 15th March, 2017. In it, Mr Lavalay deposes that he has been authorized by the other Plaintiffs to depose to the facts contained therein. He starts by deposing that the 1st, 2nd, 3rd, 4th, 5th and 6th Plaintiffs were employees of the National Revenue Authority - NRA; and that the 7th, 8th and 9th Plaintiffs were employees of Ecobank (SL) Ltd. The 10th Plaintiff was an employee of the Sierra Leone National Shipping Co. All of them were arrested in June, 2013 and were first arraigned before KAMANDA, J, then His Worship Mr Komba Kamanda, Principal Magistrate. On 2nd July, 2013, they were all indicted by the Anti-Corruption Commission, ACC, for various offences. The Indictment is exhibited as "AB1". They were arraigned in the High Court presided over by PAUL, J on 9th July, 2013. The trial was by Judge alone. Bail was applied for, but was refused by PAUL, J on 12th July, 2013. His ruling is exhibited as "AB2". In that Ruling, His Lordship made it clear he was not prepared to entertain any further applications for bail. The trial was then adjourned for a month to enable his Lordship to proceed on vacation. The trial finally commenced on 20th August, 2013 before PAUL, J, and ended on 1st July, 2014.

That day, PAUL, J adjourned for judgment to be delivered on 18th September, 2014. It appears he travelled out of the jurisdiction in July, 2014. On the latter date, i.e. 18th September, 2014, the Learned Trial Judge was still not back in the country. The Plaintiffs were so informed by the Deputy Master and Registrar, and were also told that notice of a date for judgment will be sent to each of them. No such notices were ever sent out. As such, the Plaintiffs applied for their release on bail pending judgment. The application is exhibited as "AB3". The application was heard by me, sitting as a High Court Judge, and on 16th December, 2014, I ordered their release on bail on very stringent conditions. A copy of my ruling is exhibited as "AB4". In that Ruling, I set out the unusual course the proceedings had taken, and why it was necessary at the time, in the interest of justice to release the Plaintiffs on bail. That the reporting requirement imposed by me has been adhered to by all of the Plaintiffs herein, is evidenced by the register which was opened for that purpose by the Master and Registrar, and is exhibited to the affidavit as "AB5". Also exhibited, as "AB6 a-i" are copies of requests for permission to travel, and approvals of the same.

6. Further, whilst waiting for judgment to be delivered, the Plaintiffs in the employ of NRA, had their respective services terminated. Exhibit "AB7" is an example. As a result, the 1st Plaintiff deposes further that they have been stripped off any means of livelihood, and cannot find alternative employment as the case brought against them, has not ended in the Courts. An exchange of correspondence in February, 2017 with the Master's office, is exhibited as "AB8" and "AB9", respectively. In the Master's reply to the further query made by the Plaintiffs, it becomes clear, that it is most unlikely, judgment will ever be given by PAUL, J, or, by any other Judge. Therein, the Master confirms that PAUL, J went away with the Court file when he left our jurisdiction. The 1st Plaintiff deposes lastly, to the violation of the human rights of each of them, by the uncertainty created by the inconclusive nature of the trial.

PLAINTIFFS' STATEMENT OF CASE

7. On 24th March, 2017, the Plaintiffs filed a joint statement of case. The facts and particulars of their case are set out in Paragraph A, sub-paragraphs i - xii. They indicated therein that they did not intend to call witnesses. In paragraph C, submissions are made in support of the Plaintiffs' claim. Sub-paragraph (i) is incorrect: It is not unconstitutional for the Government of Sierra Leone to appoint a foreign Judge to try cases in our country. Section

136 makes express provision for such an eventuality. Further, if the contract of a foreign born Judge expires, it could be renewed. It follows, that the expiration of such a Judge's contract, does not, ipso facto, lead inexorably to the conclusion that it will never be renewed.

8. Sub-paragraph (ii) alludes to the Constitutional provision, Section 23(1), the 'fair hearing' provision. There also, the Plaintiffs contend, relying on Article 14(1) of the International Covenant on Civil and Political Rights, 1966, that a right to a fair trial begins to run at the time of arrest, and continues until the case is disposed of at first instance, and, if necessary until an appeal is disposed of. It is argued that the provision imports finality in criminal prosecutions: i.e. that judgment must follow trial. As this is a contention which warrants serious consideration, I shall return to it later.

RESPONDENT'S STATEMENT OF CASE

9. The Respondent filed its statement of case on 7th April, 2017. It was settled by Mr Mantsebo, who also appeared as Counsel on its behalf, before this Court. The position taken by Mr Mantsebo is that PAUL, J remains a Judge and that there is no real impediment to his delivering judgment. He is not aware that the services of the said Learned Trial Judge have been terminated. The Learned Trial Judge's nationality should not matter. He also denies that the rights to fair trial enshrined in our Constitution, have been violated; or, that the Plaintiffs have suffered inhuman and degrading treatment due to the non-delivery of judgment in their case.
10. His view is that the Plaintiffs should request full compliance with the provisions of section 120(16) of the Constitution. That Constitutional provision calls upon all Courts in Sierra Leone to deliver a decision not later than three months after the conclusion of evidence if there has been a trial, followed by the submission of final addresses by Counsel; and, in the case of appeals, after listening to, accepting the written submissions of Counsel on both sides. No sanction is attached to non-compliance with this particular Constitutional provision, but section 125 of the Constitution confers on this Court supervisory powers which could enable it to give such directions, and make such orders as may be deemed necessary, where there has been non-compliance. Rule 88 of the Supreme Court Rules, 1982, sets out how this particular jurisdiction could be exercised. It states:

"88(1) Where a judgment or ruling has been reserved by any Court subordinate to the Supreme Court for three months or more, the Court, may,

on its own motion, or, upon the application of a party to the action or appeal, as the case may be, order the lower court concerned to deliver judgment or ruling on or before a date specified in the Order."

11. The difficulty involved in pursuing that line of action is that PAUL, J went away in 2014 and has not returned to date. For practical reasons, it is improbable that even if the Plaintiffs had pursued such an application in this Court, it would have been successful.
12. To cap his arguments in the Respondent's statement of case, Mr Mantsebo prays that the relief sought by the Plaintiffs in this Court, be refused.

CONSTITUTIONAL PROVISIONS IN ISSUE

13. As several Constitutional provisions have been referred to, and relied on by the Plaintiffs, it is but proper that they be set out at the outset.

14. First section 18(1) of the Constitution. It reads:

"18(1) No person shall be deprived of his freedom of movement, and, for the purposes of this section, the said freedom means the right to move freely throughout Sierra Leone, the right to reside in any part of Sierra Leone, the right to enter or to leave Sierra Leone, and immunity from expulsion from Sierra Leone. (2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with, or, in contravention of this section."

15. The refusal of bail to the Plaintiffs by PAUL, J during the trial, amounted to lawful detention, irrespective of whether he exercised his discretion properly in that respect. Section 79 of the Criminal Procedure Act, 1965 as amended, empowered him to remand the Plaintiffs during their trial. Further, Your Lordships, and Your Ladyships will appreciate that though I granted bail to the Plaintiffs on 16 December, 2014, I was also entitled to impose restrictions on the movement of the Plaintiffs within Sierra Leone. This particular issue is now academic as those conditions imposed in December, 2014 were removed by this Court last year.

16. The next provision is section 20(1) of the Constitution. It states:

"20(1) No person shall be subject to any form of torture or any punishment or other treatment which is inhuman or degrading. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with, or in contravention of this section to the extent that the law in question

authorizes the infliction of any kind of punishment which was lawful immediately before the entry into force of this Constitution."

17. The inhuman and degrading treatment complained of by the Plaintiffs, is the uncertainty of their fate, with the sword of Damocles hanging over their heads for what seems to them to be an eternity. Their continued detention for over a period of one year during the course of their trial, and until they were remanded on bail by me in 2014, constitutes in their perception degrading and inhuman treatment. That period of detention has been followed by a six year period of great anxiety during which they do not know what their individual fate will be.

18. Section 23(1) of the Constitution states:

"23(1) Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

19. I will add, for reasons which will become apparent later, subsection 23(4):

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved, or, has pleaded, guilty."

20. Section 124 of the Constitution states:

"124(1) The Supreme Court shall, save as otherwise provided in section 122 of this Constitution, have original jurisdiction, to the exclusion of all other Courts - (a) in all matters relating to the enforcement or interpretation of this Constitution.....;" paragraph (b) is not relevant for this discourse.

Section 127 states: *"127(1) A person who alleges that an enactment or anything contained in or done under the authority of that or any other enactment is inconsistent with, or, is in contravention of a provision of this Constitution, may at any time bring an action in the Supreme Court for a declaration to that effect. (2) The Supreme Court shall, for the purpose of a declaration under subsection (1), make such orders and give such directions as it may consider appropriate for giving effect to, or, enabling effect to be given to, the declaration so made. (3) Any person to whom an order or direction is addressed under subsection (1) by the Supreme Court shall duly obey and carry out the terms of the order or direction. (4) Failure to obey or to carry out the terms of an order or direction made or given under subsection (1) shall constitute a crime under this Constitution."*

21. The next statutory provision cited by the Plaintiffs is section 74 of the Courts' Act, 1965. It states:

"S.74 Subject to the provisions of the Constitution and any other enactment, the common law, the doctrines of equity, and the statutes of general application in force in England on the 1st day of January, 1880 shall be in force in Sierra Leone."

22. The Plaintiffs have cited the Criminal Procedure Act, 1965 as amended, but they have not cited any particular provision.

PAUL, J,s POSITION VIS-À-VIS THE CONSTITUTION

23. My Lords, My Ladies, I think it would be helpful if I were to proceed first, to consider the position of PAUL, J, before going on to consider the consequences of his failure to return to Sierra Leone.

24. Mr Mansebo has rightly referred to section 135(3) of the Constitution as laying down the prerequisites for anyone aspiring to become a Judge in Sierra Leone. It states:

"135(3) A person shall not be qualified for appointment as a Judge of the Superior Court of Judicature, unless he is entitled to practice as Counsel in a Court having unlimited jurisdiction in civil and criminal matters in Sierra Leone or any other country having a system of law analogous to that of Sierra Leone, and approved by the Judicial and Legal Service Commission, and has been entitled as such Counsel in the case of appointment to - (a), (b), (c) the High Court of Justice, for not less than ten years."

25. Your Lordships and Your Ladyships will permit ^{me} to say that as I was a member of the Judicial and Legal Service Commission at the time of his appointment, I can confirm that PAUL, J met this requirement on his appointment. I am also aware that he was a High Court Judge in The Gambia, where I sit as a Justice of the Supreme Court. This part of Mr Mantsebo's contention is quite correct. A Judge's nationality is not an issue when it comes to the requisite qualification to hold that office. But Mr Mantsebo has gone further to argue that PAUL, J was appointed pursuant to the said section 135(3). And in furtherance of this contention, he has gone on to argue that since PAUL, J has not been removed from office pursuant to any of the provisions of section 137, he is therefore, still a Judge in Sierra Leone.

26. But is there evidence that PAUL, J was appointed to the office of a Judge pursuant to section 135(3)? There appears to be none. When a Judge is

appointed by the President pursuant to section 135, his appointment has to be approved by Parliament. But there is another category of Judges who could be appointed pursuant to another Constitutional provision, without Parliamentary approval.

Section 136(2) states: "Where the office of a Judge of the High Court is vacant, or, for any reason, a Judge thereof is unable to perform the functions of his office, or, if the Chief Justice advises the President that the state of business in the High Court of Justice so requires, the President may, acting in accordance with the advice of the Judicial and Legal Service Commission, appoint a person who has held office as, or, a person qualified for appointment as, a judge of the Superior Court of Judicature to act as a Judge of the High Court of Justice, notwithstanding the fact that he has already attained the retiring age prescribed by section 137. (2) Any person appointed under the provisions of sub-section (3) of this section to act as a Judge of the High Court of Justice, shall continue to act for the period of his appointment or, if no such period is specified, until his appointment is revoked by the President, acting in accordance with the advice of the Judicial and Legal Service Commission."

Similar provisions exist in subsections (4) and (5) in the case of temporary appointments to the Court of Appeal, and to the Supreme Court, respectively.

27. The careful observer will have noted that there is a clear distinction between the words in section 135(2), to wit: ".....shall be appointed by the President.....subject to the approval of Parliament....."; and those in section 136(2), to wit: ".....the President may,.....appointto act as a judge....." Justice Roberts, a Member of this Court, and myself were initially appointed by the President on 1st March, 2007 pursuant to section 136(4); no period of appointment was stated in the Warrant; nor was our appointment revoked at any time. So, we continued in office until we were again appointed by the President in January, 2009 with the approval of Parliament this time round, pursuant to section 135(2).

28. It is in the sense contemplated in section 136(2) & (3) that the Plaintiffs contend that PAUL, J was a Judge on ~~the~~ contract, to use common parlance. That is, that he was appointed to "act" as a Judge. There is no evidence before us that his appointment was for an unlimited duration; nor is there evidence before us that it was revoked by the President. But as he has not been in Sierra Leone since July, 2014, we can safely conclude that he is no

longer a Judge in Sierra Leone. In paragraph 13 of the Respondent's statement of case, Mr Mantsebo contends as follows: "*The fact that he is a foreign national, employed on the basis of a contract that presumably addresses the issue of his conditions of service, and which contract has not been renewed (the plaintiffs' averment to this effect is noted but not conceded) has no legal effect on the propriety of his appointment.*" With the greatest respect to Counsel, it does have, as I have explained above; not on the propriety of the appointment, but on its duration.

COMPARISON WITH GAMBIAN CONSTITUTION

29. To illustrate the point, I shall refer here to a Gambian Case Supreme Court Crim Appeal 11/2014 - JOSEPH WOWO v THE STATE, Judgment delivered by BROWNE-MARKE, JSC on 23 November, 2017. The facts there were that Justice Wowo, whilst acting purportedly, (as the argument went), as Chief Justice, was audio-taped at the residence of the then Attorney-General and Minister of Justice (AG&MJ), and in his presence, making arrangements with two opposing parties as to how an appeal pending in the Gambia Court of Appeal involving both parties, could be settled without a formal hearing. He insinuated that as he had the duty of assigning a panel to hear the appeal, the outcome was more or less predictable. The AG&MJ had been Counsel for one of the parties at the trial of the action. Justice Wowo could be heard distinctly urging the winning side to accept a certain amount of money as settlement of that party's claim, without the necessity of going through with the appeal, since, as I expressed it at paragraph 30 of my judgment, '*he was in a position to predict the outcome of that appeal...*' He did not, at the trial, dispute these facts. His defence to that particular accusation was essentially that he would not be the final arbiter in the dispute. He and the AG&MJ were convicted of various corruption offences under the Gambia Criminal Code, including, Abuse of Office. He appealed unsuccessfully to both the Court of Appeal, and the Supreme Court.
30. At paragraphs 9 - 13 of the Judgment of the Court, I had this to say:
"Having said this, I will now proceed to deal with the legal issues in dispute in this appeal. The first is whether the Trial Judge, NKEA, J had jurisdiction to try the Appellant because, as argued by Counsel, NKEA, J's contract for continuance in office as a Judge had been renewed by the Appellant; and if Appellant was in the result convicted of an offence of falsely assuming the office of Acting Chief Justice, it followed, impliedly, that nothing lawful would flow from any of his actions or directions.

I shall start by referring to the provision dealing with the appointment of Judges, Section 138 of the Constitution (Gambian). Section 138 reads as follows:

"S138(1) The Chief Justice shall be appointed by the President after consultation with the Judicial Service Commission. (2) All other Judges of the superior Courts, except the Judges of the Special Criminal Court, shall be appointed by the President on the recommendation of the Judicial Service Commission. (3) Appointments of Judges of the superior courts shall be by warrant signed by the President and sealed with Public Seal. (4) Before assuming the functions of his or her office, a judge of the superior courts shall take the prescribed oaths."

Section 134 established the Special Criminal Court in subsection (1) thereof. Subsection (2) states that "a person shall not be appointed to be a Chairman of the Court unless he or she is qualified to be appointed a judge of the High Court. (3) The members of the court shall be appointed by the President in consultation with the Judicial Service Commission."

There was no evidence before the trial Court that NKEA, J had been appointed by any other method or process than that provided for in Section 138, or, for that matter, section 134. The argument proffered by the Appellant in all the Courts was, and is, that he renewed the contract of NKEA, J. Whether the Appellant did so in fact, or, purported to do, is in my respectful view, immaterial. The fact remains that NKEA, J was a duly a properly appointed Judge of the High Court when the Appellant's trial commenced.

Now, as to this question of whether NKEA, J was competent, not only as Judge of the High Court, but also to preside at the trial, I shall first refer to Section 141(1) of the Constitution which states:

S141(1) "No office of judge shall be abolished while there is a substantive holder thereof."

There was no evidence before the trial Court that NKEA, J was not the substantive holder of the office of Judge. His office could not therefore be abolished....."

31. There is no provision in the Constitution of the Gambia, 1997 analogous to our section 136. It follows that even where the contractual arrangements between that country's Judicial Service Commission and a foreign Judge are settled, in strict terms of the Gambian Constitution, the holder of the office will still be considered a Judge unless he is removed in the manner set out in

the said Constitution. On a practical level, the foreign holder of the office of a Judge in the Gambia, will merely cease to function as such, if suitable arrangements are not made for a proper and adequate remuneration package by the Judicial Service Commission which is taxed by the Constitution to perform that duty.

PAUL, J's CONTRACT

32. Neither side in this action has provided the Court with a copy of the so-called contract given to PAUL, J. However, we do not think it necessary as his mere absence for a period exceeding 6 years is sufficient proof that he is no longer acting as a Judge in Sierra Leone as I have pointed out in paragraph 23 supra.

FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL WITHIN A REASONABLE TIME

33. I shall now turn my attention to the fair hearing and reasonable time provision in section 23(1) of the Constitution. Criminal Trials are conducted in accordance with provisions of the Criminal Procedure Act, 1965, hereafter CPA, 1965, as amended. Where the trial is in respect of corruption offences, the provisions relating to evidence and some elements of procedure contained in the Anti-Corruption Act, 2008, hereafter ACA, 2008, as amended, apply as well. It will be useful to discuss when a criminal trial begins, and when it ends.

34. The trial conducted by PAUL, J was by Judge alone in accordance with the provisions of section 144(2) CPA, 1965. Section 133 stipulates that the trial begins with arraignment. For trials by Judge and jury, it ends with the delivery of verdicts as stipulated in section 203 CPA, 1965. For trials with Assessors, it ends as stipulated in section 205. No specific provision is made for trials by Judge alone, but good sense and best practice requires that it ends in much the same way as provided for jury trials in section 203: i.e. the judge reads out his judgment; where there is a finding of guilt, he proceeds to impose the appropriate sentence; and where the finding is not guilty, he proceeds to acquit and discharge the accused person. In short, the trial does not end merely with the submission of written addresses, and/or, with the oral delivery of addresses by Counsel. Judgment has to be delivered by the presiding judge. In the absence of such a judgment, or, of the entry of a nolle prosequi by the Attorney-General & Minister of Justice, pursuant to section 44 CPA, 1965, or, of the DPP, pursuant to section 66 of the

Constitution, an accused person cannot plead *autrefois* convict or, *autrefois* acquit, if he is faced on a subsequent occasion with the same charges. The state of uncertainty continues until judgment is delivered. This uncertainty is one of the Plaintiffs' complaints, and is one they describe as constituting inhuman or degrading treatment.

35. This Court has been called upon to determine, what in "*interest*" claims are described as '*legitimate expectations*'. What were the legitimate expectations of all of the Plaintiffs herein, when put on trial? The sensible answer to such a query is that they expected an outcome: a verdict of guilty, which would necessitate each or either of them appealing against their respective convictions to the Court of Appeal; or, an acquittal which would enable them to continue with their lives. As the 1st Plaintiff has deposed in his affidavit filed on behalf of all of them, they have ~~been~~ all been denied the ability and the opportunity to earn a living wage, and to support their respective families. No employer is prepared to take them on without a declaration from the High Court that they have been absolved of guilt. Paragraph (xiii) of the Plaintiffs' statement of case, speaks to this. The concept of '*legitimate expectation*' could be applied to the adjudicating tribunal as it has a duty to follow fair procedures. As I have stated above, a fair procedure in a criminal trial would inevitably result in a conviction, or, in an acquittal; but certainly, not in a stalemate. A fair hearing involves principally, apprising the person charged of the charges he will be facing; affording him the opportunity at the trial to challenge the testimony of witnesses for the prosecution, and to call witnesses on his own behalf as well; allowing him access to Counsel of his choice; and, I must add, a *legitimate expectation* that after the calling of evidence has closed on both sides, a final determination of his guilt or innocence would follow.
36. Save for the complaint that all the Plaintiffs were denied bail during the course of the trial, there has been none that the requirements of a criminal trial were not met. But the *legitimate expectation* remained that judgment would be delivered. What should follow?
37. As I adverted to above, the last time such a situation arose was in 1988 when JOHNSON, J passed away without giving judgment in the unreported case of THE STATE v ABU KUNTA JAWARA & 11 OTHERS, HC Crim Case 11/1989. The trial was started de novo before N D ALHADI, J, and proceeded to conclusion. If PAUL, J had still been in the country, this action would have been unnecessary. The Hon Chief Justice would in all probability call upon him to deliver judgment, and there the matter would have ended.

As I have alluded to above, the prosecutor in this case, the Anti-Corruption Commission, cannot be faulted for the failure to bring closure in this matter. It cannot be seen, as a party to the litigation, to be involved in ensuring that PAUL, J's services are re-engaged. There has been no complaint that the prosecution has been unfair in way or manner. There has been no suggestion of prosecutorial impropriety.

CASE LAW

38. The cases cited by Plaintiffs' Counsel in paragraph C of the Plaintiffs' Statement of Case, really go to the issue of prosecutorial fairness, rather than to fairness of the proceedings in Court. Save for perhaps *BUCHHOLZ v FEDERAL REPUBLIC OF GERMANY*, Appl No. 7759/77 ECHR, 6th May, 1981, where the European Court held at paragraph 50, that in criminal cases, the Court would have regard to the conduct of the parties, i.e. the competent authority in the State concerned and the Complainant on the other side, in order to determine the reasonableness or otherwise of a lengthy trial. It also held that only delays attributable to the State will render the length of time a trial has taken to be unreasonable. This was a labour dispute between the claimant and the then Federal Republic of Germany. The other cases cited do not really bear on the issue in dispute here, which is the likelihood or possibility of judgment being delivered by PAUL, J. And I am not persuaded by the arguments and the case law cited in the Plaintiffs' statement of case, that the Plaintiffs have been subjected to degrading and inhuman conduct in the manner contemplated in section 20(1) of the Constitution. PAUL, J had a discretion whether to grant or, to refuse bail. The sums of money involved in the charges in the Indictment were quite substantial. A few months after the close of the trial in July, 2014, the Plaintiffs were released on bail by me, though on very stringent terms. Some of those terms were removed when this Court became seised of the matter two years ago.

39. It would be fairer in my view to examine, through decided cases, the three constituent parts of section 23(1) of the Constitution: a) a fair hearing; b) within a reasonable time; c) by an independent and impartial court established by Law.

40. In this respect, the *MILLS v H M ADVOCATE* (No. 2) [2002] UKPC D, 2; [2004] 1 A C, 441 is instructive. There, the Privy Council advised HM The Queen to dismiss the claimant's appeal. The legislation involved was article 6 of the European Convention on Human Rights, which is in the same terms as

our section 23(1). Compliance with one aspect of our Section 23(1) does not necessarily imply compliance with the others. In that case, both LORD HOPE and LORD STEYN agreed that each component of the provision should stand by itself. It is no answer to a charge of unreasonable delay, to argue that the trial was fair in the other two respects. There, also, LORD HOPE discussed the remedy available to a claimant, and whether it was right and proper to take into consideration, competing and legitimate interests of the State, issues which had arisen in *DARMALINGUM v THE STATE* [2000] 1 WLR, 2303 and in *FLOWERS v R* [2000] 1 WLR 2396.

41. In *DARMALINGUM*, the Claimant, Darmalingum's trial had lasted for a period extending over 15 years. The Board held that section 10(1) of the Constitution of Mauritius, which is the equivalent of article 6(1) of the European Convention, contained three separate guarantees. It also held that, while the reasonable time guarantee may be applicable where a defendant has been prejudiced by inordinate delay, its reach is much wider as it may be applicable in any case where the delay has been inordinate and oppressive, and that a breach of the guarantee (fair hearing within a reasonable time) cannot be justified even if the defendant's guilt is manifest.
42. In *FLOWERS*, a differently constituted Board held, with reference to the right given by the equivalent provision in section 20(1) of the Constitution of Jamaica, that one of the factors to be taken into account was prejudice to the defendant and that the strength of the case against the appellant was such that the possibility of prejudice to him due to the delay could be substantially discounted: [2000] 1 WLR 2396, 2411H-2413A. At p 2414H-2415A the Board said that the right given by section 20(1) of the (Jamaican) Constitution must be balanced against the public interest in the attainment of justice and that the right to a trial within a reasonable time is not a separate guarantee but rather, with the other elements of section 20(1), forms part of one embracing form of protection afforded to the individual. There, a murder had followed on the footsteps of an aggravated Robbery.
43. However, in *MILLS v HM ADVOCATE* [2004] cited above at paragraph 40, the Privy Council refused to set aside the conviction on the basis that there had been unreasonable delay in proceeding with Mills' appeals. It was held that there was no precedent in domestic law for the setting aside of a conviction which had been upheld on appeal as a sound conviction on the ground that there was an unreasonable delay between the date of the conviction and the hearing of the appeal.
44. LORD HOPE held towards the end of his Judgment that: "*The circumstances of the present case provide a clear example of a situation where the setting aside of the conviction would be regarded in domestic law as both unjustified and unnecessary. It would be regarded as unjustified because the appellant's*

appeal against his conviction was, as the High Court of Justiciary said in this case, at p 1363L, para 15, wholly without merit. No grounds exist for regarding the conviction itself as unsound, nor is there any question of its having been affected in any way by the delay. And the setting aside of the conviction would be regarded as unnecessary, because the effects of the delay can be recognized perfectly well by a reduction in the appellant's sentence. Here again we are on familiar ground, as delay in bringing the accused to justice is widely recognised as a mitigating factor that can be taken into account when he is being sentenced".

45. The Privy Council case of *PROCURATOR FISCAL OF LINLINTHGROW v WATSON & BURROWS; HM ADVOCATE v JK* [2004] 1 AC 379, is another case in point. LORD HOPE was also a Member of that Court.
46. In the Judicial Committee's judgment, at paragraph 52, LORD BINGHAM set out what he considered to be the general view of what constitutes reasonable time. He said: *"In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention (the European Convention on Human Rights) is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow....."*
47. These two consequences involve the Court looking into the trial itself in detail; and into the State/Prosecutor's role in the delay. As I have explained above, the delay in this case has not been caused directly by the Defendant. It has arisen out of the fact that the trial Judge is no longer available to deliver judgment. But the State/Prosecutor could have taken steps during the six years which have elapsed since PAUL, J left these shores to bring finality to the prosecution. There were other options, as there were in the ABU KUNTA JAWARA Case cited above.
48. The reasoning in the English cases cited above, in my view provide pointers as to how this Court should treat the "fair hearing" and "within a reasonable time" provisions in our Constitution.
49. As to what action this Court should take, I will refer to the decision of the African Court of Human and Peoples Rights in *NGANYI & ORS. V TANZANIA* (006/2013) [2018] AFCHPR 36; (1 JANUARY 2013).
50. There, the Court held that:

"Fair trial and presumption of innocence in Section 69(1) of the (Tanzanian) Constitution provides that a person charged with a criminal offence has the right to a fair trial before an independent and impartial

court. This right is absolute as in terms of section 86(3)(e) this right is specifically included as a right that may not be limited by law and it is also provided that no person may limit this right.

51. In the case cited, the Applicants had been wrongfully and forcefully removed from Mozambique to Tanzania. For several years, the prosecution could not proceed for one reason or the other, and the Applicants were remanded in custody during this period. No end was in sight as far their trial was concerned. Thus, they took the matter to the African Court. At paragraph 155 of its judgment, the Court held:

"On the basis of the above, this Court concludes that the time was unreasonable not because of the complexity of the case, nor the action of the Applicants, but more so because of the lack of due diligence on the part of the national judicial authorities. The Court cannot condone the Respondent's action of putting the case on ice for a period of almost two years on the ground that the authorities were still investigating the matter or because they were waiting for the extradition of co-accused from another foreign jurisdiction. The Court thus finds the Respondent in breach of Article 7 (1)(d) of the African Charter, which guarantees the right to be tried within a reasonable time.

52. I am of the view that ~~the~~ part of the Plaintiffs' contention here is that they have been subjected to an abuse of process, in that judgment is outstanding in their matter, and that there is no likelihood that it would be delivered. My Lady, The Hon Justice Thompson has dealt in detail with this aspect of abuse of process in a separate judgment which I have had the opportunity of reading in draft. My preference is to confine the parameters of this case to the special features it discloses: for instance, the unlikelihood of judgment being delivered by PAUL, J, or, by any other Judge in Sierra Leone, based on the absence of the Court file, and the continued absence from Sierra Leone of PAUL, J. The challenge is not so much, in my view, to a fair hearing, but rather, to unreasonable delay in having the matter resolved one way or the other. In paragraph 26 supra, I have set out the Constitutional provision which enables the President, acting on the recommendation of the Judicial and Legal Service Commission, to appoint a duly qualified person to act as a Judge of the High Court. The Defendant in this action has not contended that such a course of action has been embarked upon. It is not for the Plaintiffs to show that all reasonable steps have been taken to ensure that their trial is brought to a speedy conclusion. The CPA, 1965 sets out the course a criminal trial should take. The trial, the subject matter of the

Plaintiffs' case, has not run its full course, and on the evidence disclosed in the Plaintiffs' affidavit is unlikely to do so in the near future.

53. This Court would not wish to open the flood-gates by coming to the conclusion it has reached. This case has been decided on its particular facts. The primary consideration has been, and will remain, the unavailability of the trial Judge to deliver judgment, combined with the inability of the prosecution to proceed due to the absence of the Court file and all its contents. The same consideration will not necessarily apply in other cases where there has been inordinate delay in the delivery of judgment in criminal cases.

54. What then should be the remedy? It seems to this Court that until the case has been decided fully on its merits, this Court cannot conclude that the accused persons are not guilty of the offences with which each of them has been charged. The fairest course of action will be to stay further proceedings, discharge the Plaintiffs in the ongoing trial, and order that there shall be no retrial without an order of this Court.

ORDERS

55. THIS HONOURABLE COURT ORDERS:

(1) That the criminal prosecution pending in the High Court , intituled:
THE STATE

v

1. ABRAHAM LAVALY
2. INAH JAMES
3. ADETUNJI DESMOND COLE
4. BAKIE MINAH
5. EVERTON FAULKNER
6. ABU BAKARR KAMARA
7. ISMAIL DAINKEH
8. ISATA OSAIO KAMARA
9. SHARKA KPANABUM
10. ABDUL MUTALID KAMARA

BE STAYED.

(2) The Plaintiffs, are therefore discharged on the charges in the Indictment dated 2nd July, 2013. No further criminal proceedings shall be taken, nor shall any further prosecution be instituted against them without an ORDER OF THIS COURT.

- (3) All recognisances entered into in the High Court by, or on behalf of each Plaintiff herein, are hereby discharged. The sureties who put up bail for each Plaintiff at the trial are discharged from their respective recognisances. Any and all title deeds submitted as part of such recognisances should be returned forthwith to the sureties. Any and all other documents, including travelling documents, deposited with the Master and Registrar as security, are to be returned to their respective owners, or, to the persons who deposited them.
- (4) The respective bank accounts 'frozen' by Order of the High Court and listed in paragraph 3(2)(vii) of this Judgment are by virtue of this Judgment, 'unfrozen' immediately, and the holders thereof shall be given free access to the same by the respective banking authorities.
- (5) No Order as to Costs.



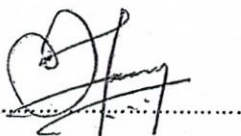
THE HON MR JUSTICE N C BROWNE-MARKE, JSC



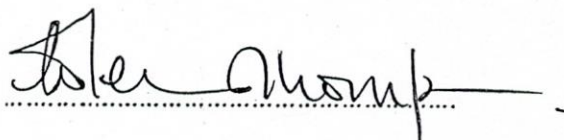
THE HON MR JUSTICE E E ROBERTS, JSC



THE HON MS JUSTICE V M SOLOMON, JSC



THE HON MR JUSTICE A S SESAY, JSC



THE HON MS JUSTICE G THOMPSON, JSC