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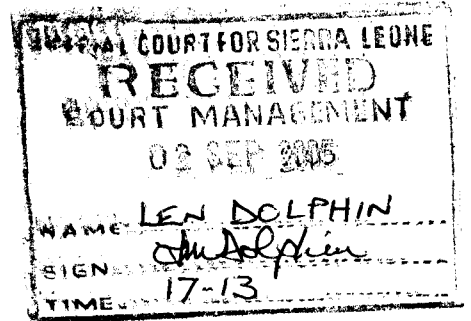
**SPECIAL COURT FOR SIERRA LEONE
FOR THE APPEALS CHAMBER**

CASE NO. SCSL – 2004 –16-T

**Before: Justice A. Raja N. Fernando, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Geoffrey Robertson, QC
Justice Renate Winter**

Registrar: Robin Vincent

Date filed: September 2, 2005



THE PROSECUTOR

Against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

AND

SANTIGNE BORBOR KANU

BRIMA-KAMARA DEFENCE NOTICE OF APPEAL

**First Respondent
The Registrar**

**Defense Counsel for Brima:
Kojo Graham
Glenna Thompson**

**Second Respondent
The Principal Defender**

**Defense Counsel for Kamara
Andrew K. Daniels
Mohammed Pa-Momo Fofanah**

I. Underlying Decision

1. On June 9, 2005, honourable Trial Chamber II, delivered a written Majority Decision on the “Extremely Urgent Confidential Joint Motion for the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara and Decision on Cross Motion by Deputy Principal Defender to Trial Chamber II, for Clarification of its Oral Order of 12 May, 2005 (**“Majority Decision”**).
2. On July 11, 2005 the Honourable Justice Julia Sebutinde delivered a written dissenting opinion to the Majority Decision (**“Dissenting Opinion”**). On July 25, 2005 a Corrigendum to the Dissenting Opinion was filed.

II. Summary of Proceedings Relating to Appealed Decision

3. The Appealed Decision was in respect of an application filed on May 24, 2004 by accused persons Brima and Kamara for the re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel pursuant to Article 17 (4) (C) and 17 (4) (D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the inherent jurisdiction of the Court (**“Original Motion”**).
4. The Original Motion named the Registrar and the Acting Principal Defender as First and Second Respondents respectively.
5. On May 30, 2005 the Defense Office filed a Response to the Original Motion which also included a Cross-Motion by the Principal Defender to Trial Chamber II for clarification of its Oral Order of May 12, 2005 and its subsequent decision dated May 20, 2005.

6. On May 31, 2005 and June 6, 2005 the Registrar filed a Reply to the Original Motion and Cross Motion respectively.
7. On June 3, the Defense for Brima and Kamara files its Joint Reply to the Registrar's Reply filed on June 6, 2005.
8. On June 9, 2005 the Trial Chamber delivered its Majority Decision.
9. The Majority Decision dismissed the Original Motion as "frivolous and vexatious" and refused the following reliefs prayed for by the Defense for Brima and Kamara.
 - (a) An order to the Registrar to ensure that Mr. Metzger and Mr. Harris are re-assigned as Counsel for Accused persons Brima and Kamara.
 - (b) An order to the Acting Principal Defender to immediately enter into a legal services contract with Mr. Metzger and Mr. Harris.
 - (c) That the Justices that reconfirmed the order not to re-appoint as indicated in the letter from the registrar's legal adviser recuse themselves from hearing the Original Motion.
 - (d) An order to declare as null and void the decision of the Registrar not to reassign counsel as the decision was made without legal or just cause.

- (e) Public and open court hearing of Original Motion and Cross Motion.

10. Brima-Kamara Defense appeals the decision of the Trial Chamber by which it dismissed the application and concomitant reliefs for the following reasons.

III Grounds of Appeal

1. First Ground of Appeal

11. Error in law and/or fact due to the Trial Chamber's erroneous interpretation, of the statutory rights of the accused persons as provided under Article 17 (4) (c) and (d) of the Statute of the Special Court. The Defense submits that the appealed decision wrongfully denied the rights of the Accused persons to have counsel of their own "choosing" as provided for in Article 17 (4) (d) of the Special Court Statute.

2. Second Ground of Appeal

12. Error in law and / or fact due to the appealed decision's denial of the Defense request for an Order to the Acting Principal Defender to enter into a legal services contract with Messrs. Metzger and Harris on the grounds the Trial Chamber has no power to interfere with the law relating to privity of contract.

3. Third Ground of Appeal

13. Error in law and / or fact due to the ruling of the Trial Chamber that the Defense request for "an open and public hearing" is an application for further relief in a Reply and that "there has been no submission to support or explain this application for a public hearing".

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4. Fourth Ground of Appeal

14. Error in law and / or fact due to the Trial Chamber's erroneous legal interpretation of Rule 45 (E) of the Rules of Procedures and Evidence of the Special Court for Sierra Leone (Rules) to prohibit re-appointment of former Lead Counsel. The ruling in this respect is entirely misplaced because the Original Motion was not a Rule 45 (E) application.

5. Fifth Ground of Appeal

15. Error in law and / or fact due to the Trial Chamber's treatment of the Original Motion as an application for review of its earlier decision on Motion for withdrawal by Messrs. Metzger and Harris.

The Defense is of the opinion that the Trial Chamber erred in law by not considering the original Motion as separate and distinct from the Motion for Withdrawal of Counsel.

6. Sixth Ground of Appeal

16. Error in law and / or fact due the Trial Chamber's decision that "Counsel are not eligible to be reappointed since they are no longer on the list of qualified Counsel required to be kept under the Rule 45 (C).

7. Seventh Ground of Appeal

17. The Trial Chamber erred in law and/or fact due its ruling that since "there was no determination of the issue of re-appointment of counsel, there are no grounds for submitting that any Judge recuse him/herself."

IV RELIEF SOUGHT

For the foregoing reasons, the Defense respectfully prays the honourable Appeal Chamber to:

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- (i) Find the Appeal admissible
 - (ii) Declaration that refusal of the Registrar and the Trial Chamber to re-appoint Messrs. Metzger and Harris as Lead Counsel amounted to a violation of the Statutory rights of the Accused as provided in Article 17 (4) (d) of the Special Court Statute.
 - (iii) Declaration that the Registrar's decision against the re-assignment of Messrs. Metzger and Harris and also the removal of their names from the list of eligible Counsel is ultra vires and null and void
 - (iv) An order for the reinstatement of Kevin Metzger and Wilbert Harris on the list of qualified Counsel.
 - (v) A declaration that the Trial Chamber has both the inherent jurisdiction and the power to review the Registrar's decision not to reassign Messrs. Metzger and Harris as assigned Counsel as well as the Registrar's decision to remove their names from the list of qualified Counsel.
 - (vi) A declaration that Justices Doherty and Lussick, having advised the Registrar against the re-appointment of Messrs. Metzger and Harris should properly have recused themselves from hearing the Original Motion on their re-appointment.

Respectfully submitted

On September 2, 2005

14562

for J. Naby

Kojo Graham

Brima Defence

for J. Naby

Andrew K. Daniels

Kamara Defence

**SPECIAL COURT FOR SIERRA LEONE
FOR THE APPEALS CHAMBER**

145-63

CASE NO. SCSL – 2004 – 16 -T

**Before: Justice A. Raja N. Fernando, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Geoffrey Robertson, QC
Justice Renate Winter**

Registrar: Robin Vincent

Date filed: September 2, 2005

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

AND

SANTIGNE BORBOR KANU

**BRIMA-KAMARA DEFENSE INDEX OF RECORD TO APPEAL MOTION
OF SEPTEMBER 2, 2005 PURSUANT TO ARTICLE 16 OF THE PRACTICE
DIRECTION FOR CERTAIN APPEALS BEFORE THE SPECIAL COURT**

**First Respondent:
The Registrar**

**Defense Counsel for Brima:
Kojo Graham
Glenna Thompson**

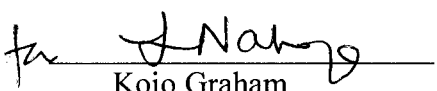
**Second Respondent:
Principal Defender**

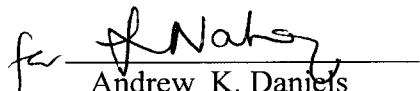
**Defense Counsel for Kamara
Andrew K. Daniels
Mohammed Pa-Momo Fofanah**

1. Based on paragraph 15 of the Practice Direction for Certain Appeals before the Special Court of September 30, 2004, the Defense herewith files an index of record in addition to the “Brima-Kamara Defense Appeal Motion Pursuant to Article 11 of the Practice Direction for Certain Appeals Before the Special Court,” (“Appeal Motion”) of September 2, 2005.
2. Paragraph 15 of the aforementioned Practices Direction indicates that the record on appeal should consist of: “(a) All documents in the proceedings before the Judge or Trial Chamber necessary to the decision in the appeal; (b) the decision of the judge or the Trial Chamber”.
3. Paragraph 16 of this Practice Direction indicates that the party filing the appeal shall indicate in an index which document it deems necessary for the Appeals Chamber to decide on the appeal.
4. Pursuant to these reasons the Brima-Kamara Defense submits the following documents to be part of the record on appeal:
 - Original Motion filed by Brima-Kamara Defense on May 24, 2005 together with the corrigendum thereto filed on May 25, **2005 (Attached to this index as exhibit 1)**.
 - Reply filed by Registrar as First Respondent to the Original Motion. **(Attached to this index as exhibit 2)**.
 - Responses filed by the Acting Principal Defender as Second Respondent to the Original Motion **(Attached to this index as exhibit 3)**.
 - Joint Defense Response to First Respondent’s reply to Original Motion **(Attached to this index as exhibit 4)**.

- Trial Chamber Majority Decision on the Original Motion (**Attached to this index as exhibit 5**).
 - Dissenting Opinion of Honourable Justice Julia Sebutinde in respect of the Original Motion (**Attached to this index as exhibit 6**).
 - Brima-Karama Defense Application for Leave to Appeal Majority Decision of Trial Chamber on Original Motion. (**Attached to this index as exhibit 7**).
 - First Respondent's Response to Brima-Kamara Defense Application for Leave to Appeal Majority Decision of the Trial Chamber. (**Attached to this index as exhibit 8**).
 - Principal Defender's response to the Brima-Kamara Defense Application for Leave to Appeal Majority Decision of the Trial Chamber (**Attached to this index as exhibit 9**).
 - Decision on Brima-Kamara Application for Leave to Appeal from Decision on the Re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel (**Attached to this index as exhibit 10**).
5. The Defense believes the afore-itemized documents to be necessary for the Appeals Chamber to decide on this matter.

Respectfully submitted,
On 2 September, 2005


Kojo Graham
For: Brima Defense


Andrew K. Daniels
For: Kamara Defense

**SPECIAL COURT FOR SIERRA LEONE
FOR THE APPEALS CHAMBER**

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CASE NO. SCSL – 2004 –16-T

**Before: Justice A. Raja N. Fernando, Presiding
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Geoffrey Robertson, QC
Justice Renate Winter**

Registrar: Robin Vincent

Date filed: September 2, 2005

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

AND

SANTIGNE BORBOR KANU

**BRIMA-KAMARA DEFENSE APPEAL MOTION PURSUANT TO ARTICLE
II OF THE PRACTICE DIRECTION FOR CERTAIN APPEALS BEFORE
THE SPECIAL COURT.**

**First Respondent:
The Registrar**

**Defense Counsel for Brima:
Kojo Graham
Glenna Thompson**

**Second Respondent:
The Principal Defender**

**Defense Counsel for Kamara
Andrew K. Daniels
Mohammed Pa-Momo Fofanah**

I. INTRODUCTION

1. The Appealed Decision was in respect of an application filed on May 24, 2004 by accused persons Brima and Kamara for the re-appointment of Kevin Metzger and Wilbert Harris as Lead Counsel pursuant to Article 17 (4) (C) and 17 (4) (D) of the Statute of the Special Court for Sierra Leone and Rule 54 of the Rules of Procedure and Evidence and the inherent jurisdiction of the Court. (“Original Motion”).
2. The Original Motion named the Registrar and the Acting Principal Defender as First and Second Respondents respectively.
3. On May 30, 2005 the Defense Office filed a Response to the Original Motion which also included a Cross-Motion by the Principal Defender to Trial Chamber II for clarification of its Oral Order of May 12, 2005 and its subsequent decision dated May 20, 2005.
4. On May 31, 2005 and June 6, 2005 the Registrar filed its Responses to the Original Motion and Cross Motion respectively.
5. On June 3, the Defense for Brima and Kamara filed its Joint Reply to the Registrar’s Response filed on June 6, 2005.
6. On June 9, 2005 the Trial Chamber delivered its Majority Decision.
7. The Majority Decision dismissed the Original Motion and denied the reliefs prayed for by the Defense for Brima and Kamara.

II. ADMISSIBILITY OF THE APPEAL

8. The legal admissibility requirements for the Appeal Motion is set out, inter alia, in Articles 10, 11 and 16 of the Practice Direction for Certain Appeals before the Special Court of September 30, 2004 (**“Practice Direction”**).
9. Article 10 of the Practice Direction for Certain Appeals before the Special Court (Practice Pire) provides that *“when Leave to Appeal is granted, the appellant shall, in accordance with the Rules, file and serve on the other parties a Notice of Appeal in accordance with the prescribed form. (.....)”*
10. Further Article 11 of the Practice Direction provides that *“the Appellant’s submissions based on the grounds of appeal shall be filed on the same day as the Notice of Appeal and may be filed as part of the same document or as a separate document, as long as it is clearly delineated which filing or part of the filing constitutes grounds and which filing or part of the filing constitutes submissions based on those grounds”*.
11. The Defense submits that pursuant to the aforementioned Practice Directions it will file the Notice of Appeal as a separate document but filed together on the same day as the substantive Appeal Motion.
12. Article 16 of the Practice Direction provides that *“the Appellant shall at the same time as filing a Notice of Appeal indicate to the Appeals Chamber and to the other party in an index the documents believed to be necessary for the decision in the Appeal”*. The Defense has satisfied this legal requirement by filing an Index of Record to the Appeal Motion.
13. Having satisfied the legal requirements of the Practice Direction the Defense humbly prays the honourable Appeal Chamber to admit this Appeal.

III. SUBSTANCE OF THE APPEAL**3.1 First Ground of Appeal: Error in law and / or fact due to denial of statutory rights of Accused to have counsel of his own “choosing” as provided for in Article 17 (4) (d) of the Special Court Statute.**

14. In the first place, the Defense submits that the decision of the Registrar to refuse the re-appointment of previous Lead Counsel amounts to a breach of the rights of the Accused persons to choose their own counsel. In matters relating to the assignment of Defense Counsel, the Accused has the right to be consulted regarding his wishes and the Registrar may only refuse those wishes on “reasonable and valid grounds”¹ including proven incompetence, misconduct or serious violations of Counsel’s respective Codes of Conduct or instances where Counsel’s name has been removed from the list of qualified Counsel pursuant to Article 13 of the Directive on Assignment of Counsel.
15. Further, the Accused persons expressed their unequivocal and unwavering preference for their previous Lead Counsel to other qualified Counsel. The Accused persons also affirmed their utmost confidence and trust in the abilities and competence of their former Lead Counsel.
16. The Defense submits that there is no legal basis for the Registrar as supported by the Majority Decision of the Trial Chamber for not reassigning former Lead Counsel.
17. It is the submission of the Defense that the Trial Chamber has no power or authority to interfere in the Statutory right of an Accused person to choose assigned Counsel; by giving directives that are contrary to that choice.

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¹ Jones & Powels, International Criminal Practice (Third Edition), page 588, para 8.5.62

3.2 Second Appeal Ground: Error in law and / or fact due to the refusal to order Acting Principal to enter into a legal services contract on the grounds of privity of contract.

18. The Defense submits that it is trite law that the Trial Chamber is vested with powers of inherent jurisdiction to allow a motion alleging a violation or denial of the Statutory right of Accused persons, when it serves the overriding interests of justice and the need for a fair trial, and also in order to prevent a breach or violation of those rights.
19. It is further submitted that both the ICTY and the ICTR have resorted to their inherent jurisdiction to exercise supervisory authority over Officers and Officials of these International Tribunals in order to ensure a fair and just trial and also to ensure the protection of the rights of Accused persons.
20. In the case, *Prosecutor V. Alex Tamba Brima et al*, Case No. SCSC – 04-16-PT,² Trial Chamber II did not seek refuge in the arms of the law of privity of Contract but boldly asserted its inherent jurisdiction and powers in order to judicially review the administrative actions of the Registrar and Acting Principal Defender even though both respondents had argued forcefully that their “questionable administrative acts” were not subject to Judicial Scrutiny. In the opinion of Trial Chamber II, the exercise of the courts inherent jurisdiction was necessary in order “to ensure the observance of the due process of the law, to prevent improper vexation or oppression”.
21. The Defense submits that the Trial Chamber erred in law when it stated that it has no powers to order the Acting Principal Defender to enter into a Legal Service, Contract with Messrs. Metzger and Harris in the light of overwhelming legal authority and precedent to the contrary.

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² Brima-Decision on Applicant’s Motion Against Denial by the Acting Principal Defender to Enter a Legal Services Contract for the Assignment of Counsel, 6 May 2004.

3.3 Third Appeal Ground: Error in law and / or fact due to the Trial Chambers denial of an order for a public hearing of the application

22. The Defense submits that the application for a public hearing was an assertion of the Statutory right of the Accused persons to a public hearing as guaranteed by Article 17 (2) of the Statute of the Special Court.
23. Additionally, the application for a public hearing was particularly made upon the discovery that the 1st Respondent had in fact de-listed both Messrs. Harris and Metzger from the eligible roll of Counsel for the Special Court.
24. The Defense submits that the right of the Accused persons to a fair and public Trial is guaranteed by Article 17 (C) and that the only statutory restriction upon that right is that of measures imposed by the Trial Chamber for the protection of victims and witnesses. The Defense subscribes to the dissenting opinion of Honourable Justice Julia Sebutinde, specifically paragraph 35, and avers that the right of an Accused to a public hearing is not limited to the conduct of the main Trial, but also to interlocutory application and motions filed by the parties to the trial.
25. Further Rule 73 (A) which empowers the Trial Chamber to rule on Motions based strictly on written submission also gives the Trial Chamber the power and discretion to hear motions in open court “ where they otherwise decide”. The defense is of the opinion that the Court’s discretionary power to hear a motion in open court under the Rule under reference is unrestrained at least to the extent that the Rule does not provide or specify the particular circumstances or conditions which may require the Court to hear a motion in open Court or not.

26. The Defense submits further that the Trial Chamber erred in law by giving an interpretation to Rule 73(A), the effect of which is to erode or whittle away the rights of Accused persons as guaranteed under Article 17 of the Statute. The interpretation to Rule 73 spawned forth by the decision of the Trial Chamber has the legal effect at rendering Rule 73 ultra vires Article 17 (2) of the Special Court Statute.

3.4 Fourth Ground of Appeal: Error in law and / or fact due to the an erroneous perception of the Original Motion as a Rule 45 (E) application

27. The Defense submits that the Original Motion was filed pursuant to Rule 54, Article 17 (4)(d) and the inherent jurisdiction of the Court.

28. However, the Trial Chamber in its decision and accompanying pronouncements appear to indicate that they perceived the original motion as a Rule 54 (E) motion to withdraw by Lead Counsel. The result of such an attitudinal position was to dismiss the original motion as “frivolous and vexatious”. The Trial Chamber then proceeded to deliver a decision which in all respects amounts to a review of the earlier Rule 45 (E) motion and the accompanying decision.

29. In conclusion, the Defense submits that the Trial Chamber erred in law and / or fact by erroneously considering the Original Motion as a Rule 45 (E) Motion to withdraw.

3.5 Fifth Ground of Appeal: Error in law and / or fact due to the Trial Chamber’s consideration of the Original Motion as an application for review of its earlier Rule 54 (E) decision.

30. The Defense submits that the two applications are separate and distinct from each other however, the Trial Chamber in its decision appears to have considered the Original Motion as a continuation or extension of the earlier Rule 45 (E) application to withdraw by Counsel. The Defense avers that the Original Motion was never intended to be a review or continuation of the earlier Rule 45 (E) application.
31. The Defense further submits that the Trial Chamber erred in law and / or fact by not considering the two applications as separate and distinct, more so when such a perception appears to have prevented the Trial Chamber from considering the merits of the Original Motion.
32. In conclusion, the Trial Chamber erred in law by not considering the Original Motion on its merits but rather dismissed same as frivolous and vexatious because it was disguised application for a review of its earlier decision on the Motion for Withdrawal.

3.6 Sixth Ground of Appeal: Error in law and / or fact due the Trial Chamber's decision that "Counsel are not eligible to be reappointed since they are no longer on the list of qualified Counsel required to be kept under the Rule 45 (C)"

33. The Defense submits that the statement of the Trial Chamber in this regard was erroneous because it did not take into account the significant fact that the said removal was effected by the Registrar at the time the Original Motion was pending judicial consideration by the Trial Chamber.
34. In conclusion, the Trial Chamber erred in not properly considering the legal effects of such a removal by questioning or properly evaluating the circumstances of such a removal.

3.7 Seventh Ground of Appeal: The Trial Chamber erred in law and/or fact due its ruling that since “ there was no determination of the issue of re-appointment of counsel, there are no grounds for submitting that any Judge recuse him/herself.”

35. The Defense restates that an expression of preference or otherwise for Counsel by Justices of the Trial Chamber, gives the impression however unintended of partiality, bias and unsolicited and unwarranted interference with the statutory rights of the Accused persons.

36. The Defense submits that it associates its appeal motion *mutatis mutandi* with the observation and opinions expressed by honourable Justice Julia Sebutinde in her dissenting opinion on the issues of bias and impartiality.

CONCLUSION

In support of this Appeal Motion the Defence canvasses *mutatis mutandi* the submissions and observations contained in the Dissenting Opinion of hon. Justice Julia Sebutinde.

IV RELIEF SOUGHT


For the foregoing reasons, the Defense respectfully prays the honourable Appeal Chamber to:

- (i) Find the Appeal admissible
- (ii) Make a Declaration that refusal of the Registrar and the Trial Chamber to re-appoint Messrs. Metzger and Harris as Lead Counsel amounted to a violation of the Statutory rights of the Accused as provided in Article 17 (4) (d) of the Special Court Statute.

- (iii) Make a Declaration that the Registrar's decision against the re-assignment of Messrs. Metzger and Harris and also the removal of their names from the list of eligible Counsel is ultra vires and null and void
- (iv) Order the reinstatement of Kevin Metzger and Wilbert Harris on the list of qualified Counsel.
- (v) Make a Declaration that the Trial Chamber has both the inherent jurisdiction and the power to review the Registrar's decision not to reassign Messrs. Metzger and Harris as assigned Counsel as well as the Registrar's decision to remove their names from the list of qualified Counsel.
- (vi) Make a Declaration that Justices Doherty and Lussick, having advised the Registrar against the re-appointment of Messrs. Metzger and Harris should properly have recused themselves from hearing the Original Motion on their re-appointment.
- (vii) Make a Declaration that the Trial Chamber erred in law by not considering the Original Motion on its merits as a separate and distinct application.

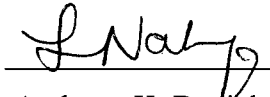
Respectfully submitted

On September 2, 2005

for 

Kojo Graham

CASE NO. SCSL – 2004 –16-T

for 

Andrew K. Daniels