

**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

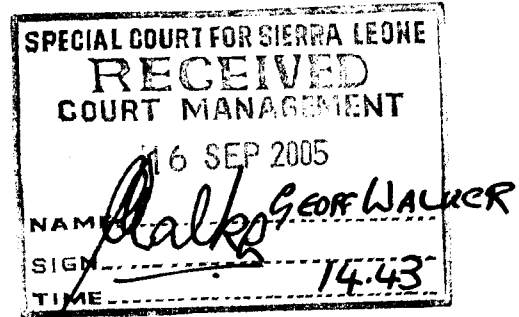
Date filed: 16 September 2005

THE PROSECUTOR

Against

**ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
AND**

SANTIGNE BORBOR KANU



**BRIMA-KAMARA JOINT DEFENSE REPLY TO 1ST RESPONDENT'S
RESPONSE TO THE INTERLOCUTORY APPEAL OF ALEX TAMBA
BRIMA AND BRIMA BAZZY KAMARA**

**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. FIRST GROUND OF APPEAL

1. In reply to paragraphs 14 – 22 of the 1st Respondent's Response to the Interlocutory Appeal of Alex Tamba Brima and Brima Bazzy Kamara (the "Response") the Defense submits that even though accused persons have no absolute right to Counsel of their own choosing, any restrictions or qualification that tends to erode or whittle away the sanctity of that right must be legally justified.
2. The Defense submits further that it is disingenuous for the 1st Respondent to deny the accused persons their choice of Counsel on grounds that such a denial will ensure an "effective defense" for the accused persons, more so when the accused persons have unequivocally expressed their own choice or preference for Counsel.

II. SECOND GROUND OF APPEAL

3. The Defense submits that by the reason and strength of the powers and authority derived from its inherent jurisdiction, the Trial Chamber can give orders which will have the legal effect of ensuring that a legal services contract is entered between the Principal Defender and the Lead Counsel.
4. Further, the legal service contract is more or less a standard form contract which leaves little room, if at all, for negotiation by Counsel, apart from the composition of the team and the allocation of billable work hours. The need for negotiation of the key elements of such a contract cannot therefore be an absolute bar to the Trial Chamber's exercises of its inherent jurisdiction to ensure that the trial is fair and just.

III. THIRD GROUND OF APPEAL

5. The Defense submits that its application for a public hearing was properly made because the principal purpose for the application was to ensure that the accused persons receive a fair trial.
6. Further, the Defense submits that the request for a public hearing was an exercise of the statutory rights of the accused to a fair and just public hearing under Article 17(2) of the Statute and therefore it was erroneous for the Trial Chamber to have dismissed same on the grounds it was an application for additional relief.

IV. FOURTH GROUND OF APPEAL

7. The Defense submits that the Original Motion was properly made, inter alia, pursuant to Rule 54 and the inherent jurisdiction of the Trial Chamber and that non-submission of arguments or pleadings in support of the application of Rule 54 is not fatal to the Original Motion because the inherent jurisdiction leg of the application provides substantive power for the Trial Chamber to grant the relief sought hereunder.

V. FIFTH GROUND OF APPEAL

8. The Defense restated its submission that the Trial Chamber erred in law and fact by not drawing a distinction between the accused person's motion and previous Lead Counsel's motion for withdrawal as being separate: the former was brought by the accused persons and the latter by Lead Counsel.

The Defense avers further that the Trial Chamber erred by perceiving the Original Motion as a review of its earlier decision on the motion for withdrawal. The Defense respectfully submits that for this reason the Trial Chamber did not consider the Original Motion on its merits thereby denying the accused persons a fair and just hearing on the relief prayed for in the Original Motion.

VI. SIXTH GROUND OF APPEAL

9. In response to paragraphs 53 to 57 of the Response the Defense submits that it is not within the power of the Registrar to de-list or remove names of Counsel from the list of assigned Counsel without just and reasonable cause.
10. The Defense submits further that the removal of the names of Counsel was effected *sub judice* and therefore represented an attempt to resolve through the back door a matter that was properly pending before the Trial Chamber. The delisting of Counsel was an improper and unjustified pre-emptive strike designed to present the Trial Chamber with a *fait accompli* in respect of the issue of the re-appointment of Counsel. In this regard the Defense submits that it is instructive that the Trial Chamber relied on the fact of the withdrawal of the names of Counsel from the list as a ground for denying the Original Motion and the accompanying relief.
11. In further opposition to the Response, the Brima-Kamara Defense adopts in support of the Defense Reply the submissions advanced by the 2nd Respondent in Paragraph III, sub- paragraph 5 of the Defense Response to Brima-Kamara Defense Appeal Motion Pursuant to Article II of the Practice Direction for Certain Appeals Before the Special Court (the “Defence Response”).

VII. SEVENTH GROUND OF APPEAL

12. The Defense reaffirms its submissions advanced in respect of its seventh ground of appeal and submits further that by expressing their opinion or position against the re-appointment of previous Lead Counsel, Hon. Justices Doherty and Lussick were not in a position to impartially consider the Original Motion and therefore ought to have properly recused themselves.
13. In order to preserve the integrity of the trial process the bench must be both impartial and unbiased. As the Bureau observed in the ICTY case of *Prosecutor v. Kardic & Cerkez*¹.

“It is a federal right of all persons facing criminal charges to be tried before an independent and impartial tribunal. The tribunal is guided by the principle that the requirement of impartiality prohibits not only actual bias or prejudice, but also the appearance of partiality. Thus, where the circumstances create a reasonable or legitimate suspicion of prejudice, there may be a basis for disqualification though in fact no actual bias or prejudice exists.”

14. The Defense adopts in support of its Reply the submissions made in paragraph III sub-paragraph 6 of the Defense Response.
15. The Defence submits that it is untenable for the 1st Respondent to argue that the Dissenting Opinion of Hon. Justice Sebutinde cannot be relied upon because of factual disputes in the accounts of Justice Doherty on one hand Justice Sebutinde on the other hand without clearly stating the factual disputes being relied upon to arrive at that legal proposition. The Defence submits that

¹ No. IT-95-14/2 (Bureau Decision), May 4 1998 and Trial Chamber 2, May 1998

it properly relied on the Dissenting Opinion because it contains serious submissions and propositions of law which require the attention and consideration of all serious and fair-minded persons committed to a fair and just trial for the accused persons.

GENERAL

16. The Defence, respectfully questions the legal validity of Honourable Justice Doherty's "personal comment" appended to a totally unrelated matter. The Defence takes issue with this procedure and submits that it is an irregular procedure engendering a serious violation of the accused persons' rights to fair trial. It is the view of the Defence that the "personal comment" was intended to unduly influence the Appeals Chamber. Honourable Justice Doherty should not have proffered a "personal comment" on a Dissenting Opinion containing pertinent legal arguments, which favour the Accused. The Defence contends that the Honourable Justice Doherty's 'personal comment' makes her a party to the Appeal, which she is not. After having issued a majority decision on 9 June 2005, the Honourable Justice Doherty is *functus officio* and cannot, therefore, purport to change that decision or the dissenting opinion in such an unconventional manner.² The Defence appeals to the Honourable Justice of the Appeals Chamber not to consider that 'personal comment.'

CONCLUSION

- (1) The Defense adopts *mutatis mutandis* the submissions contained in the Defence Response.

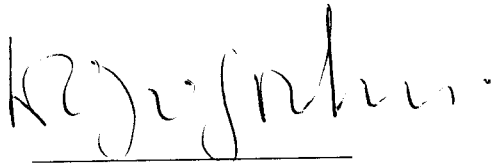
² T 12 May 2005, p.9-10, lines 25-29 & p. 10, lines 1-20, where the same Honourable Justice made another misplaced personal remark on one of the withdrawn Counsel, in his absence.

- (2) The Defense re-affirms its adoption of the Dissenting Opinion in its entirety in support of this Reply.

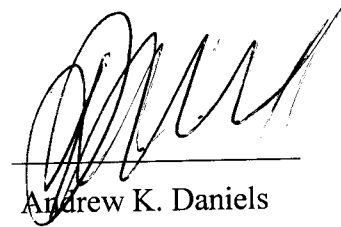
- (3) The Defence prays that the Appeal Chamber finds the appeal motion admissible and grants the relief prayed for in the Appeal Motion.

Respectfully submitted

16 September 2005



Kojo Graham



Andrew K. Daniels

TABLE OF AUTHORITY**International Criminal Tribunal of the former Yugoslavia (ICTY)**

Prosecution v. Kordic & Cerkez; Case No. IT-95-14/2 (Bureau Decision)

Other Source

Transcript of the 12th May 2005, p.9-10, lines 25-29 & p. 10, lines 1-20, where the same Honourable Justice made another misplaced personal remark on one of the withdrawn Counsel, in his absence.

Case No. SCSL-2004-16-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

THURSDAY, 12 MAY 2005
2.00 P.M.
TRIAL

TRIAL CHAMBER II

Before the Judges:	Teresa Doherty, Presiding Julia Sebutinde Richard Lussick
For Chambers:	Mr Simon Meisenberg
For the Registry:	Ms Maureen Edmonds
For the Prosecution:	Ms Lesley Taylor Ms Maja Dimitrova (Case Manager)
For the Principal Defender:	Ms Simone Monasebian Ms Claire Carlton-Hanciles Ms Haddijatou Kah-Jallow Ms Elizabeth Nahamya
For the accused Alex Tamba Brima:	Ms Glenna Thompson
For the accused Brima Bazy Kamara:	Mr Wilbert Harris Mr Mohamed Pa-Momo Fofanah
For the accused Santigie Borbor Kanuu:	Mr Ajibola E Manly-Spain Ms Karlijn van der Voort

1 Thursday, 12 May 2005

2 [The accused not present]

3 [TB120505A - RK]

4 [Open session]

5 [On commencing at 2.05 p.m.]

6 MS EDMONDS: Decision on the Confidential Joint Application
7 for Withdrawal by Counsel for Brima and Kamara and on the Request
8 for Further Representation By Counsel for Kanu.

9 PRESIDING JUDGE: This is a majority decision on the
10 applications before us. The majority opinion and the dissenting
11 opinion both setting out reasons will be published later.

12 The Trial Chamber:

13 1. Permits the lead counsel for Alex Tamba Brima to
14 withdraw from the case to which he has been assigned.

15 2. Permits the lead counsel for Brima Bazzy Kamara to
16 withdraw from the case to which he has been assigned.

17 3. Directs the Principal Defender to assign another
18 counsel as lead counsel to Alex Tamba Brima.

19 4. Directs the Principal Defender to assign another
20 counsel as lead counsel to Brima Bazzy Kamara.

21 Before I proceed with the other orders and directives,
22 Ms Monasebian, could you please advise the court whether the
23 foregoing orders: Do co-accused to Alex Tamba Brima and Brima
24 Bazzy Kamara remain assigned counsel under their contracts
25 notwithstanding -- despite the withdrawal of lead counsel. Could
26 you clarify that -- co-counsel, excuse me -- co-counsel. I
27 misread my own writing.

28 MS MONASEBIAN: It is unfortunate that they don't. It
29 is unfortunate that the way the contracts were constructed was

1 such -- long before I came were such that it only had privity
2 between the lead counsel and the office -- the Defence office and
3 the Registrar. The three parties to the contract are the
4 Registrar, the Principal Defender and the lead counsel and the
5 only reference in the contract to teams and their
6 responsibilities is just an overall reference stating that the
7 lead counsel shall be responsible for supervising and monitoring
8 them. It does, however, say that in order for the changes in the
9 team to be made, which would also included withdrawal, that my
10 office has to be consulted. Yeah, that's about it.

11 PRESIDING JUDGE: Thank you.

12 In the light of the information provided by the Principal
13 Defender, we are satisfied that the accused have waived their
14 right to be present at court and pursuant to Rule 60(B) we direct
15 that the accused Alex Tamba Brima be represented by co-counsel,
16 Glenna Thompson and Kojo Graham.

17 We further direct that the accused Brima Bazzy Kamara
18 pursuant to Rule 60(B) be represented by co-counsel Mohamed
19 Pa-Momo Fofanah.

20 We refuse the request of the Principal Defender that lead
21 counsel and co-counsel for Alex Tamba Brima and lead counsel and
22 co-counsel for Brima Bazzy Kamara be temporarily redesignated from
23 assigned counsel to amicus curiae.

24 The Court further notes that lead counsel and co-counsel
25 for Santigie Borbor Kanu will continue to represent their
26 clients.

27 That is the ruling of the court.

28 MS MONASEBIAN: I am not going to ask the Court anything
29 about its ruling. It stands as it is. I just have one thing

1 that needs to be brought to Your Honour's attention regarding
 2 Your Honour's order. Pursuant to Rule 45, lead counsel can only
 3 be one with seven years of experience. With regard to
 4 Ms Thompson, she of course meets at that qualification. The
 5 problem is with regard to Mr Fofanah. He does not have seven
 6 years at the Bar yet. So if he is now going to be the lead
 7 counsel in the absence of Mr Harris --

8 PRESIDING JUDGE: Ms Monesabian, it is not the prerogative
 9 to say who is lead counsel. We are saying they are co-counsel
 10 and we are aware of the provisions of the ruling.

11 JUDGE LUSSICK: We'll be relying on you, Ms Monasebian, to
 12 appoint two new lead counsel in accordance with the order. But
 13 we are very confident that the co-counsel can carry the case in
 14 the meantime, as they have been doing for long sessions in any
 15 event.

16 MS MONASEBIAN: And as they are permitted to, that's right.

17 JUDGE LUSSICK: Certainly, yes. We are well aware they are
 18 permitted to do that.

19 MS MONASEBIAN: Yes, yes. Thank you for that clarification
 20 and that just leads me to know that we have to assign other
 21 people in due course. Thank you, for that, Your Honours

22 PRESIDING JUDGE: This brings me to the more pertinent
 23 question as to when this case can now resume to hearing. Is
 24 there any reason in the light of the ruling why the matter should
 25 not proceed tomorrow morning?

26 MS TAYLOR: The Prosecution is ready to proceed tomorrow
 27 morning, Your Honours.

28 PRESIDING JUDGE: Thank you, Ms Taylor.

29 MS THOMPSON: Your Honour, may I respectfully ask that we

1 resume evidence on Monday? The reason being that it will cause
 2 some difficulties, certainly for myself and Mr Fofanah who, up to
 3 this point, have been co-counsel and within each team tasks have
 4 been set out. It will take us at least tomorrow to sort of get
 5 ourselves together, and perhaps the weekend, because I note that
 6 the witness list has been -- the witness order has been served on
 7 us yesterday and it is different from the witness order we had
 8 expected.

9 JUDGE LUSSICK: Well, this is a matter for counsel of
 10 course, but I wonder if anyone will be in touch with Mr Knoops to
 11 tell him that his request that he and his team stay -- are
 12 staying in the case as he moved in his motion?

13 MR MANLY-SPAIN: That will be done, Your Honour, and I
 14 should inform the Court that Mr Knoops will be here today. He
 15 will be arriving in the country today.

16 PRESIDING JUDGE: Ms Thompson, are you speaking for all
 17 counsel or am I to --

18 MS THOMPSON: I was speaking on behalf myself and
 19 Mr Fofanah.

20 PRESIDING JUDGE: I see.

21 [Trial Chamber confers]

22 PRESIDING JUDGE: The Bench unanimously agrees that counsel
 23 for the Defence be given one day in order to prepare for their
 24 case.

25 Ms Taylor, I note that counsel for the Defence has
 26 indicated there is a change in the witness list. You no doubt --
 27 that will arrive on our desks this afternoon.

28 MS TAYLOR: It was forwarded to your legal officer on
 29 Wednesday, Your Honours.

1 PRESIDING JUDGE: Perhaps it is already on my desk in that
2 case. There was one. I just noted that counsel said today,
3 hence my --

4 MS THOMPSON: Your Honour, I have one more matter to bring
5 to Your Honour's attention. My understanding of the motions
6 which brought about today's ruling was that they were
7 confidential and indeed today's ruling is also supposed to be
8 confidential. It was brought to my notice earlier today -- in
9 fact, I think it was late yesterday that the Prosecution's
10 response had been served on the -- on someone who -- I later was
11 told was actually the Chief of the Public Affairs. I don't know
12 what other people's understanding of confidentiality is, but if
13 confidential motions are going to be served on Public Affairs,
14 then Your Honour, obviously, your ruling -- it means that someone
15 is driving a Trojan horse through your ruling, which is not what
16 I'm sure this Trial Chamber intended. Sorry, Your Honour, I
17 think you want to say something.

18 JUDGE LUSSICK: You go ahead, sorry.

19 MS THOMPSON: It means that someone is driving a Trojan
20 horse through the Court's ruling, that this issue should be
21 confidential. If Your Honour would -- will recall that issues
22 were raised within those motions which -- and the Defence did not
23 want it to be made public -- if it has gone to the public
24 affairs, then my submission is that whoever did it -- there
25 should be an inquiry in any event as to who did it and Public
26 Affairs should be directed that that motion should be returned to
27 where it is supposed to be, which is Court Management and not
28 move out of Court Management except to be served to the Defence
29 and Prosecution, and it should not be disclosed to any other

1 person. Indeed, Your Honour if that has -- if -- um that has
2 been done, my respectful submission is that it is actually
3 contempt of your order.

4 MS MONASEBIAN: Your Honour, if I may briefly address.
5 Having inquired into this matter myself, asked Court Management
6 why it is that confidential documents between Your Honours and
7 between the Prosecution and Defence are being e-mailed to the
8 Chief of Press and Public Affairs, Ms Cooper. And Court
9 Management has informed me, and I believe the Prosecution as
10 well, that the reason is because the Registrar has given an
11 instruction to Court Management that Ms Cooper can receive all
12 confidential documents. Ms Cooper is not an attorney, I should
13 add. In some tribunals the Chief of Press and Public Affairs is
14 an attorney. When I was asking why she was given that
15 permission, they told me so that she could understand what is
16 going on in the Court. I submit respectfully on behalf of the
17 Defence and I can tell you that Mr Metzger and Mr Harris are
18 quite up set about this, in particular that nothing that the
19 Prosecution submits to Your Honours on a confidential basis or
20 anything that the Defence submits on a confidential basis should
21 ever be given to the press or to the Chief of Press and Public
22 Affairs when her only job is to service the Defence and
23 Prosecution and the Court by providing information, not by
24 understanding confidential information. So I would ask that
25 perhaps an instruction be given to the Registry that anything
26 confidential can only be disseminated if the Court allows it and
27 upon notice to the parties beforehand. Thank you, Your Honours.

28 PRESIDING JUDGE: Ms Monasebian, you referred to the
29 Registrar giving instructions. Are you able to refer us to a

1 Practice Direction or a direction of any kind that is used by the
2 Registrar?

3 MS MONESABIAN: The only information that has been given to
4 me, and when I spoke with the Prosecution about it this morning,
5 which was confirmed to me, is that the Registrar has given the
6 Court Management that instruction. I know nothing more than
7 that.

8 PRESIDING JUDGE: In the light of the fact that you are not
9 able to sorry -- Ms Taylor, you have heard counsel and Principal
10 Defender. It would appear that the document in question is a
11 document emanating originally from your office. Are you aware of
12 this and have you any comment?

13 MS TAYLOR: I believe that the Office of the Prosecutor was
14 made aware of this at the same time as the Principal Defender was
15 made aware of this. Beyond that I have no further information
16 which can assist the Court in the determination of the matter.

17 JUDGE SEBUTINDE: Ms Taylor, are you saying that in the
18 event that what Defence counsel have said is true, your office
19 would not have been party to the tendering of that document to
20 the Press and Public Affairs.

21 MS TAYLOR: Yes, once the documents are filed with the
22 Registry, Your Honour, it is then up to the Court Management to
23 serve those documents. So once the Prosecution has filed its
24 confidential document, what happened to it then was beyond its
25 control.

26 [Trial Chamber confer]

27 PRESIDING JUDGE: We note that we have no practice
28 directive in --

29 MS MONASEBIAN: I was just, Your Honour, given a Practice

1 Direction on filing documents before the Special Court for Sierra
2 Leona and learned counsel, Mr Fofanah, rightly points out that
3 Article 4, format of documents says that: "Where a party, state
4 or organisation seeks to file all or part of a document
5 confidentially and indicate that on the relevant Court Management
6 section form the reasons for confidentiality, the judge or
7 Chamber shall thereafter review the document and determine
8 whether confidentiality is necessary. Documents that are not
9 filed confidentially may be used in press releases and posted on
10 the official web site of the Special Court."

11 So it seems like there is no Practice Direction on whether
12 they can be given the materials, but there certainly is a
13 Practice Direction on their not being permitted to use it. I
14 would just say that I can provide Your Honours with a copy of the
15 documents from Court Management showing Ms Cooper was given it by
16 them, and just ask in the future that Your Honours are the ones
17 who control this Chamber and the confidentiality and only Your
18 Honours be able to do that in the future. Thank you.

19 PRESIDING JUDGE: As I was saying, we note there is no
20 Practice Direction regarding publication in the manner that
21 counsel has submitted. We note the provisions of Article 4 and
22 we note the respective submissions. We will therefore inquire as
23 to how this has happened and we will endeavour to have that
24 inquiry made prior to the reopening of the Court.

25 Before we adjourn until 9.15 on Monday morning, there is
26 one thing which I wish say, and I say it not in my capacity as
27 Presiding Judge and I do not say it on behalf of my learned
28 brother and sister. I wish to make a remark concerning a series
29 of exchanges that took place in this Court on 28th of April 2005

1 when counsel for Brima, Mr Metzger, who I note is not present
2 here today, made several remarks in this Court concerning the
3 Prosecution and the Court by which he alleged or suggested that
4 the Prosecution had made remarks concerning the Court comparable
5 to remarks made by another counsel in a publication and that this
6 Court had failed to deal with those critical or biased remarks
7 and that this Court was biased and/or had failed to act fairly
8 between Defence and Prosecution. There was a directive given
9 from the Bench that he produce those -- substantiate those
10 statements by way of evidence and by presenting the publications
11 in question, and despite an elapse of two weeks, he has not
12 presented any documentary evidence to this Court to substantiate
13 the allegations he stated and repeated in the open court.

14 I therefore consider that those allegations were totally
15 without substance and were without right and I am displeased that
16 he has failed to substantiate what he has said in open court. I
17 note his absence and I therefore request his co-counsel to inform
18 him of my attitude.

19 There being no other matters, we will adjourn the Court
20 until 9.15 on Monday morning. Madam Court Attendant, please
21 adjourn the Court.

22 MS EDMONDS: Court rise.

23 [Whereupon the hearing adjourned at 2.25 p.m.
24 to be reconvened on Monday, the 16th day of
25 May, 2005, at 9.15 a.m.]

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