080) SCSL-11-02-A (080-102) 080

SPECIAL COURT FOR SIERRA LEONE

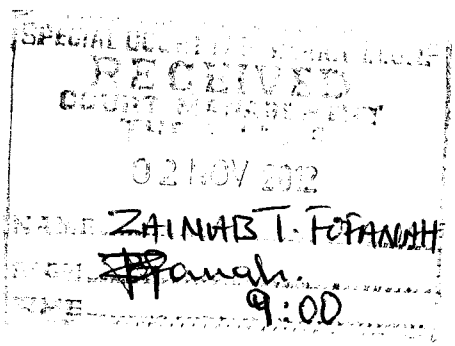
APPEALS CHAMBER

Before:	Justice Emmanuel Ayoola, Presiding Justice Renate Winter Justice Jon Moadeh Kamanda
Registrar:	Ms. Binta Mansaray
Case No.:	SCSL-11-02-A
Date filed:	1 November 2012

PROSECUTOR **Against** **Hassan Papa Bangura**
Samuel Kargbo
Santigie Borbor Kanu
Brima Bazzy Kamara

PUBLIC
PROSECUTOR'S MOTION FOR LEAVE TO SUBSTITUTE CORRECT FINAL SIGNATURE PAGE OF PROSECUTOR'S RESPONSE TO PARTIAL NOTICE OF APPEAL AND SUBMISSION OF SAMUEL KARGBO AND TO NOTICES OF APPEAL AND SUBMISSIONS OF HASSAN PAPA BANGURA, SANTIGIE BORBOR KANU AND BRIMA BAZZY KAMARA WITH ANNEX CONTAINING CORRECTED PROSECUTOR'S RESPONSE

Office of the Independent Counsel:
Mr Robert L. Herbst



Counsel for the Accused:
Mr Melron Nicol Wilson
Chief Charles A. Taku
Mr Kevin Metzger
Mr A.F. Serry Kamal

Office of the Principal Defender:
Ms Claire Carlton-Hanciles

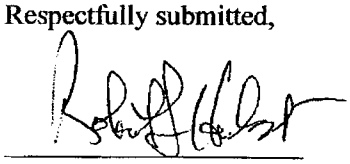
1. On 31 October 2012, the Prosecution filed its Response to the Partial Notice of Appeal and Submission of Samuel Kargbo and to the Notices of Appeal and Submissions of Hassan Papa Bangura, Santigie Borbor Kanu and Brima Bazzy Kamara.

2. The papers had been prepared in advance and submitted by email to Court Management in anticipation of a Hurricane Sandy which hit the Northeast Coast of the United States with unprecedented force and effects, knocking out power and internet communications capability of the Independent Counsel.

3. Because of formatting differences, the Response filed inadvertently contained an erroneous final page which deleted the last portion of the final substantive paragraph, ¶ 54. The Independent Counsel's internet service was not restored until after the Response was filed, not in time to prevent the erroneous filing.

4. Accordingly, the Prosecution now seeks leave to file a substitute corrected Response containing the correct final page and the full ¶ 54.

Respectfully submitted,



Robert L. Herbst

Independent Counsel

Dated: 1 November 2012

I. Introduction

1. The Prosecution takes no position on the Partial Appeal of Samuel Kargbo ["Kargbo"] and opposes the Appeals and Submissions of Hassan Papa Bangura ["Bangura"], Santigie Borbor Kanu ["Kanu"] and Brima Bazzy Kamara ["Kamara"].

2. All grounds of appeal raised by Bangura, Kamara and Kanu are without merit and should be dismissed. Consequently, the relief requested should be denied. The Trial Chamber's Single Judge ["Single Judge"] did not err in fact, law, and/or procedure, or abuse her discretion.

II. Standard of Review on Appeal

3. Under the Statute of the Special Court and the Rules of Procedure and Evidence, an appeal may be allowed on the basis of an error on a question of law invalidating the decision, an error of fact which has occasioned a miscarriage of justice, and/or a procedural error.[1] The standard of review on appeal is different for each of these types of error.

4. With respect to errors of law, the Appeals Chamber, as the "final authority on the correct interpretation of the governing law",[2] should determine whether the alleged error of substantive or procedural law was in fact made. It is only an error of law *invalidating the decision* of the Trial Chamber that may lead to a reversal or revision of that decision by the Appeals Chamber.[3]

5. With respect to errors of fact, the Appeals Chamber must give a "margin of deference to a finding of fact reached by a Trial Chamber"[4] and "will not lightly overturn" such findings.[5] In order to succeed in its Appeal, the Defence must

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[1] Article 20 of the Statute of the Special Court ("**Statute**") & Rule 106 of the Rules of Procedure and Evidence ("**Rules**").
[2] *Prosecutor v. Norman et al.*, SCSL-04-14-T-688, "Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone", 11 September 2006 ("***Norman* Appeals Decision**"), para. 7.
[3] *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, "Judgement", Appeals Chamber, 12 June 2002, para. 38.
[4] *Prosecutor v. Kupreskic et al.*, IT-95-16-A, "Judgement", Appeals Chamber, 23 October 2001, para. 30.
[5] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A-829, "Judgement", Appeals Chamber, 28 May 2008, para. 33.

show that no reasonable Trial Chamber could have reached the conclusion that this Trial Chamber did on the material before it.

6. With respect to procedural errors, a distinction should be drawn between non-compliance with a mandatory procedural requirement, which will not necessarily invalidate the Trial Chamber's decision if there has been no prejudice to the Defence[6] and the alleged erroneous exercise by the Trial Chamber of its discretion. "It is well established that in reviewing the exercise of a discretionary power, an appellate tribunal does not necessarily have to agree with the Trial Chamber's decision as long as that Chamber's discretion was properly exercised in accordance with the relevant law in reaching that decision."[7] In simple terms, the question is whether the exercise of the discretion was "reasonably open" to the Trial Chamber,[8] or whether conversely, the Trial Chamber "abused its discretion."[9]

7. The Appeals Chamber has repeatedly reiterated that it has the inherent discretion to dismiss a party's submissions which are evidently unfounded without providing detailed reasoning in writing.[10]

8. As well, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.[11] Additionally, in *Krajišnik*, the Appeals Chamber identified several categories of deficient submissions that would be open to summary dismissal.[12]

9. Many of the grounds asserted in the Bangura, Kamara and Kanu Appeals below are of that kind and may be summarily dismissed. None of the asserted grounds

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[6] See e.g. *Prosecutor v. Delalic* et al, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 (**"Delalic Appeals Judgement"**), paras. 630–639; and *Prosecutor v. Krstic*, IT-98-33-A, "Judgement", Appeals Chamber, 19 April 2004, para. 187.
[7] *Norman* Appeals Decision, para. 5.
[8] *Delalic* Appeals Judgement, para. 274.
[9] *Delalic* Appeals Judgement, para. 533.
[10] *Munyakazi* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement, para 16.
[11] *Munyakazi* Appeal Judgement, para. 10; *Krajišnik* Appeal Judgement para. 17.
[12] *Krajišnik* Appeal Judgement, para 18-27.

in those Appeals require reversal or revision of the Judgment or Sentencing Judgment below.

III. Grounds and Submissions in Response to the Appeals

Kargbo's Partial Appeal

10. In his partial appeal, filed on 19 October 2012, Kargbo seeks court ordered protective measures, citing threats to himself and his family resulting from his cooperation and testimony against the accused in the prosecution of this case. It is not clear from Kargbo's Notice of Partial Appeal and submission what specific protective measures are being requested.[13] However, there is an averment that WVS effectively placed Kargbo in a witness protection programme.[14] It appears that Kargbo may be satisfied with the protective measures in place and is complaining only of the fact that such measures were not embodied in a court order. It also appears that Kargbo filed this partial appeal because he is of the view that the Single Judge, whom he labels "functus officio," now lacks jurisdiction to entertain a direct application for such order herself.[15]
11. The Prosecution, like the Special Court as a whole, has a vital interest in insuring the safety and security of cooperating witnesses and their families. Evaluation of threats against them, and of the appropriate protective measures to be taken in response thereto, are properly the province of WVS. The Independent Counsel lacks the necessary competence in these matters, and has relied throughout these proceedings on WVS to take the requisite measures to protect Kargbo and the other key witness requiring such measures.[16] Accordingly, the Prosecution takes no position on what specific protective measures are necessary, or whether court-ordered protective measures are required in this case. We also take no position on the merits of, and the procedural issues raised by, Kargbo's partial appeal. What

[13] See Notice of Partial Appeal of Samuel Kargbo, 19 October 2012, para (IV) and (V).
[14] Id., para (X).
[15] Id., para.(VI).
[16] See id., para (F)(i) and (ii), where Kargbo effectively recognizes that WVS rather than the Independent Counsel is the responsible agency of the Special Court in these matters.

is critically important is that Kargbo receive the full measure of protection required, for as long as required.

Bangura's Appeal

12. Bangura's provisional appeal is limited to one aspect of his sentence, about which he has sought clarification from the Single Judge. His sentence was 18 months imprisonment, less six months' deduction, or "12 months with effect from today, 11 October 2012."[17]
13. By application filed 18 October 2012, Bangura sought clarification from the Single Judge as to whether she intended that the deducted six months be calendar months or prison months, the latter allegedly being subject to one-third remission under Section 49 of the Sierra Leone Prisons Ordinance [Act 22 of 1960].[18] Because clarification has not yet been forthcoming, Bangura seeks an extension of time to file the Notice of Appeal annexed to his motion. It appears that Bangura intends to withdraw his appeal if the clarification applies the remission he seeks, and if not, to press his appeal on this sole ground.
14. The Prosecution opposes the appeal no matter what clarification is forthcoming. Because the deduction is a matter of grace and discretion, whatever the Learned Single Judge intended would not constitute an error of law invalidating the decision either way. If her intent were not to include the requested remission, the sentence would still be quite lenient considering the serious offenses for which Bangura stands convicted. Accordingly, Bangura's appeal is meritless and should be dismissed.

Kamara's Appeal

15. **Kamara's first ground** is that no leave was sought or obtained by the Prosecution to try the accused jointly. This ground is meritless, as no such leave

[17] See Sentencing Judgment, para. 91, 101; Motion for Extension of Time to File Grounds of Appeals Pending the Determination of an Application to Justice Theresa Doherty, sitting as Single Judge for clarification of paragraph 101 of the Sentencing Judgment delivered on the 11th October 2012 and filed on the 16th October 2012, With Annex A – Notice of Appeal.

[18] See Urgent Application for Clarification of Paragraph 101 of Sentencing Judgment in Contempt Proceedings Dated 11th October 2012 and Filed on 16th October 2012, para 2, 8.

was necessary. Kamara and his co-accused were jointly indicted, accused of the same or different crimes committed in the course of the same transaction. Accordingly, Rule 48(A) permits them to be jointly tried. Kamara cites Rule 48(B) which applies to persons who are separately rather than jointly indicted.[19] Thus, Rule 48(B) is not applicable here. Kamara cannot and essentially does not dispute that he was accused of the same crimes, or of different crimes committed in the course of the same transaction, as his co-accused; he basically complains only of the failure of Independent Counsel to move for and obtain leave for a joint trial.[20] But, as noted above, such leave was not required. Moreover, if *arguendo* required, such leave was effectively granted in the Court's scheduling order setting the case for trial jointly. Finally, Kamara does not assert on appeal that he ever moved for a separate trial; accordingly this ground of appeal is waived and may be summarily dismissed.

16. **Kamara's second ground** is that the Trial Chamber's jurisdiction to try this matter ceased when the AFRC appeal was filed.[21] This ground is meritless, for the reasons stated by the Independent Counsel and by the Single Judge in disposing of this motion on 16 June 2012.[22] In order to function effectively, any court must necessarily have inherent jurisdiction to hear and determine contempts that arise after its trial proceedings have concluded; otherwise, those subject to its orders would be free to ignore them, and to threaten, intimidate, bribe or interfere with witnesses, and otherwise to interfere with the administration of justice. This inherent power is specifically mentioned in Rule 77(A). Accordingly, Kamara's suggestion of a lack of jurisdiction in the Trial Chamber to hear and determine the allegations against him has no merit.

17. **Kamara's third ground** is that his statements, obtained during the Independent Counsel's investigation, were used against him at trial, allegedly in violation of Rule 42(A) (ii) and Rule 43, which respectively provide a suspect the right to have an interpreter if he cannot understand or speak the language used for

[19] See Notice of Appeal in Respect of Brima Bazzy Kamara, filed on 22 October 2012, para. 10, 11.
[20] See id., para. 11, 12.
[21] See id., para. 13.
[22] See 16 June 2012 Transcript, at 32-37, 38-40.

questioning, and to have his statement audio or video recorded. In this meritless ground of his appeal, Kamara fails to allege, let alone prove, that he could not understand or speak the language used for questioning. He also fails to specify what statement(s) were offered in evidence against him, and how such statements could possibly have prejudiced him in light of the other overwhelming evidence of his guilt independent of any such statement(s). In the absence of such allegations, proof and prejudice, such procedural errors cannot invalidate the decision finding him guilty, and this ground may be summarily dismissed.

18. **Kamara's fourth ground** -- that his conviction on counts 2 and 3 is unreasonable and unsupported by the evidence -- is without merit. His contention that the finding of no direct communication between Kamara and 334 is inconsistent with the Court's finding of guilt on Count 2 is simply wrong. As the Single Judge found, the evidence clearly showed that, with the specific intent to interfere with the Court's administration of justice, Kamara called both Kargbo and Bangura and instructed them to contact 334 and pressure him to change his evidence to help Kamara and the other AFRC convicts achieve a change in a court decision.[23]
19. **Kamara's fifth ground** is that the absence of telephone records of specific calls from Kamara to 334, Kargbo or Bangura spells out reasonable doubt as a matter of law. This ground is without merit. First, the MTN phone records, which documented only outgoing but not incoming calls, *do* show calls from the prison mobile phone to Kargbo and Bangura.[24] Indeed, Kamara himself conceded on cross-examination that he spoke to Bangura.[25] Second, because the Rwanda convicts could call one person and ask to speak to another person or have another person call them back,[26] the absence of a documented call in the MTN records on a particular date does not undermine testimony by 334 and Kargbo that a particular telephone communication took place. Third, Kamara ignores all the other evidence of his guilt beyond a reasonable doubt in the record referenced in the Judgment, including but not limited to the direct evidence from 334, Kargbo,

[23] See Judgment, para. 684.
[24] See Judgment, para. 641, 643, 669, 674, 677, 684.
[25] See Judgment, para. 617.
[26] See Judgment, para. 618.

Bangura and Daniels, and the evidence adduced on cross-examination of Kamara, Bangura and Kanu.[27]

20. **Kamara's sixth ground** is similar to his fifth above and equally without merit. The absence of telephone records of Kargbo's phone does not undermine Kamara's guilt beyond a reasonable doubt on both Counts 2 and 3 in light of all the other evidence in the case. We respectfully incorporate our arguments in response to Kamara's fifth ground in ¶ 19 above as if fully set forth herein. Moreover, the absence of pertinent calls and Kamara's denial of a telephone conversation on 29 November 2010 is irrelevant since the critical telephone communications between Kamara and Kargbo, and between Kanu and 334, occurred on 30 November rather than 29 November 2010. Those critical, incriminating 30 November telephone communications *are* documented in both the MTN phone records and the prison phone log.[28]
21. **Kamara's seventh ground** is that the Single Judge erroneously applied the rule in *Brown v. Dunne* but does not identify any such purported erroneous application, nor specify any prejudice therefrom. This ground may therefore be summarily dismissed.
22. **Kamara's eighth ground** purports to invoke an unidentified requirement to corroborate the evidence of an accomplice. It is therefore defective and may be summarily dismissed. Moreover, the suggestion that the evidence of Kargbo was uncorroborated is simply wrong, as it was corroborated in most material respects by 334's evidence as well as much of the other testimonial and documentary evidence in the case.
23. **Kamara's ninth ground** does not clearly spell out its factual or legal basis and may be summarily dismissed. To the extent that it contends that the Prosecution was required to adduce proof that the critical incriminating calls occurred on 29 November rather than 30 November 2010, that suggestion is obviously mistaken since the calls occurred on 30 November 2010, as noted in ¶ 20 above. To the extent that this ground contends that the Prosecution adduced no evidence about

[27] See Judgment, para. 622, 624-28, 631-41, 644-45, 648, 651, 656-58, 663, 665-66, 669-74, 684.
[28] See Exhibits P14 and P15; Judgment, para. 641, 643.

the 30 November calls from Kamara to Kargbo documented in the MTN phone record and the prison phone log, that contention is also without merit, as there was overwhelming evidence from Kargbo, 334, Saffa and the Alagendra email about these incriminating communications from Kamara to Kargbo and Kanu to 334 on 30 November 2010.[29]

24. **Kamara's tenth ground** mistakenly argues that the Single Judge's decision to recognize a crime-fraud exception to the legal professional privilege[30] was erroneous. That decision held that the lawyer-client privilege is not absolute when the purpose of the communication is to seek advice about a future crime. The crime-fraud exception has a long history and its application cannot properly be said to be erroneous. Indeed, it is implicitly if not explicitly a part of Article 17©(iii) of the Special Court's Code of Professional Conduct for Counsel. Kamara cites no contrary authority or cogent reason(s) for not recognizing this exception to the privilege in the circumstances at bar. Moreover, Kamara does not challenge the second ground of the Single Judge's decision: that there was no attorney-client relationship in existence at the time of the conversation between Kamara and Daniels. Finally, in contending that Attorney Daniels's testimony suggested nothing criminal, and that Kamara's conversation with Daniels merely informed Daniels about what Kamara and Tamba Brima had discovered and what was being planned, Kamara undermines any suggestion of prejudice from the admission of Daniels's testimony.

25. **Kamara's final ground** argues that his two year sentence is "inordinately high." This contention is also without merit. Indeed, considering the serious nature of Kamara's two separate offenses on which he was properly found guilty, a two year sentence was at most barely adequate to vindicate the sentencing goals of retribution and specific and general deterrence. Kamara provides no support for his bald assertion that his sentence was inordinately high.

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[29] See n. 24, 27, *supra*.

[30] See Interim Decision on Prosecutor's Additional Statement of Anticipated Trial Issues and Request for Subpoena, filed on 18 June 2012; and Decision on the Prosecutor's Request for Subpoenas, filed on 28 June 2012.

Kanu's Appeal

26. **Kanu's first three grounds** raise the same jurisdictional argument as Kamara's second ground, addressed above in ¶ 16. We respectfully incorporate our arguments in response thereto as if fully set forth herein.

27. **Kanu's fourth ground** raises the same contention with respect to the joint trial and Rule 48(B) as Kamara's first ground addressed above in ¶ 15. We respectfully incorporate our responsive arguments there as if fully set forth herein. We add that, as the Single Judge found, Kanu's contention that the prosecution's case "was shifting throughout" is meritless and not borne out by the record.[31] The Prosecutor's opening statement fixed the date of the most incriminating telephone calls as 30 November rather than 29 November 2010. The Single Judge also ultimately ruled out and did not consider any suggestion or evidence that Hamid Kamara, a/k/a Keh for Keh, was present at the birth of the contemptuous scheme in a bar at Wilberforce.[32]

28. **Kanu's fifth ground** contends that the Single Judge erred in law when she rejected an application for an extension of time to file preliminary motions. This contention, stated baldly without identifying the legal basis for rejection of the application or suggesting how such basis was erroneous, is meritless and should be rejected out of hand. Moreover, a review of the decisions denying Kanu leave to file preliminary motions out of (the previously enlarged) time reveals that there were eminently proper and valid reasons given for those decisions.[33]

29. **Kanu's sixth ground** contends that the two counts against him "had the tendency to fall foul of the rule against duplicity" but such contention is without merit for several reasons. First, Kanu carefully refrains from arguing that the counts are in fact duplicitous, but only "tend" in that direction. That is not a cognizable argument, and this ground may be summarily dismissed. Second, Kanu failed to

[31] See Judgment, para. 651.
[32] See, e.g., Judgment, para 606 and 609 et seq. (no findings with respect to the birth of the scheme at a bar in Wilberforce).
[33] See SCSL-11-02-PT-012; SCSL-11-02-PT-014.

raise this argument in a timely manner below, thereby waiving it. Third, the counts were not duplicitous since, as reflected in the Prosecutor's opening statement, they charged two different kinds of unlawful interferences: (1) approaching and pressuring 334 to recant his testimony to assist Kanu and others in their planned petition for review, and (2) offering 334 a bribe to do so.[34] Fourth, Kanu can point to no prejudice from his conviction on both counts as he was sentenced to two years on each count concurrently. Notably, Kanu is the only appellant raising this meritless contention on appeal.

30. **Kanu's seventh ground** raises the same meritless objection to the application of the crime-fraud exception as Kamara's tenth ground addressed in ¶ 24 above. We respectfully incorporate our arguments in response thereto as if fully set forth herein. We add that Kanu did not have an attorney-client relationship with Daniels at the time of the conversation Kamara and Tamba Brima had with him, and Kanu therefore has no standing to assert the attorney-client privilege.

31. **Kanu's eighth ground** challenges the Single Judge's decision to permit Kargbo to remain in court throughout the trial notwithstanding his earlier guilty plea. This ground is without merit. First, neither Rules 102 or 103, nor any other Rule or other authority cited by Kanu, prohibited Kargbo's presence during the trial in the circumstances at bar. Second, Kargbo testified first so Rule 90(D) was not violated, and Kanu does not contend otherwise. Third, Kanu has failed to identify any prejudice to him resulting from Kargbo's continued presence in court after he testified. Although the court initially was inclined to sentence Kargbo on his guilty plea prior to the opening of the prosecution case, she properly exercised her discretion not to do so upon the application of the Independent Counsel and Kargbo's counsel, who pointed to cogent reasons, not addressed by Kanu on his appeal, for sentencing Kargbo after the trial, including permitting the Single Judge to observe and evaluate his testimony and the extent of his cooperation before sentencing him. Kanu sets forth no reason to suggest that that decision was an abuse of discretion.

[34] See 20 June 2012 Transcript, at 73-74.

32. **Kanu's ninth ground** argues that it was error to reject Kanu's motion for judgment of acquittal. This bald and meritless assertion, without any discussion of the clearly sufficient evidence of guilt marshaled against him in the Prosecution's case-in-chief, should be rejected out of hand. Alternatively, if this ground is entertained, the Prosecution's detailed submission in opposition to the motion[35] and the Single Judge's review of that evidence in her well-reasoned decision denying Kanu's motion[36] easily disposes of this ninth ground.
33. **Kanu's tenth ground** complains of the failure to grant his application to instruct a handwriting expert. That application was untimely and unsupported[37] and was properly denied.[38] Moreover, witness Sengabo testified that the signatures that he ascribed to Kanu on 26 and 30 November 2010 were slightly different, and at no point was it put to Sengabo that the 30 November signature was more than "different," i.e., that it was not Kanu's or was a forgery, or that it was signed by someone else. Thus, as the Single Judge properly held,[39] there was no identified need to call a handwriting expert, and his analysis, which would have substantially delayed the trial to the detriment of the rights of Kanu's co-accused, would also have required the original disputed document which was an exhibit which could not be released from the Court's custody without leave, which had not been applied for. Under all these circumstances, the decision to dismiss this motion was eminently correct, not an abuse of discretion.
34. **Kanu's eleventh ground** appears to challenge the obvious truth that the Special Court's official English interpretation of witness testimony given in a language other than English must necessarily serve as the interpretation on record to be considered by the Court. Kanu's contention that this truth is somehow inconsistent with Rules 81 and 85 is not clearly explained and is without merit.

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[35] See Prosecutor's Brief in Opposition to Defence Motions for Judgment of Acquittal, dated 27 July 2012 and filed 30 July 2012.
[36] See Decision on Defence Motions on Behalf of Hassan Papa Bangura, Santigie Borbor Kanu and Brima Bazzy Kamara for Judgement of Acquittal Pursuant to Rule 98, filed 10 August 2012.
[37] See Prosecutor's Brief in Opposition to Kanu's Urgent Defence Application for Permission to Instruct Handwriting Expert, dated 6 August 2012 and filed 8 August 2012.
[38] See Decision on Urgent Defence Application to Permission to Instruct Handwriting Expert, filed on 15 August 2012.
[39] See Id., at ¶¶15-17.

Moreover, Kanu cites no claimed specific instance in which the official interpretation of his testimony was erroneous, or which prejudiced him or redounded to his detriment. Accordingly, this ground should be summarily dismissed.

35. **Kanu's twelfth ground**, although headed "Defects in Indictment," rehashes his fifth ground addressed in ¶ 28 above. We respectfully incorporate our arguments in response thereto as if fully set forth herein. Moreover, Kanu points to no specific alleged defects in the Order in Lieu of Indictment, nor any instance in which the Single Judge ever placed the burden of proof upon Kanu rather than the prosecution. Thus, this ground also may be summarily dismissed.

36. **Kanu's thirteenth ground** suggests that the Single Judge erred in fact by finding that 334 was a victim rather than a perpetrator in connection with an incident many years ago that Kanu alleged caused a bad relationship between them. Yet Kanu cites no portion of the record, nor any paragraph of the Judgment in support of this contention. Thus, this ground should be rejected out of hand. Nor could any such finding possibly be significant enough to invalidate Kanu's conviction, especially in view of the clear evidence of his guilt beyond a reasonable doubt.[40]

37. **Kanu's fourteenth ground** asserts that, while entitled to dismiss Kanu's allegation on cross-examination that Sengabo and the Independent Counsel manipulated the prison log book, Exhibit P15, the Single Judge erroneously opined that such allegation detracted from his credibility. This assertion is without merit. Kanu cites no case or other authority precluding the Single Judge from making such credibility determinations, which are well within her discretion as the finder of fact. There was substantial support for that determination here, where, *inter alia*, Kanu's habit of bolding over letters and numbers – like the bolding over reflected in the "smoking gun" 30 November entry in P15 -- was clearly revealed in his own diaries.[41] Although the Single Judge did not find that Kanu was the one who manipulated the 30 November entry, she could reasonably have concluded on this record that accusing Sengabo and the Independent

[40] See Judgment, para. 609 et seq.
[41] See Judgment, para. 611-12, 642-43, 646-47, 652, 654.

Counsel of manipulating the entry was a knowingly false assertion covering his own incriminating conversation with 334 on that date.[42] Observing that Kanu's totally unfounded allegation detracted from Kanu's credibility was an eminently appropriate finding. Nor did the fact that Sengabo was initially listed as a witness for the Defence preclude Kanu's counsel from putting to Sengabo during cross-examination the suggestion that he had manipulated the entry had there been any reason to credit it; rather, what apparently precluded counsel from so doing was the outlandishness of the suggestion itself, which counsel could not put to Sengabo in good faith. Nor does Kanu suggest here that the *Rule in Brown v. Dunne* was improperly applied. There was no error and no miscarriage of justice.

38. **Kanu's fifteenth ground** contends that the Single Judge erred in fact in observing that neither Kargbo nor 334 identified the date of the critical 30 November telephone communications. The relevant factual issue was the date of those telephone communications, not what Kargbo and 334 were able to remember or say about the date. The Single Judge's conclusion that those calls took place on 30 November rather than 29 November is fully supported by the credible evidence in the case, including the 30 November date on the contemporaneous Alagendra email,[43] the MTN phone records showing the calls to Kargbo's phone on 30 November,[44] the prison phone log showing Kamara and Kanu present on 30 November when a number only two digits off from Kargbo's number was called,[45] and Saffa's testimony that the 29 November date was a mistake caused by the fact that when Saffa drafted 334's statement containing the mistaken 29 November date, Saffa did not have before him the Alagendra email identifying the proper date.[46] Thus, although 334, on cross examination by Kanu's counsel, said he thought the call with Kanu occurred on 29 November in accordance with his witness statement, it was entirely proper for the Single Judge to find that the telephone communication between Kanu and 334 occurred on 30

[42] See id. See also Prosecutor's Written Submissions, filed on 12 September 2012, para. 30.
[43] See Judgment, para. 638-39.
[44] See Judgment, para. 641.
[45] See id.
[46] See Judgment, para. 663.

November. No factual error in that regard exists, and no miscarriage of justice or other cause to invalidate Kanu's conviction has been shown.

39. **Kanu's sixteenth ground** contends that it was erroneous to find that there was a conflict between the testimony of Kamara and Kanu. That contention is without merit. First, there was indeed a conflict between their testimony. Kamara purported to remember an alternative set of calls and conversations with a large number of "his boys," including Keh for Keh, Eddie, V-Boy, Manga, Con Teh and others, and with Kargbo, on 30 November 2010,[47] which was not put either to Kargbo or 334, and which involved Kanu being called by Kamara to talk to those "boys." Kanu, who testified after Kamara, was not asked by his counsel whether he had been called down by Kamara on 30 November to speak to any of those people. On cross-examination, Kanu denied making any entries in the prison log book on 30 November, and specifically denied writing his name and initialing the entry next to his name. By implication, Kanu's testimony was that he had not had any telephone communications with anyone on 30 November on the prison cell phone. Thus, the evidence supports the Single Judge's conclusion that there was a conflict between Kamara and Kanu on the 30 November 2010 calls. Second, the issue is inconsequential and could not possibly amount to a miscarriage of justice or be sufficient to invalidate Kanu's conviction.

40. **Kanu's seventeenth ground** is merely a restatement of his meritless fourteenth ground, addressed above in ¶ 37. We respectfully incorporate our arguments in response thereto as if fully set forth herein.

41. **Kanu's eighteenth ground** complains about the rejection of his claim that an alleged insult by 334 directed at Kanu's mother motivated 334 to make false allegations against Kanu some 10 years later. This ground is without merit. First, Kanu never put this insult, or the entire incident of which it allegedly was a part, to 334 in cross-examination.[48] This alone entitled the Single Judge to discount Kanu's claim. Second, even if *arguendo* such insult and incident had occurred, as the Single Judge observed, it (1) would more likely have installed a motive for

[47] See Judgment, para. 645.

[48] See Prosecutor's Written Submissions, filed on 12 September 2012, para. 27-28.

revenge in the alleged victim (Kanu) rather than 334, and (2) would be unlikely to motivate 334 to make false allegations in this case so many years later.[49] These observations were eminently reasonable. Nothing in this ground of appeal is capable of constituting either a miscarriage of justice or a rationale for invalidating Kanu's conviction.

42. **Kanu's nineteenth ground** complains about the Single Judge's observation that, notwithstanding Kanu's false denials under oath, the issue of review under Rules 120-122 was discussed, and such review was on Kanu's mind at the relevant time. This ground, too, is without merit. The conclusion that such review was discussed and was on Kanu's mind, and that Kanu falsely denied it, is unassailable. The Single Judge was also careful to note that she drew no implication of criminality from the fact that such review was discussed alone. In conjunction with other evidence of such criminality as charged, however, it was entirely appropriate for the Single Judge to note the facts of which Kanu complains here. No miscarriage of justice could possibly be inferred from it.
43. **Kanu's twentieth ground** suggests that the Single Judge also concluded that the review pursuant to Rules 120-122 was also on Kanu's mind from the testimony of Daniels, who spoke only to Kamara and Tamba Brima. Here, Kanu misconstrues ¶¶ 624-26 of the Judgment. In ¶ 624, the Single Judge properly observed that the review and Rules 120-122 were on Kanu's mind from the documentary evidence of such discussions to which Kanu was a party earlier in 2010. In ¶ 625, the Single Judge also properly noted that Kamara and Tamba Brima (not Kanu) told Daniels that some witnesses who had testified in the AFRC trial were prepared to change their testimony (thus revealing that a review was also on their minds). In ¶ 626, the Single Judge says only that discussions of a possible review by Kamara and Kanu under those Rules is not criminal, but just shows that a review and those Rules were on their minds. Nowhere does the Learned Judge connect the Daniels conversation to Kanu. Rather, she is merely observing in ¶626 that there is documentary evidence that Kanu had a review in mind (¶624), and evidence from Daniels that Kamara had such a review in mind (¶625). This ground of Kanu's

[49] See Judgment, para. 613.

complaint is therefore without merit, as there was no wrong or unreasonable conclusion here. Moreover, the issue is inconsequential since the relevant fact that Kanu had a review in mind is unassailable.

44. **Kanu's twenty-first ground** complains about an alleged conclusion that Kanu was either involved in, or privy to the content of, telephone calls with Bangura or Keh for Keh, to the extent that it would enable the conclusion that he was guilty. This meritless contention rests on the erroneous premise that Kanu's guilt depends upon his involvement in or knowledge of the Bangura or Keh for Keh calls. As the Single Judge noted, however, the primary evidence of Kanu's guilt was the independent testimony of Kargbo and 334 that during the telephone calls on 30 November on Kargbo's phone, (1) Kamara told Kargbo he would call back with Kanu on the line to talk to 334 to persuade him to recant his testimony, (2) Kamara did call back, and (3) Kanu asked 334 to recant his testimony, saying their lawyers had told them that this was the only way for the three Rwanda AFRC convicts to be released or have their sentences reduced, and offering money to 334 if he did so.[50] This testimony by Kargbo and 334 was corroborated by the Alagendra email documenting a report by 334 that same day, by subsequent reports to Saffa in the days thereafter, and by the MTN phone records and prison phone log.[51] There was also evidence that Kanu was involved in prior pertinent conversations with Kargbo.[52] Kanu's own admissions and false exculpatory testimony on cross-examination added significantly to the already-overwhelming proof of his guilt.[53] Thus, Kanu is simply wrong to suggest that the Prosecution "could not have discharged its burden of proof beyond a reasonable doubt" that Kanu was involved in discussions concerning 334 recanting his evidence, and that his calls to Kargbo and 334 were a result of the contemptuous plan.

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[50] See Judgment, para. 636-37, 656, 664.
[51] See Judgment, para. 638-43, 657.
[52] See Judgment, para. 84, 88, 107, 109, 116, 117, 633-34, 636, 656.
[53] See Judgment, para. 646-47, 651-52, 654-56; 6 September 2012 Transcript, at 2386-87 and 2404-05 (summarizing evidence of increasing calls to Bangura from once or twice a month to several times a week), and 2407-08 (summarizing evidence of calls to K for K on 22, 23, 24, 27 and 30 November 2010).

45. Finally, notwithstanding Kanu's suggestion to the contrary in ¶ 62 of his appeal, the record supported the Single Judge's observation that the MTN phone records for the period November 1 to December 7 *do* show an increase in calls to Bangura after 12 November 2010, and to Keh for Keh after 22 November 2010.[54]

46. **Kanu's twenty-second ground** contends that no reasonable tribunal could accept 334's evidence of his telephone conversation with Kanu when 334 was with Kargbo at PWD compound (on 30 November 2010). This contention lacks merit and borders on the frivolous, in view of all the supporting and corroborating evidence set forth above in ¶ 44, which is incorporated herein as if fully set forth. Any inconsistencies in the testimony of 334 and Kargbo were minor and inconsequential considering all the corroborating evidence in this record. There was in fact no credibility contest, in terms of substance or demeanor, between the 334 and Kargbo testimony and that of Kanu, whose admissions and false exculpatory denials helped convict him.[55] Not only was the Single Judge's verdict reasonable, but it was in fact the only reasonable verdict on this record.

47. **Kanu's twenty-third ground** asserts that the Single Judge impermissibly reversed the burden of proof in concluding that she could not identify the origin of the date of 29 November 2010 given for the conversation between Kanu and 334. This assertion is without merit. First, Kanu cites no authority for the proposition that Prosecution was required to provide the metadata or call independent evidence of the accuracy of the 30 November date of the Alagendra email, and the Court was right to reject that proposition. Second, as noted above in ¶¶ 38 and 44, the 30 November date was corroborated by both the MTN phone records and the prison phone log, and by Saffa's testimony and the memoranda he prepared the next day. There can be no real dispute as to the date on this evidentiary record. The Prosecution properly discharged its burden of proof as to the date, and the Single Judge's finding that the calls occurred on 30 November 2010 was eminently reasonable and correct. That is the only relevant issue, not "where this

[54] See Exhibit P14.

[55] See 6 September 2012 Transcript, at 2387-99 (summarizing some of those admissions and false denials).

date, 29 November came from."[56] Thus, it is immaterial whether the mistaken 29 November date originally came from 334 or Saffa. As Saffa testified, and the Single Judge properly found, that date was mistakenly inserted into Saffa's draft of 334's statement because Saffa no longer had the Alagendra email in front of him when he debriefed 334 and drafted the statement.[57] There was no miscarriage of justice and there is no justification for invalidating Kanu's conviction.

48. **Kanu's twenty-fourth ground** is his contention that the Single Judge erred in observing that Kanu's contention that he had never spoken to 334, and that the telephone conversation between Kanu and 334 never occurred, was never put to 334 on cross examination. The record does reflect that Kanu's counsel asked 334 if he could "suggest" to 334 that Kanu was not the person on the line during that conversation, and that 334 had never spoken to Kanu since Kanu's incarceration in Rwanda. The record also reflects that 334 reaffirmed that it was indeed Kanu on the line to whom he spoke. When Kanu testified in his own defence, he (falsely) denied the conversation. Accordingly, the material factual issue was squarely put, and the issue of whether the issue had been put to 334 on cross examination became irrelevant. On the material factual issue of whether the incriminating conversation between Kanu and 334 occurred, the Single Judge's factual findings are eminently supported by the evidence. There is thus no miscarriage of justice, and no reason to invalidate Kanu's conviction.

49. **Kanu's twenty-fifth ground** is the contention that the Single Judge erroneously concluded that Kanu's conversation with 334 distressed and disturbed 334 sufficiently to cause 334 to make a contemporaneous report to Alagendra and the next day, to Saffa. This contention is meritless. The record clearly supports the finding that the entire approach of Kamara and Kanu, through Kargbo and Bangura, to 334 to request that he recant his testimony, did in fact greatly disturb and distress 334, right from the earliest meeting with Kargbo through the direct (and corrupt) request from Kanu for 334's assistance and recantation. 334 (1) was visibly disturbed by the contacts from Kargbo and Bangura, (2) repeatedly told

[56] Kanu Appeal, para. 73.
[57] See Judgment, para. 663.

Kargbo he did not want any part of it, (3) repeatedly refused to speak to Kamara on 30 November and only took the phone to speak to Kanu after much prompting and begging by Kargbo, (4) thought he might be being set up by the Rwanda convicts, and (5) was sufficiently upset and tormented to contact Alagendra and then Saffa to report the approaches immediately after the call from Kanu.[58] These facts all demonstrate that 334 was in fact disturbed and upset after Kanu's call, which prompted 334 to make the report to Alagendra and OTP almost immediately thereafter, as the Single Judge found.[59] Under these circumstances, it does not matter whether Kargbo's testimony about 334's change of countenance occurred before the call to Kanu. That was only one fact attesting to 334's distress. There clearly was no error on the fundamental fact that Kanu's call disturbed and distressed 334 and caused him to report to Alagendra and Saffa. There was no miscarriage of justice, and no reason to invalidate Kanu's conviction.

50. **Kanu's twenty-sixth ground** is the contention that it was error to convict Kanu on both counts without distinguishing which act was the basis for which count. This contention is without merit. The Single Judge clearly found that Kanu's request to 334 that he recant or revisit his testimony in the AFRC trial, which disturbed 334, constituted the unlawful interference charged in Count 2, while his offer to pay 334 constituted the unlawful attempt to bribe and influence charged in Count 1.[60] These are different facts which make the Counts neither duplicitous nor "mutually exclusive," as Kanu also contends here. Indeed, the conviction of co-accused Kamara on Count 1 while being acquitted on Count 2 clearly demonstrate that those two counts could be, and were, analyzed separately and were neither duplicitous nor mutually exclusive. There was no miscarriage of justice and no justification for invalidating Kanu's convictions on both counts.

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[58] See Judgment, para. 85-87, 89-90, 138-39, 143, 147, 152, 631-33, 636-38, 664, 666; see also 27 June 2012 Transcript at 654-56, 684 (334 testifying (1) that he was concerned that if he agreed to lie by recanting his testimony in the AFRC trial, that it would affect his testimony in the Charles Taylor trial, which the Taylor defense team would use against him; and that after the 30 November 2010 conversation with Kanu, he thought he was being "set up," and therefore sought advice from Alagendra).

[59] See id.

[60] See Judgment, para. 664.

51. **Kanu's twenty-seventh ground** alleges error in the finding that Kargbo, 334 and Bangura all described and recognized Kanu's voice despite the lapse of time since they last heard his voice.[61] The contention that this finding was erroneous either in fact or law is meritless. Kanu has a rather unique, easily recognizable voice, speaking rapidly, in staccato sentences, with a stutter. All three witnesses – Kargbo, 334 and Bangura had long relationships with Kanu. All three testified that they recognized his voice. Kargbo also testified that Kanu announced his name when he spoke to Kargbo.[62] Accordingly, the evidence identifying Kanu as the speaker was overwhelming, and there is no rational basis for arguing that Kanu was misidentified. There was no miscarriage of justice and no reason to invalidate his conviction on this ground. Indeed, even if Kanu's proposition of law – that more care should be taken when the recognition relied on relates to voice – were accepted instead of *R. v. Turnbull* – that standard would be met here, especially since the recognition relied not solely on voice as Kanu also identified himself by name.

52. **Kanu's remaining grounds relate to sentencing.** Like Kamara, Kanu's sentence of one year and 50 weeks is certainly not harsh or excessive considering the serious nature of his offenses, the lengthy sentence he was already serving when he committed them, and the legitimate goals of sentencing, including special and general deterrence.[63] Rather, it is at the very low end of the reasonable range. The sentence is also well within the range of prior sentences in similar contempt cases.[64]

53. Kanu also contends that insufficient regard was taken of mitigation, but Kanu fails to specify what mitigating factors he alleges were ignored. Thus, this **second sentencing ground** should be dismissed out of hand.

54. **Kanu's final sentencing ground** claims a significant disparity between Kanu's sentence and Bangura's. That ground is also without merit. Since Kanu accepts the proposition that he was more culpable than Bangura since he and Kamara

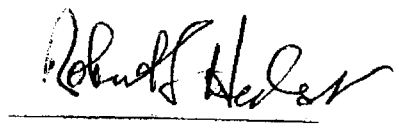
[61] See Judgment, para. 660-62.
[62] See Judgment, para. 660.
[63] See Prosecutor's Sentencing Submissions, filed on 28 September 2012.
[64] See id., para. 2, referring to OTP's Amicus Curiae Brief filed on 25 June 2012 in connection with the *Senessie* sentencing.

induced Bangura's contemptuous conduct, it is impossible to discern any erroneous disparity between Kanu's sentence of less than two years and Bangura's sentence of 18 months, with credit for four months of time served, and approximately two months off for his previous unrelated period of custody without charge years ago. Accordingly, there is no error in sentencing and no justification for re-sentencing.

IV. Conclusion

The appeals of Bangura, Kamara and Kanu should be dismissed in their entirety.

Respectfully submitted,



Robert L. Herbst

Independent Counsel

Dated: 31 October 2012