SPECIAL COURT FOR SIERRA LEONE
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Standard Times
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Admissibility of Hearsay Evidence in the Special Court for Sierra Leone

FROM THE EDITOR'S DESK

COURTESY ANGELO STAVRIANOU...IN THE MONITOR

For quite a long time, Issa B. M. Kamara has been thinking about the validity of hearsay evidence in any court of Law. The more I thought about it the more confused I become. Someone will say why do you have to feel that way? The reason is very simple, because as a professional journalist, someone will give me some news which I may pass out to others though I may not have been at the scene. What would you say about a hearsay evidence tendered in Court and yet well collaborated in Court? Well it appears I have been rescued by some legal mind.

I. Introduction

The rule against hearsay is a fundamental rule of evidence applicable in most common law jurisdictions. The adhoc international criminal tribunals and the International Criminal Court are more flexible in the admissibility of evidence.

It is well established that hearsay evidence is admissible in the Special Court for Sierra Leone (Special Court), the International Criminal Court, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). When determining whether evidence will be admitted these courts and tribunals are concerned with the relevance of a statement, rather than its reliability which is assessed at the end of the trial.

The decision to allow hearsay into evidence has perplexed many international commentators, who argue that this compromises the right of the accused to a fair trial.

This paper examines the rule against hearsay, the position taken by the Special Court, and arguments for and against the admissibility of hearsay evidence. It asks the question: Should the court continue to admit hearsay, or limit admissible evidence to direct evidence?

II. THE RULE AGAINST HEARSAY

The rule against hearsay operates as follows:

An assertion other than one made by a witness while testifying in the proceedings is inadmissible as evidence of any fact asserted.

Hearsay encompasses statements made by a witness that are based on what someone else has told them. Such statements are inadmissible if the object of the evidence is to prove the truth of what was said. It is not hearsay and is admissible when the object of the evidence is to establish not the truth of the statement, but the fact that the statement was made.

The effect of the rule is that witnesses are only permitted to testify in relation to what they have personally seen and heard. They are not permitted to testify as to the assertions of others.

III. ADMISSIBILITY OF HEARSAY IN THE SPECIAL COURT

A. Statute

While the Rules of Procedure and Evidence for the Special Court for Sierra

Leone (**Special Court Rules**) do not directly address the issue of hearsay, the Trial Chamber has discretion under Rule 89 © to admit any relevant evidence, including hearsay. Similar provisions exist in the Rules of Procedure and Evidence for the ICTY and ICTR; however they specify that the evidence must also be probative. It was pointed out by the Prosecution in the Fonfana Bail Appeal Decision that while the Rules for the ICTY explicitly refer to the probative value of the evidence, and the Special Court Rules do not, the requirement that the evidence is relevant is essentially the same as the requirement that it be probative.

B. Case Law

The Special Court has consistently decided in favour of admitting hearsay into evidence, finding that relevance is the only condition for the admission of evidence, and that its reliability is considered at a later stage. Hearsay is admitted on the basis that the Trial Chamber consists of professional judges who are capable of evaluating the weight to be given to it.

Determinations on the admissibility of hearsay are considered to be a waste of the court's time.

On the 24 May 2005 the Trial Chamber in the AFRC case handed down a decision on a joint defence motion to exclude the evidence of a witness on the grounds that it was hearsay. The disputed evidence of the witness was that he was present when a man named Mr. Saj Alieu reported to his uncle that a person referred to as "55" (an alternative name given to the accused) shot a woman.

Defence counsel argued that hearsay evidence should only be admissible where there are difficulties in obtaining first-hand accounts.

The Trial Chamber disagreed, stating that it is not necessary for the Prosecution to establish that the other people involved in the conversation are not available to give evidence. The Trial Chamber decided that this issue goes to the weight, rather than admissibility, of the evidence.

In reaching a decision the Trial Chamber considered the decision of the Appeal Chamber in the *Fonfana Bail Appeal Decision*. In that decision the Appeal Chamber found that the Trial Chamber erred in law in refusing to admit hearsay evidence. The Appeal Chamber interpreted Rule 89 (c) as follows:

Rule 89 © ensures that the administration of justice will not be brought into disrepute by artificial or technical rules, often devised for jury trial, which prevent judges from having access to information which is relevant.

IBM Kamara

> The reliability of hearsay evidenceis further undermined because it is not provided under oath. When evidence is provided under oath a witness is required to testify in the solemn context of proceedings in court, being instructed as to their obligation to tell the truth and the consequences for not doing so.statements before a courtroom, while under oath...

Judges sitting alone can be trusted to give second hand evidence appropriate weight, in the context of the evidence as a whole and according to well understood forensic standards.

With this in mind, the Trial Chamber found that the reliability of evidence does not affect its admissibility.

The Trial Chamber confirmed that its decision to admit hearsay evidence 'does not imply that it accepts it as reliable and probative.

The Trial Chamber will admit evidence on the basis of its relevance, and at the end of the trial it has the responsibility of 'evaluating the evidenced as a whole, in light of the context and nature of the evidence itself, including the credibility and reliability of the relevant witness'.

The Trial Chamber ruled that the evidence was relevant and therefore admissible under Rule 89 ©. This decision was consistent with the Fonfana Bail Appeal Decision where the Appeal Chamber remarked that '(e)vidence is

admissible once it is shown to be relevant: the question of its reliability is determined thereafter, and is not a condition for its admission. These decisions reflect the view taken by the Special Court that the trials are conducted by professional Judges who are capable of determining the weight to be given to hearsay evidence.

IV. ARGUMENTS FOR AGAINST THE ADMISSION OF HEARSAY EVIDENCE

The following section considers the arguments for and against the admission of hearsay evidence.

A. The reliability of hearsay

The rule against hearsay reflects the fact that hearsay evidence is not as reliable as direct evidence. This section examines factors undermining the reliability of hearsay evidence.

1. No opportunity to cross-examine the primary witness

Juries, and in international tribunals, Judges, have the onerous task of evaluating the evidence of each witness. The reliability of their testimony is affected by their honesty, perception, memory and narration.

These factors can be tested in cross-examination; however, in the case of hearsay evidence as the primary witness is not coming before the court this is not possible.

If a witness providing secondary evidence has misheard or misremembered a statement, or taken it out of context, this is not evident to the court unless the primary source of the statement is cross-examined. Cross-examination gives the court the opportunity to test the reliability of evidence and assess the credibility of a witness by observing their demeanour. The Special Court has ruled that whether or not evidence can be tested by cross-examination goes to the weight of the evidence, not its admissibility.

Hearsay evidence coming before the Special Court is of an even more extraordinary nature as in many cases it is not just second-hand but third and fourth-hand accounts. In countries with a largely rural population, such as Sierra Leone, the majority of information travels by words of mouth. When a witness testifies it is impossible to test how many individuals a statement they are making has passed through before it reached them. This further compromises the reliability of such a statement.

2. Hearsay evidence is not provided under oath

The reliability of hearsay evidence is further undermined because it is not provided under oath. When evidence is provided under oath a witness is required to testify in the solemn context of proceedings in court, being instructed as to their obligation to tell the truth and the consequences for not doing so. It is common for people to mislead others, particularly when they are not aware of the implications of their statements. It is a lot less likely that someone will make misleading statements before a courtroom, while under oath.

Concord Times
Thursday, 28 July 2011

UN awards Human Rights Commission

By Ibrahim Tarawallie

The Human Rights Commission of Sierra Leone (HRC-SL) has been awarded an "A Status" by the United Nations International Coordinating Committee (ICC) - responsible for the promotion of national human rights institutions - for complying with the Paris Principles in its establishment and operation.

The Paris Principles adopted by the UN General Assembly requires national human rights institutions to have a clearly defined and broad mandate based on universal human rights standards, independence guaranteed by legislation or constitution, autonomy

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UN awards Human Rights Commission

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from government, adequate powers of investigation, security of tenure of its members, pluralism in membership that broadly reflects the society, and adequate funding to support its operations.

HRC-SL chairperson, Edward Sam told journalists that the award from the ICC comes with hard work from staff of the commission in promoting and protecting human rights in the country. He described the award as an achievement and a challenge to the commission, noting: "It is an achievement because of what we have done since we started operation and a challenge for us to maintain it."

The HRC Commissioner maintained that the "A Status" award now qualified them to engage in the promotion of human rights not only at national level, but regional and international as well.

"The commission can now speak at sessions of the UN Human Rights Council, vote at ICC sessions and hold leadership positions in UN human rights bodies," he said. "We will exercise the privilege to address the UN Human Rights Council this September during Sierra Leone's final review under the Universal Periodic Review"

He opined that with such an achievement, they will recommit themselves to continuously work hard to be able to retain it and make human rights real for the populace.

"We hope to continue receiving support from the government, international partners and civil society," Mr. Sam stated. "We call on government to work with us in order to maintain compliance with the Paris Principles and the fulfillment of our statutory mandate to protect and promote human rights in the country."

He said the ICC during its deliberations in May 2011 commended the commission for the work done in pursuing its mandate to promote and protect human rights and also encouraged them to include more information on the measures undertaken by the government to implement specific recommendations or decisions in a practical, systematic and timely manner.

The Standard (Kenya)
Wednesday, 27 July 2011

'ICC calling on African women lawyers'

By Nicholas Anyuor

A campaign by African Judges at the International Criminal Court has only netted two Kenyan women lawyers to represent cases for children and women at the international court.

The campaign spearheaded by African Judges at ICC was to address the shortage of African female lawyers to give representation to women and children at the court.

ICC Judge Joyce Aluoch.

"We started the sensitization campaign last year and we have got two Kenyan women lawyers and four assistant counsels," said ICC Judge Joyce Aluoch.

She also revealed that Africa has about 24 Assistant Counsels, with Kenya having ten, of which only four are women.
Justice Aluoch, Chief of the ICC Counsel Support Section Estreban Peralta Losilla and a Counsel Boniface Njiru said shortage of female lawyers from Africa was negating dispensation of justice on cases touching on children and women from the continent at the ICC.

They said that African women and children were the most affected in the cases currently handled at the court, with a good number having suffered rape and sexual assaults among other human rights violations.

"Female lawyers are conspicuously missing at the court. We want many more of these lawyers to take cases, which are mostly affecting women," Judge Aluoch said.
Aluoch said that in Kenya alone, between 2010 and this year, only two lawyers have applied as counsels at the court.

On judges, Aluoch revealed Africa still had less, with producing only five out of 18, including men.
She was addressing Kenyan Women lawyers in Kisumu, in their efforts to sensitize African women lawyers to apply as lawyers at the ICC.

After Kenya, the team is expected to address another such workshop in Kigali, Rwanda.
Last year, they visited 16 African countries in the programme dabbed "ICC needs you, Calling African Female Lawyers.'

The Standard (Kenya)
Wednesday, 27 July 2011

ICC accepting nominations for prosecutor

By Roseleen Nzioka

The International Criminal Court in The Hague is accepting nominations for the position of prosecutor. President of the Assembly of States Parties, Ambassador Christian Wenaweser has said nominations for the position of prosecutor, which started in June, would continue until September 9.

President of Assembly of States Parties, Ambassador Christian Wenaweser.

In a statement released on the official ICC website, Wenaweser said he was encouraged that States, civil society and academia have been cooperating with the Search Committee. The Search Committee is mandated to facilitate the nomination and election, by consensus, of the next Prosecutor. They will produce a shortlist of at least three suitable candidates for a decision to be taken by States Parties.

The terms of reference for the Search Committee state that the committee will "informally receive expressions of interest from individuals, States, regional and international organizations, civil society, professional associations and other sources.

"The Search Committee will also actively identify and informally approach individuals who may satisfy the applicable criteria, in particular those contained in article 42 of the Rome Statute, and who may subsequently express their interest to be considered."

Wenaweser said: "I am confident that this mechanism will yield results of the highest quality and thus enable States Parties to find a consensual agreement on the next Prosecutor of the International Criminal Court, in accordance with the relevant provisions of the Rome Statute and the relevant decisions of the Assembly of States Parties."

The statement said that interested candidates or those wishing to recommend the names of qualified individuals are requested to contact the Search Committee through the Secretariat of the Assembly of States Parties at the ICC in The Hague.

The elections of the ICC prosecutor are scheduled for the tenth session of the Assembly of States Parties, to be held at United Nations Headquarters, New York, from 12 to 21 December 2011. The election of the new prosecutor should be no later than February 2012.

The term of the current Prosecutor, Luis Moreno Ocampo expires in June 2012.

Bembatrial.org
Wednesday, 27 July 2011

Can Bemba Run For Congolese President From His ICC Jail?

By Wakabi Wairagala

While the International Criminal Court (ICC) strives to get into its custody the two indicted heads of state, one of the inmates in the court's detention center is bent on becoming his country's president. How he plans to manage his presidential campaign from his cell in Scheveningen, the Netherlands, remains to be seen. Equally uncertain is whether Congolese electoral officials would permit him to stand in the November poll.

For now, Jean-Pierre Bemba is set on being the presidential candidate for the Movement for the Liberation of Congo (MLC). At the weekend, the political party gave him its nod, after he wrote to its top officials beseeching them to name him the flag-bearer. However, there are seeming insurmountable odds stacked against his candidature.

Mr. Bemba, 48, is on trial at the ICC over the rape, murder, and pillaging carried out by the militia arm of the MLC against civilians of the Central African Republic during 2002 and 2003. His trial commenced last November.

Mr. Bemba's defense lawyer, Nick Kaufman, said on July 26 that the law under which the Congolese opposition leader is being tried does not bar him from standing for elections. "There is nothing in the Rome Statute which prevents Mr. Bemba from being the flag bearer for his party in the November 2011 presidential elections. This is even more so the case since – until determined otherwise – Mr. Bemba is an innocent man," stated the Mr. Kaufman.

He added, "Mr. Bemba has devoted his life to the people of the DRC [Democratic Republic of Congo] and will continue to do so wherever he may be."

For their part, ICC officials stated that the unfolding scenario was without precedent in the court's history, so they did not know what to make of it.

What Mr. Kaufman would not answer was whether Mr. Bemba hoped to get out of ICC custody one of these days. The elections are four months away, while Mr. Bemba's war crimes trial at the Hague-based court could go on for at least another year. How would he manage his campaigns? And if he were elected, would Mr. Bemba run the country from his Dutch cell as he awaits the verdict of the judges? Moreover, would his not-too-charitable bitter rival, incumbent president Joseph Kabila, allow his nemesis the luxury of running for president from a far-flung European jail?

Some observers believe Mr. Bemba's candidature will yet sail into troubled legal waters. Richard Bondo Tshimbombo Bontshi, a Kinshasa lawyer who formerly headed the organization Advocates Without Borders in Congo, explained that the country's laws allowed someone on trial to stand for election. "But someone out of the country can't stand," he added in an interview with the www.bembatrial.org website.

According to him, Mr. Bemba's candidature is "strategic" and intended to dissuade any pretenders off the MLC top seat. François Mwamba, the party's general secretary who openly nursed presidential ambitions, was edged out of the position three months ago, in what could support this view. Mr. Bemba was also seen as trying to show that he was still politically powerful nationally, said Mr. Bontshi, but, he added,

while the country's opposition had reacted to his candidature respectfully, the ruling party had responded with scorn.

The country's insipid media has largely taken the announcement of Mr. Bemba's candidature as a "non-issue" and hardly reacted to it, according to local media analyst Juakali Kambale. "In fact, very few people, even the MLC [fanatics] believe that Bemba will be released in order to be part of the election," said Kambale.

Mr. Bemba has several times asked ICC judges to let him out of detention, committing to appear in court whenever needed. They have declined each time, agreeing with prosecutors that the accused is an influential and wealthy man who could interfere with witnesses or abscond. It is understood Mr. Bemba is working on a fresh bid to get out of detention, in line with court rules that require judges to review the detention of those in custody at least once every 120 days. Since he was taken in, the former Congolese vice president has twice been out of court precincts – to attend the funerals of his father and his step mother, both in Belgium.

With an impressive roll of more than 300 registered political parties gunning for the hearts of the more than 31 million registered voters, seven notable opposition leaders have already announced their candidatures. However, widespread opinion is that only a joint candidate could dislodge Mr. Kabila. And that candidate needs to court the support of Mr. Bemba – if he himself isn't that candidate. This is probably why prominent contender Etienne Tshisekedi, a Prime Minister in the1990s, has been to The Hague to visit the MLC chief.

Indeed, as 'Le Pays' commented, Mr. Bemba is trying to affirm his presence on the country's political scene, hoping to convince even the most sceptical that he still controls his party and that he is not politically dead.

Yet the 'Le Palmarès' newspaper considered that by the MLC deciding to go alone and endorsing the Bemba candidacy, it was complicating the delicate exercise underway for major parties to field a single candidate. In the 2006 election, Mr. Kabila had to endure a run-off against Mr. Bemba, but he has since changed the constitution to enable him retain the presidency through a simple majority win.

One commentator termed what Mr. Bemba was doing as "virtual politics" that exhibited his desire to remain a key player in Congolese politics, and the "undisputed bull in the MLC kraal." He remarked, "Bemba is pronouncing that he is available to put up a good fight for the presidency, but that fight will be fought on another day, not in 2011."