IN THE SUPERIOR COURT OF JUDICATURE
**IN THE SUPREME COURT OF GHANA**
ACCRA – A. D. 2022

**CIVIL MOTION NO. J5/67/2022**



**THE REPUBLIC**

VERSUS

**HIGH COURT,**
CRIMINAL DIVISION (3),
ACCRA. } RESPONDENT

**EX PARTE:**
**JAMES GYAKYE QUAYSON,**
H/NO. SD/16 SDA,
ASSIN BEREKU. } APPLICANT

AND

**ATTORNEY-GENERAL,**
MINISTRY OF JUSTICE,
MINISTRIES, ACCRA. } INTERESTED PARTY

## REPLY TO STATEMENT OF CASE FILED BY 1ST INTERESTED PARTY

### A. FUNDAMENTAL ERRORS IN INTERESTED PARTY SUBMISSIONS

i) The Statement of Case filed on behalf of the Interested Party makes a number of fundamentally erroneous legal arguments in opposing the application herein. It is claimed that:

1. the supervisory jurisdiction of this court has not been properly invoked since "the High Court did not commit a jurisdictional error or a fundamental non-jurisdictional error." (paragraph 4.11 at p. 14)
2. section 60(1) of the Evidence Act, 1975 "is not couched in mandatory terms and not a pre-condition to the witness testifying." (paragraph 5.6 at p. 16).
3. "the provisions contained in section 60(2) of the same Evidence Act in another vein permits evidence to be led with or without such an introduction of personal knowledge."
4. "despite provisions in sections 14,17(1) and 60 (1) and (2) of NRCD 323, particular attention should be paid to section 111 which permits a witness to give a testimony in the form of an opinion or inference, **which is not personal knowledge (emphasis supplied)** on a matter and the

basis for which he is testifying to need not be disclosed unless the court otherwise determines." (paragraph 5.9 at p. 16)

5. "The only circumstances under which a court can exclude relevant evidence are listed under section 52 of NRCD 323." (paragraph 5.18 at p. 19)
6. "a complainant need not have personal knowledge of the facts of the matter he is testifying to if there is sufficient evidence in in his statement to assist the court in resolving facts in issue." (paragraph 5.20 at p. 20)
7. "The trial judge did not err when she stated that: "**The said witness has made certain positive statements and is presumed that he has personal knowledge of what he is testifying on. Whether or not what he has stated therein are matters he knows can only be determined under cross examination to rebut that presumption. It is only after a piece of evidence has been tested under cross-examination that the court will know whether what he says will assist the court to determine the fact in issue".** (paragraph 5.23 at pp. 20-21)
8. "the ruling of the Respondent High Court does not occasion any injustice to the Appellant as he has opportunity in accordance with the rules of court and natural justice to cross-examine the witness to demonstrate that he has no personal knowledge of the matter which he seeks to testify on." (paragraph 5.26 at p. 22).

**B. Error 1 -Claim that certiorari is not the right remedy in this case**

i) At paragraph 5.25 on pp. 21-22 of interested party's statement of case appears the following statement: "That the Respondent High Court had jurisdiction to determine whether PW1, Richard Gyakye-Quayson (sic), could testify in the trial and her finding did not by any stretch of imagination constitute a fundamental error of the law patent on the face of the record." The Statement of Case then goes further in paragraph 5.27 on p. 22 to submit that "the learned High Court judge did not wrongfully assume jurisdiction and that at all times acted within its proper jurisdiction and **applied her construction and understanding of the provisions in the Evidence Act, 1975."**

It is as if once the trial judge applied her construction and understanding of the statutory provisions, even if in fundamental

error, she could not be said to have gone outside her jurisdiction. The argument of the interested party is similar to an argument put forward in **Okofoh Estates v. Modern Signs Ltd & Another** [1996-1997] SCGLR 224 which Sophia Akuffo JSC records at p. 239 as follows: "Counsel for the first respondent argued, in his preliminary objection, that since the High Court Judge was properly seised of the application before him, any error of law on the face of the record is non-jurisdictional error and the proper remedy is an appeal and not an order for certiorari." The Court rejected this argument.

ii) In the words of Sophia Akuffo JSC (at p. 241): "In this case there can be no doubt that the learned judge in the High Court had the jurisdiction to hear the application before him. However, as I have already found, supra, **since the application was one that came under Order 25, r. 4 which required him not to take into account affidavits and exhibits annexed thereto, the learned judge committed an error and fell beyond the bounds of his jurisdiction in the matter.**" (Sophia Akuffo JSC as she then was).

iii) Aikins JSC also expressed himself as follows at p. 249: "It is trite law that where a court makes a speaking order, i.e. one in which the grounds and the reasons therefor are adequately and clearly stated, and the said grounds are found to be patently erroneous in law on the face of the record, a superior court can quash the order on certiorari. ... the learned judge committed an error of law, and since the error is apparent on the face of the record, the application for certiorari would be granted".

iv) Atuguba JSC also stated at pp. 256: "Mr. Kom also contended that "where a court is properly seised with a matter and makes a non-jurisdictional error of law the appropriate remedy is an appeal and not CERTIORARI." The contention is right only in a situation where the error is not apparent on the face of the record. **The scope of certiorari is not restricted to jurisdictional errors.**" After then referring to a number of cases, and relating the principles established in them to the case at hand, Atuguba JSC further said: "It is quite obvious and as demonstrated by my sister Sophia Akuffo JSC, that **the learned trial judge fell into a patent error on the face of the record.**

....In short, **by a patently wrong legal view of the application before him the trial judge acted ultra vires**, thereby denying the applicant natural justice." (at pp. 257-8, emphasis supplied).

v) In **Republic v High Court Accra, ex parte Commissioner on Human Rights and Administrative Justice (Addo interested party) [2003-2004] SCGLR312 at p. 345, Dr.** Date-Bah JSC provided an oft-quoted restatement of the law in respect of recourse to certiorari as follows:

"Where the High Court (or for that matter the Court of Appeal has made a non-jurisdictional error of law, which was not patent on the face of the record ..., the avenue for redress open to an aggrieved party was an appeal, not judicial review. Therefore, certiorari would not lie to quash errors of law which were not patent on the face of the record and which had been made by a superior court judge who was properly seised of the matter before him or her. In that regard, **an error of law made by the High Court judge or the Court of Appeal, would not be regarded as taking the judge outside the court's jurisdiction, unless the court had acted ultra vires the constitution or an express statutory restriction validly imposed on it** ...". (Emphasis supplied).

It is clear that the errors of the trial judge here, as shown in our statement of case as well the submissions herein, were patent errors of law on the face of the record which were fundamental. By going contrary to an express statutory restriction contained in section 60(1) of the Evidence Act and claiming to rely on a non-existent presumption and the reasons she gave for not requiring evidence of personal knowledge under section 60(1) of the Evidence Act, the trial judge acted ultra vires.

vi) The case of **Republic v. Court of Appeal; ex p. Tsatsu Tsikata** [2005 - 2006] SCGLR 612, which the interested party relies on, is obviously wholly inapplicable to the circumstances of this case. The errors of law here are by no means "minor, trifling inconsequential or unimportant errors" as per the dicta quoted from the judgment of Wood JSC. On the contrary, they fall squarely within her characterization of errors that are "fundamental, substantial, material grave or so serious as to go to the root of the matter." (at p. 619). It is also worth underlining that the Court of Appeal decision

that was the subject matter of the certiorari application was as to stay of proceedings pending appeal and the Supreme Court was dealing with whether the errors complained of went to the core issue of determining if there were "exceptional circumstances" for the grant of the stay.

vii) The current application is in relation to a High Court decision allowing testimony in a criminal trial from a witness in relation to whom no evidence of personal knowledge of the matters about which he was testifying had been introduced on the basis of patently erroneous interpretation of provisions of the Evidence Act. That is the core issue on which the whole decision turned. As we also show in submission below on Error 7, admission of evidence in a criminal trial based on a presumption of personal knowledge of the prosecution witness effectively denies the accused the presumption of innocence and infringes the accused person's fundamental constitutional rights. These matters are entirely different from a consideration of whether the Court of Appeal not granting a stay of proceedings should be quashed by certiorari, which was the issue in **Ex p. Tsatsu Tsikata.**

viii) It is worth referring to the case of ***Republic v High Court (Lands Division) Accra, Ex-parte Lands Commission (Nungua Stool and Others – Interested Parties, Civil Motion No. J5/4/14 dated 5th December 2013*** where Wood CJ, presiding quoted with approval the following passage of the judgment of Atuguba JSC in the case of ***Network Computers Limited v Intelsat Global Sales and Marketing [2012] 1 SCGLR 218 at page 231***:

"Unless a substantive Act can be regarded as directory and not mandatory or its infraction is so minimal that it can be observed that it can be covered by the maxim de minimis non curat lex or such that the complaint about it is mere fastidious stiffness in its construction or the breach relates to part of it which in relation to others, can be regarded as subsidiary and therefore should not be allowed to prejudice the operation of the dominant part or purpose thereof, or the strict enforcement of the statute would amount to a fraudulent or inequitable use of the statute or some other compelling reason, **I do not see how a court can gloss over the breach of a statute.**" (Emphasis supplied).

ix) This was also the position of the Supreme Court in **Republic v. High Court (Fast Track Division); Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties)** 2009 SCGLR 390 where an order granted by the High Court for an interlocutory injunction was quashed because of non-compliance with statute. In our Statement of Case in this application, we quoted passages from Atuguba JSC and Date-Bah JSC in that case which have often been quoted with approval in this court. {See, for instance, **Republic v Michael Conduah, Ex-parte AABA (Substituted by) Asmah,** [2013-2014] 2 SCGLR 1032 at page 1060}.

x) The importance of compliance with statute is also expressed succinctly in the following words of Dotse JSC in **Republic v High Court, Koforidua; Ex-parte Asare (Baba Jamal & Others Interested Parties) 2009 SCGLR 460 at 509: "Where a statute has made provisions for certain steps to be taken in order to comply with the requirements of the law, then no other steps other than those prescribed must be taken or followed**. In this case, once the first interested parties have failed to strictly adhere to the provisions of PNDCL 284 as will be shortly established, it follows that their actions falls flat in the face of the law." (Emphasis supplied).
The failure of the trial judge to follow the step required in section 60(1) of the Evidence Act before a witness can testify, as we demonstrate fully below, makes her decision fatally flawed.

xi) There is thus no reason for this court to entertain the claim in paragraph 5.27 on p. 22 of the interested party statement of case that: "Assuming without admitting that the learned High Court Judge even erred in her understanding of section 60(1) of NRCD 323 as stated by the Applicant, that will constitute non-jurisdictional error since the High Court has jurisdiction to determine the competence of a witness, relevance of evidence and admissibility of evidence. The process will be an appeal and not Judicial review. The learned High Court did not commit a jurisdictional error by her Ruling which the subject matter of this application (sic)." The serious and fundamental nature of the patent errors of law which form the basis of this application cannot be brushed aside on the basis that the High Court has jurisdiction to determine the competence of a witness, relevance

of evidence and admissibility of evidence. While exercising its jurisdiction over these matters the trial judge made patent and fundamental errors of law by egregiously breaching statutory provisions.

xii) All the authorities, including those cited in the statement of case of the interested party, make it clear that this Honourable court cannot gloss over the statutory breaches of the trial judge in this case. By refusing to comply with applicable rules of evidence established by statute and making determinations on admitting witness testimony that imposes burdens of proof on the accused person without any legal basis whatsoever, the decision of the trial judge clearly needs to be quashed in the exercise of the supervisory jurisdiction of this court by means of certiorari.

**C. Error 2 -Section 60(1) of the Evidence Act, 1975 misinterpreted as discretionary**

i) Evidence of personal knowledge is a general foundation requirement for testimony by a witness. Section 60(1) of the Evidence Act, 1975, based on which the objection was raised before the High Court judge, is perfectly clear in its terms: "A witness may not testify to a matter unless sufficient evidence is introduced to support a finding that he has personal knowledge of the matter."

The claim that the provision is not couched in mandatory terms is simply wrong. The Director of Public Prosecutions evidently equates "may" with "may not"! "May not", however, is obviously the negation of "may" and means something that **ought not to be done or is not permitted to or is not authorized to be done**. While **"may"** means that you have permission to do something, **"may not"** means you are not permitted to do something. Thus, a statement that "Counsel appearing before the Supreme Court may not be heard unless they are robed" is not expressing a discretion that Counsel has to robe or not to! **"May not"** indicates that a prohibition is imposed and not that there is a discretion.

ii) In section 60(1) what is being prohibited is the witness testifying when sufficient evidence has not been introduced to support a finding that he has personal knowledge of the matter about which he

is seeking to testify. The word "unless" preceding the rest of the provision also means that it is a pre-condition that is being introduced. There can really be no argument about the obvious and only plausible and reasonable meaning of the words of this section and it is unfortunate that claims can be made that contradict that meaning. It is also worth pointing out that under section 60(3): "A witness may testify to a matter without proof of personal knowledge if no objection is raised by any party." In this case, an objection was raised to the witness testifying without proof of personal knowledge. With the raising of the objection, the witness may not testify without proof of personal knowledge; that is the import of this section 60(3) also.

iii) We further put the matter beyond a shadow of doubt by referring to both the Memorandum published when the Decree was enacted and the Commentary on it by the Law Reform Commission. In the Commentary, at page 50, it is expressly stated, in discussing section 60, that: "This section assumes that the witness is competent under section 59. **Its purpose is to limit the scope of his testimony to matters of which he has first-hand information.**

The purpose of this section is **to assure the use in court of the most reliable evidence ....If a matter can be perceived by the senses, the witness must in fact have perceived it before he can testify to it.** ...

The question of the witness's personal knowledge is **preliminarily decided by the judge. If there is not sufficient evidence to support a finding of personal knowledge, no tribunal of fact could find personal knowledge,** and so as not to waste the time of the court, the matter is withdrawn from the consideration of the jury or the further consideration of the judge." (Emphasis supplied).

iv) In the Memorandum also, it is stated in paragraph 13 that: "Part V of the Decree deals with witnesses" and, after Sections 58 and 59 are discussed, it is stated: "The remaining provisions of that Part deal with **requirements for testifying,** the examination of witnesses, the exclusion of witnesses, credibility and related matters." (Emphasis supplied). Section 60(1) is clearly among the "**requirements for testifying**" and a witness who does not meet the requirement of personal knowledge is not to be allowed to, or **may not,** testify.

v) Yet, the Interested Party invites the Honourable Court in paragraph 5.14 on p. 18 of the Statement of Case to ignore the fact that no

evidence was introduced to show the personal knowledge of the witness about the matters he sought to testify about: "We therefore humbly submit that although the Applicant (sic) may not work at the passport office, the Electoral Commission or the Canadian Embassy, as citizen of Ghana who has information about the Applicant's dealings with these institutions, **should not be barred from testifying in a case merely on grounds that he did not lead sufficient evidence to show that he had personal knowledge of the matter.**" (Emphasis supplied) This is an invitation to arbitrary and capricious judicial decision-making contrary to statute and to binding judicial precedent.

vi) In **Juxon-Smith v. KLM Dutch Airlines [2005-2006] SCGLR 438** the Supreme Court was faced with a claim that a decision by the Court of Appeal to reject as exhibits certain foreign official documents because they had not been authenticated as required under section 161 of the Evidence Act before being tendered was in error. The Court, speaking through Georgina Wood JSC (as she then was) said: "In this instant appeal, the Court of Appeal, proceeding under powers conferred on it by section 8 of NRCD 323, decided to exclude these four exhibits on the basis that being foreign official documents, as a precondition to admissibility, the signatures on them ought to have been authenticated in accordance with section 161 of NRCD 323 ..... was the court wrong in invoking section 8 of its own motion to exclude documents on these legal grounds? Not in the least! ...
Was section 161 of NRCD misapplied? It was not." (at p 448)

vii) The Court proceeded to make reference to the Commentary on the Evidence Decree and then concluded: "The legal position is that section 136 of NRCD 323 makes authentication, which is an application of the relevancy rule, **a condition precedent to admissibility**. Stated differently, no foreign official document is admissible in evidence without authentication. Also, it is the judge who makes **a preliminary determination** of authenticity. It follows that where a foreign official document is sought to be tendered, irrespective of whether or not any objection to authenticity has been raised, **it is the duty of the court to determine this critical question (of authenticity) and proceed to admit the document only when it has been satisfied**, provided, of course, all other hurdles to admission have been cleared." (pp. 450-1, emphasis supplied).

viii) After also determining that an exception, under section 161(3), to the need for determination of authentication was inapplicable, the court concluded this part of its decision in the following words: "The authenticating presumption rule is therefore clearly inapplicable to this case. **The documents were therefore wrongly received into evidence. The defendant was entitled to call for their rejection and the appellate court was right in correcting this patent error.**" (at p. 451, emphasis supplied).

The preliminary determination of authenticity of a document here is exactly like the preliminary determination of personal knowledge that a judge is required to make under section 60(1) and the accused was entitled to call for the rejection of testimony of a witness' testimony when the critical, preliminary question of personal knowledge of the witness had not been satisfied. Just as notapplying the requirement of prior authentication of a document before its admission into evidence was characterised as a patent error, so the misinterpretation of section 60(1) relating to the requirement of personal knowledge constitutes patent error.

## D. Error 3- Claim that section 60(2) permits evidence to be led without personal knowledge

In paragraph 5.7 on p. 16 of the statement of case, the Director of Public Prosecution starts of from the mistaken premise of section 60(1) being "permissive" to argue as follows: "because section 60(1) is permissive, the framers went ahead to (sic) in section 60(2) of the Evidence Act to provide that **"Evidence to prove personal knowledge may, but need not consist of the testimony of the witness personally."** The import of this section is simply that proof of personal knowledge of the witness need not come from the witness himself. It can come from another witness, for instance. This subsection actually, therefore, reinforces the requirement of proof of personal knowledge as a precondition for the testimony of a witness but only enables testimony on such personal knowledge to come from a source other than the witness himself. The requirement of evidence of personal knowledge is not removed by the terms of section 60(2). Yet in paragraph 5.8 on p. 16 of the statement of case

of the interested party goes on after quoting section 60(2) to claim that: "Respectfully, the provisions contained in section 60(2) of the same Evidence Act in another vein permits evidence to be led with or without such an introduction of personal knowledge." It is simply incredible that such a claim is made on the basis of section 60(2) of the Evidence Act which actually reinforces the need to prove personal knowledge as a precondition to witness testimony and simply provides that the evidence required to prove personal knowledge of a witness does not have to come from that witness. There is no vein in section 60(2) which "permits evidence to be led with or without such an introduction of personal knowledge."

## E. Error 4 -Claim that Section 111 of the Evidence Act, 1975 permits testimony in the form of an opinion or inference, without personal knowledge

i) It is claimed that the decision of the High Court judge can be justified by reference to section 111 of the Evidence Act, 1975 which "permits a witness to give a **testimony in the form of an opinion or inference, which is not personal knowledge (emphasis supplied)** on a matter and the basis for which he is testifying to need not be disclosed unless the court otherwise determines." It must be noted that the trial judge, in her ruling, did not rely on this argument which was presented to her too by the Director of Public Prosecutions. We are obliged to respond because the argument is again being put forward in opposition to the application for certiorari before this court.

ii) The sentence quoted above from the Statement of Case of the Interested Party is not quite clear (some words appear missing) but to the extent that it involves a claim that section 111 permits testimony in the form of an opinion or inference without personal knowledge, it flies in the face of both the words of the section and the most basic principles underlying the rules of evidence. Section 111 (1) states that "A witness who is not testifying as an expert may give testimony in the form of an opinion or inference **only if**

(a) the opinion or the inference **concerns matters perceived by the witness, and**

(b) the testimony in the form of an opinion or inference is helpful to the witness in giving a clear statement, or is helpful to the Court or tribunal of fact in determining an issue." (emphasis supplied).

Condition (a), -requiring that "the opinion or inference concerns matters perceived by the witness", is obviously a requirement of personal knowledge and conditions (a) and (b) apply conjunctively. Section 111 cannot, therefore, be interpreted as if it enables the witness to give an opinion about matters he has not perceived.

iii) There is absolutely nothing in section 111 to suggest that it seeks to derogate from section 60(1). It is, in fact, significant that section 60(4) provides that: "This section is subject to section 112 relating to **opinion testimony by expert witnesses.**" (Emphasis supplied) If section 60 were also intended to be subject to section 111 on lay witnesses that would surely have been stated.

iv) The Commentary on Section 111, again, puts this matter beyond doubt by stating: that: "The common law required a witness to have personal knowledge of the matter to which he testified. Only expert witnesses, with special knowledge not possessed by laymen, were allowed to testify to matters which they had not themselves observed." (p. 83). The Commentary goes on to recognize that: "This section [111] **reinforces section 60 in precluding lay testimony not based on personal observation. It recognizes the general preference for testimony of observations to testimony of opinion.**" (p. 85, emphasis supplied).

What the Statement of Case for the Interested Party interprets section 111 as permitting is the direct opposite of what section 111 says. The language of the section and the Commentary thereon conclusively show this.

v) Furthermore, nowhere in the Statement of Case does the Director of Public Prosecutions set out the opinions or inferences which are being claimed to be permitted by virtue of section 111, so as make clear how the argument put forward relates to the specific testimony against which the objection was raised on behalf of the accused person, the applicant herein.

**F. Error 5 Claim that Section 52 of the Evidence Act, 1975 is only basis for exclusion of relevant evidence**

i) There is a sheer misinterpretation of section 52 in the claim in the Statement of Case for the Interested Party that "The **only circumstances under which a court can exclude relevant evidence are listed under section 52 of NRCD 323**. Therefore, where relevant evidence does not meet the threshold, it need not be excluded by a court." (paragraph 5.18 at p. 19, emphasis supplied). Nothing in the terms of Section 52 suggests that it is meant to set out "**the only circumstances under which a court can exclude relevant evidence**". Yet this is part of the way in which an attempt is being made in the Statement of Case for the Interested Party to neutralize the operation of section 60(1), particularly. The argument that where relevant evidence is not being excluded in terms of the criteria in section 52, "it need not be excluded by a court", is entirely without merit.

ii) All section 52 provides is that: "The court in its discretion may exclude relevant evidence if the probative value of the evidence is substantially outweighed by –

(a) considerations of undue delay, waste of time, or needless presentation of cumulative evidence; or

(b) the risk that admission of the evidence will create substantial danger of unfair prejudice or substantial danger of confusing the issues; or

(c) the risk, in a civil action, where a stay is not possible or appropriate, that admission of the evidence will unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered."

This section is in Part IV of the Evidence Act, 1975, under the heading "Relevancy". The first section in that Part IV is section 51, subsection 1 of which defines what "relevant evidence" is and subsection 2 of which provides: "All relevant evident evidence is admissible **except as otherwise provided by any enactment.**" (Emphasis supplied). It did not say "except as provided in section 52". By the terms of the section 51(2), it is obvious that it cannot be only by reference to section 52 that relevant evidence can be excluded. Such exclusion

may be by "any enactment", including section 60 and other provisions in the Evidence Act.

iii. The Supreme Court applied section 52 in **Bonsu alias Benjillo v. The Republic** [1998-99] SCGLR 112. Nowhere in its judgment was it suggested that the section sets out "the only circumstances under which a court can exclude relevant evidence" and there is no basis whatsoever for this claim in the Statement of Case for the Interested Party.

iv. The following statement in paragraph 12 to the Memorandum to the Evidence Decree, again, makes it clear that there are other provisions apart from section 52 which exclude relevant evidence: "One such relevant matter which is often excluded for policy reasons is character evidence." Section 53 of the Evidence Act is the section that deals with the exclusion of character evidence.

## G. Error 6 – Claim that, being testimony of complainant, personal knowledge is not required

i) The fact that a witness is the complainant in the case gives him no special standing in respect of the application of rules of evidence to his testimony. The rules of evidence, including section 60(1) of the Evidence Act, apply to all witnesses and nowhere in these rules, whether under common law or under the Evidence Act, has there ever been any special provision for a complainant. Thus, the submission that "**a complainant need not have personal knowledge of the facts of the matter he is testifying to** if there is sufficient evidence in his statement to assist the court in resolving facts in issue" (paragraph 5.20 at p. 20) also falls flat on its face. That paragraph 5.20 follows paragraph 5.19 which reads: "It is the contention of the Interested Party herein that, the trial judge in her ruling did not only make reference to the competence of the witness and the relevance of his testimony to the case of the prosecution but also to the fact that the witness (sic) positive statements made by the witness could be tested under cross-examination."

ii) Paragraph 5.20 starts off with the statement: "Interested Party strongly disagrees with this assertion"; this is strange since the immediately preceding assertion in the just quoted paragraph 5.19 is the position of the trial judge which Interested Party indicates support for earlier. If the Interested Party now "strongly disagrees",

there is a contradiction in its position. There may be a missing passage here.

iii) The "trite" statement in paragraph 5.21 about criminal proceedings "commenc[ing] with a complaint" and the statements about the complainant having petitioned the police about the conduct of the police etc do not address the critical issue of lack of personal knowledge on the part of the witness. Nor is it in fact true that criminal proceedings necessarily commence with a complaint.

## H. Error 7 -Claim that trial judge did not err in presuming personal knowledge on the part of the witness and that cross-examination can be used to rebut

i) It is claimed that "[t]he trial judge did not err when she stated that: **"The said witness has made certain positive statements and is presumed that he has personal knowledge of what he is testifying on. Whether or not what he has stated therein are matters he knows can only be determined under cross examination to rebut that presumption. It is only after a piece of evidence has been tested under cross-examination that the court will know whether what he says will assist the court to determine the fact in issue".** (paragraph 5.23 at pp. 20-21). The making of positive statements by a witness does not justify the claimed presumption as to personal knowledge. This is not consistent with the clear language of section 60(1) requiring establishment of personal knowledge as a pre-condition to the witness being permitted to testify. If the provision were intended to create a presumption as to personal knowledge, that would have been stated in the same way as various presumptions are set out in Part III of the Evidence Act. No attempt is made in the submissions of the interested party to situate this claimed presumption within any of the sections (18 to 50) of the Evidence Act that deal with presumptions, nor to offer any sort of legal basis for this "presumption".

ii) Section 18 of the Act defines a presumption as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." Without any law requiring such an assumption of fact to be made, it is fundamental error for the trial judge to assert a presumption. Nor does the Interested Party refer, in their statement of case, to any law to justify

their statement that the judge did not err in invoking a presumption. The trial judge and the prosecution cannot, with respect, create a presumption simply by their say-so.

iii) It is to be noted that section 20 of the Evidence Act lays down the effect of a rebuttable presumption as follows: "A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact." The effect of the alleged presumption in a criminal trial such as this, particularly the imposition of the burden of producing evidence and the burden of persuasion as provided for in section 20, is not consistent with the provisions in sections 10 to 17 of the Evidence Act as to the burden of proof. Indeed, it undermines the fundamental rights of the accused, as we further submit in the discussion below of error 8. The Interested Party evidently recognizes how what is being urged on the court is at odds with provisions in the Evidence Act on issues of burden of proof, hence "the contention of the interested party herein that **despite provisions in sections 14, 17(1) and 60 (1) and (2) of NRCD 323,** particular attention should be paid to section 111...", (paragraph 5.9 emphasis supplied). As we have earlier demonstrated, section 111 does not justify overriding the other statutory provisions such as section 60(1).

iv) The opportunity the accused has to cross-examine the witness, referred to by the trial judge and also relied on in the statement of case of the interested party, is really irrelevant to the interpretation of section 60(1). It is also irrelevant to the effect, under section 20, of the claimed presumption as to personal knowledge in imposing a burden of producing evidence and a burden of persuasion on the accused person to rebut the presumption. If there were a burden of proof to be discharged, it would not only be through cross-examination of the prosecution witness that this could be done. The claim that only under cross-examination can there be rebuttal of the presumption of personal knowledge of the witness only further underscores the arbitrary and capricious nature of this invocation of a presumption.

## I. Error 8 - Claim that no injustice to Applicant

i) The claim also that "the ruling of the Respondent High Court does not occasion any injustice to the Applicant as he has opportunity in accordance with the rules of court and natural justice to cross-examine the witness to demonstrate that he has no personal knowledge of the matter which he seeks to testify on" (paragraph 5.26 at p. 22), is quite extraordinary. The alleged presumption would have profound consequences for the conduct of criminal trials such as that faced by the accused where his liberty is at stake. The prosecution would be enabled to parade witnesses lacking personal knowledge of what they are testifying about but always presumed to have personal knowledge. The accused would, in each case, have the burden of producing evidence and the burden of persuasion on the basis of section 20 of the Evidence Act, quoted above.

ii) Article 19(2)(c) of the 1992 Constitution states that: "A person charged with a criminal offence shall –

be presumed to be innocent until he is proved or has pleaded guilty."

This presumption is wholly undermined by a presumption of the personal knowledge of prosecution witnesses which imposes the burden on the accused to produce evidence and to persuade the court of the lack of personal knowledge of the witnesses. Simply being able to cross-examine these witnesses to demonstrate their lack of personal knowledge of the facts of the matter that the accused is charged with does nothing to alleviate the injustice to the accused person. The right to fair trial of the accused would thereby be honoured more in its breach than in observance. There could be no more grievous injustice to the accused than such a violation of his fundamental human rights.

## J. CONCLUSION

The trial judge was in fundamental error in overruling an objection to the testimony of PW 1 that was being offered without the introduction of any any evidence that the witness had personal knowledge of the matters he was testifying about. The attempts of the prosecution in the statement of case to justify this error have led to the erroneous legal arguments that we have

considered above. The basic fundamental error of the judge, as stated in Ground 1 of our application was to decide that because the witness is a competent witness and his evidence is relevant, the objection should be overruled. The words of Bamford -Addo JSC in the **Bonsu alias Benjillo** case, applying section 52 of the Evidence Act, are pertinent: "Normally all relevant evidence is admissible. However, **the court ought to exclude evidence, however relevant, if it is prejudicial against an accused**: see section 52(b) of NRCD 323". The provision used by the Supreme Court in that case to exclude the evidence, is expressed in terms of exercise of discretion by the court. The provision relied on in raising the objection in this case prohibits the testimony of the witness, which make this an even more compelling situation for the evidence to be excluded than what the Supreme Court dealt with in **Bonsu alias Benjillo**. There was clear and fundamental error on the part of the trial judge in not upholding the objection.

Respectfully submitted.

DATED AT KAPONDE & ASSOCIATES, SUITE 606/607, 6TH FLOOR, REPUBLIC HOUSE, GHANA SUPPLY COMPANY BUILDING, ACCRA THIS 18TH DAY OF JULY, 2022.

**SOLICITOR FOR THE APPLICANT**
JUSTIN PWAVRA TERIWAJAH, ESQ.
SOLICITOR'S LICENCE NO. **eGAR 00011/22**
CHAMBER'S REGISTRATION NO. **ePP00756/21**

JUSTIN PWAVRA TERIWAJAH
LL.B (GHANA), LL.M (PEKING)
SOLICITOR AND BARRISTER
TEL: +233 544 181818 / +233 233 181818
+223 277 181818/ +233 208 101010
Email:jpteriwajah@pku.edu.cn

THE REGISTRAR,
SUPREME COURT,
ACCRA.

AND TO:

1. THE REGISTRAR, HIGH COURT, CRIMINAL DIVISION (3), ACCRA; AND

2. THE INTERESTED PARTY, THE ATTORNEY-GENERAL, ATTORNEY-GENERAL'S DEPARTMENT, PROSECUTIONS UNIT, MINISTRIES – ACCRA.