Edward Slangar of the City of Monrovia, Liberia DEFENDANT/APPELLANT VERSUS The Republic of Liberia by & Thru **Emmanuel Konah** of the city of Monrovia, Liberia PLAINTIFF/APPELLEE

APPEAL. JUDGMENT REVERSED AND CASE REMANDED

Heard: April 2, 2007 Decided: August 9, 2007.

MR. JUSTICE JA'NEH DELIVERED THE OPINION OF THE COURT.

On March 31, 2006, the Grand Jurors of the county of Montserrado, by and through the
County Attorney of said County, did make a Presentment and Indictment against Emmanuel Konah and Edward Slangar charging them with THEFT OF PROPERTY. The indictment was predicated upon the sworn complaint of the State, by and through private prosecutor, John P. Beh, represented by his attorney-in-fact, A. Noah Kai.

THEFT OF PROPERTY, the crime defendants were charged with, is defined under Chapter 15 Section 51 (a, b and c) of the Penal Law of Liberia which states: "a person is guilty of theft if he:

(a) Knowingly takes, misappropriates converts or exercises unauthorized control over, or makes an unauthorized transfer of an interest in the property of another with the purpose of depriving the owner thereof;

(b) Knowingly obtains the property of another by deception or by trick with the purpose of depriving another of his property by deception or by trick or;

(c) Knowingly receives, retains or disposes of property of another which has been stolen, with the purpose of depriving the owner thereof."

The indictment against the two defendants Emmanuel Konah and Edward Slangar alleges as follows: *"That in the months of February and May, 2005, the defendants,. Emmanuel Konah and Edward Slangar, both of the city of Monrovia, criminally and with wicked intent to deprive the private prosecutor John P. Beh, Sr. of his money, jointly connived and conspired and criminally stole and took away US$1,575.00 and LD24,000.00; that said two defendants have continued to exercise unauthorized control over said property to the detriment of the private prosecutor; and that defendants Emmanuel Konah and Edward Slangar have engaged in the*

described criminal conduct without any fear of the statutory laws of the Republic, and by this conduct said two defendants committed the crime of theft of property, contrary to the organic laws of the Republic of Liberia."

On the strength of the indictment, a writ of arrest was on April 1, 2006, issued out of the First Judicial Circuit, Criminal Assizes "C" against the two herein named defendants. Thereafter, co-defendant Edward Slangar was arrested and brought under the court's jurisdiction. Co-defendant Emmanuel Konah was not arrested and therefore remained at large.

This Court observes that on May 23, 2006, Prosecution made a submission to the trial court in which it indicated the following:

"...Prosecution says that it observes upon the calling of the case the unexcused absence of one of the defendants in person of Emmanuel Konah, who was seen few minutes before the call of this case in this court room but absconded and fled into hiding upon the call of the case. Prosecution says that the failure of co-Prosecution days that the failure of co-defendant Emmanuel Konah to appear in court at this crucial moment of the trial of this case is not only a violation but a breach of the major clause of the bond filed by said co-defendant. Wherefore and in view of the foregoing facts and circumstances, prosecution prays your honor to set aside any bond which may be before this court and filed in favor of co-defendant Emmanuel Konah and to order his arrest for bail jumping; prosecution so prays. *"[Emphasis supplied]*

To this submission, the trial court ruled as follows:

"The submission of the prosecution is hereby noted. Due to circumstances beyond the control of this court and in other to ascertain whether or not co-defendant Emmanuel Konah is under the jurisdiction of this court, this case is hereby reassigned for hearing on Thursday May 25, 2006 at 2:30 p.m …"

On May 24, 2006, while investigation by the trial court into the whereabouts of co-defendant Emmanuel Konah was pending, counsel for co-defendant Edward Slangar, filed a six (6) count motion to dismiss the indictment, substantially arguing as follows:

(1) "Movant submits that while it is true an attorney-in-fact can institute an action based upon a power of attorney but said action must be civil in nature and if as alleged, he and co-defendant Emmanuel Konah deprived John P. Beh, Sr. of the amount as mentioned in the indictment, it is only

John P. Beh, Sr., as an individual who can institute a criminal action against him and not by and thru an attorney-in-fact as in the instant case."

(2) "Under the statutes, practices and procedures extant, a civil action can be instituted either by the person who is aggrieved or by and through an attorney-in-fact but in criminal action it is only the aggrieved person who can institute an action and up to drawing of the indictment, John P. Beh, Sr., resides at 2, Nevada Street, Apartment No. 18H, Newark, New Jersey, United States of America. Attached hereto is copy of a letter addressed to Movant herein and co-defendant in the alleged Theft of Property and marked as Exhibit M/1 to form a cogent part of this motion and court is also requested to take judicial notice of the indictment, especially witnesses that appeared before the grand inquests/jurors."

(3) "Movant further submits that under the statutes extant, a party can institute an action based on legal standing but in the instant case, A. Noah Kai has no legal standing and as such, the indictment is a fit subject for dismissal."

The State filed a six-count resistance to the motion to dismiss advancing amongst others, the following arguments:

1. "As to counts 3, 4, 5, and 6, [of co-defendant Slangar's motion to dismiss] same are false and misleading and has no iota of truth because the indictment which was drawn by the Grand Jury of this jurisdiction, sitting in its February Term, A.D 2006, indicted the Defendants for the alleged commission of the crime of Theft of Property on behalf of the State. In the issue at bar, the State, Republic of Liberia, is the Plaintiff, as it is the law of this noble Republic that was violated by the Defendants."

(2) "Further to said Counts, Respondent said that even though John P. Beh, Sr., is said to be the Private Prosecutor yet he is a witness and because he is not presently residing in the country, he has under our laws appointed, nominated and assigned someone [in this case] A. Noah Kai, as Attorney-in-fact, to oversee his property and to report any violation thereto to him and to the Government. Issues affecting Government interest are to be referred to the Government by the Attorney-In-Fact and issues affecting Mr. Beh's interest directly are to be reported to Mr. Beh. In the instant case, the crime allegedly committed by the Defendants is directly in contravention of the statutory laws of Liberia as contained in Section 15.51 of the New Penal Code."

On June 1, 2006, both the motion and the resistance thereto were argued, pro et con, and the defendant's motion dismissed. As this Court agrees with the ruling of the trial judge, His Honor Blamo Dixon, we quote verbatim relevant portion of same as follows:

"There is one issue before this court for the determination of Movant's motion to dismiss. The said issue is whether or not the State is the complainant in a criminal case and the private prosecutor or private prosecutrix is a State witness? The answer to the said issue is an emphatic yes. Under our law, the Republic of Liberia is the complainant in all criminal cases in this jurisdiction and the private prosecutor or private Prosecutrix is a state witness.

Further the said motion is .fatally defective, vague and indistinct because same does not contain the statutory grounds provided for by law [to support defendant's argument] for the dismissal of this case…"

Reverting to the issue relating to the whereabouts of co-defendant Emmanuel Konah, this Court again observes that said co-defendant was never brought under the jurisdiction of the trial court throughout the trial. The trial court made the following observation on the said issue:

"The case was called on the 23rd Day of May, A.D. 2006 for hearing and codefendant Edward Slangar was present in court, but co-defendant Emmanuel Konah who was seen in court on the day, prior to the call of the case absconded the bailiwick of the court when the case was formally called for hearing on the minutes of court. Prosecution then moved the court to hold co-defendant Emmanuel Konah for bail jumping."

"Further, the case was adjourned for hearing on the 25 th day of May, A.D. 2006 in order to ascertain whether or not co-defendant Emmanuel Konah is under the jurisdiction of the Court; and it was established from the investigation that the Writ of Arrest was not served on him. The court ordered the issuance of a Writ of arrest against co-defendant Emmanuel Konah for contempt of Court and up to now, the said co-defendant has not been arrested." [Emphasis supplied] (SEE SHEET TWO, DAY'S JURY SITTING, THURSDAY, JUNE 1, 2006 MAY TERM)

On June 2, 2006, counsel for co-defendant Slangar made an application and the trial court granted same for severance. This followed said co-defendant's arraignment and plea of "Not Guilty" and waiver of his right to jury trial.

During the trial by the court without jury, prosecution presented four witnesses including one rebuttal witness. The witnesses essentially testified that tenants on the premises of private prosecutor John P. Beh paid their rentals to counselor Emmanuel Konah who was introduced to them by defendant Slangar. The witnesses said defendant Slangar had requested them to transact all business through Counselor

Konah that is "payments of rents and other matters". According to the witnesses, rentals for the year 2005 had been paid to counselor Konah and defendant Slangar.

They also said that receipts evidencing rental payments duly executed by counselor Konah and defendant Slangar amounted to US$1,578 (One thousand five hundred seventy eight United States dollars) and L$24,000 (Twenty-four thousand Liberian dollars) which were collected on various dates. One of the witnesses indicated that of the amounts collected, "there is an amount of US$275.00 (Two hundred seventy five United States dollars) received from Joseph Togbah [on] May 28, 2005 by Mr. Edward Slangar. All the other amounts were collected by Emmanuel Konah upon the instruction of Mr. Edward Slangar which have never been remitted to Mr. John Beh."

On cross examination, one of prosecution witnesses was asked to provide evidence to the effect that "all the other amounts were collected by Emmanuel Konah upon the instruction of Mr. Edward Slangar." The witness answered saying "the tenants told me Mr. Slangar, when he took over as attorney-in-fact for Mr. John P. Beh, Sr. brought Counselor Emmanuel Konah to them and told them that they, (tenants) should transact all business with Emmanuel Konah, that is, payment of rent and other matter..." This witness also said: "To our utmost surprise, when Mr. Beh came from America he told us that he did not receive any money from Mr. Slangar and right away he sent for Mr. Slangar...." The witness also said Mr. Beh said to them [later] that the man [Stanger] didn't give [me] any good report and the next thing he can do is tell his lawyer to file a case and ask the tenants to testify in the case. [Emphasis ours]

One of prosecution's witnesses also said that when receipts signed by counselor Konah were presented to co-defendant Slangar, "Mr. Slangar said he did not tell us to pay money to Mr. Konah". After some discussions, he paid the amount of US$275.00 (Two hundred and seventy-five United States dollars) to Slangar.

When prosecution rested with the usual reservation, Co-defendant Edward Slangar took the stand in his own defense along with two other witnesses. Slangar said that employing a lawyer or agent as he did in the case at bar, does not make the employer responsible for the act of that employee when said employee acted beyond the line of duty. The defendant testified that he was indeed attorney-in-fact in January 2005 to oversee John P. Beh's parcel of land in Paynesville and he retained the services of Atlantic Law Firm.

The defendant said that as Emmanuel Konah served at said firm as legal counsel, "I simply asked the lawyer to cite all the intruders on Mr. Beh's property to a meeting and there I introduced Emmanuel Konah as my legal counsel to handle all legal matters of said property".

The defendant said he told the people that those wishing to remain on the parcel of land should enter into "new lease agreement with me as the attorney-in-fact." He said that he also indicated at that meeting that "a lease agreement will be signed and all money including arrears will be received by me, Edward N. Slangar and receipts issued under my signature."

In answer to a question on cross examination witness Slangar said:

"I did not collect various amounts but rather received only USD275.00 from Mr. Togba."

The witness was also asked to look at certain instruments in bulk showing payments and to say whether he signed any. To this question, he answered as follows:

"Among these receipts there is just one receipt dated May 28, 2005, in favor of Mr. Joseph Togba. This is the only receipt that carries my signature with the amount of USD275.00, the rest of the receipts I don't know about, so I cannot say whether the signatures there are that of Emmanuel Konah, because I was not there or involved in the transaction and the issuing of the balance receipts that did not carry my signature."

Following this answer, prosecution gave due notice that it will produce a rebuttal witness coupled with accompanying receipts to rebut the witness' answer aforementioned.

The defendant was also asked on cross-examination why he collected USD275.00 yet transferred USD500.00 to his principal, Mr. Beh, to which he answered saying:

"The USD 275.00 that I received from Mr. Togba at the time was not enough and I added it up with my own money and sent same to John Beh; this is why I continue to say had I faced Mr. Beh himself in this trial, I would have acquainted him with the instruction and the agreement that we came to but not written on paper. This makes the trial so complicated to me in that there are some facts that need clarification by Mr. Beh himself and not those that were intruding on the property, for which John Beh sought my intervention...."

Defense other witnesses testified essentially confirming the testimonies of the first witness, co-defendant Slangar. Thereafter, defense rested. In keeping with notice earlier given, Prosecution produced a rebuttal witness who informed the court that two receipts dated May 25, 2005, were issued to him and one Morris Cooper in the amount of USD250.00 each by Mr. Edward Slangar. Both counsels then requested the court to submit the case to final argument.

On June 21, 2006, the presiding judge His Honor A. Blamo Dixon entered his final judgment. We recite relevant portion thereof as follows:

The rebuttal witness for the prosecution, Mr. Mark Dennis, informed the court that co-defendant Slangar received from him the amount of US$250.00 and also received from Witness Morris Cooper the amount US$250.00 on May 25, 2005, making the total of US$500.00....."

"A careful review of D/1 in bulk reveals that Mr. John P. Beh, Sr., requested co-defendant Slangar to prepare a comprehensive report regarding the number of persons occupying the said property and their terms of payment. [CC] Co-defendant Slangar did not prepare any report and did not take any action regarding the information given to him by his principal. Notwithstanding, Mr. John P. Beh, Sr. came to Liberia from America in November 2005 and he told defendant Slangar to find means for the both of them to jointly retrieve the amounts of US$1,575.00 and LD$24,000.00 from codefendant Emmanuel Konah, but Defendant Slangar refused to co-operate with Mr. Beh..

"Further, co-defendant Slangar committed perjury when he told the Court that the US$275.00 that he received from witness Joseph Togbah was the only amount paid to him and he added his personal US$225.00 to increase said amount to US$500.00, out of which only US$458.00 was remitted to Mr. Beh.

"The rebuttal witness for the prosecution, Mark Dennis, informed the Court that co-defendant Slangar received from him the amount of US$250.00 and also received from Witness Morris Cooper the amount of US$250.00, on May 25, 2005 making the total of US$500.00.

"In the mind of this Honourable Court, the refusal of co-defendant Slangar to have co-operated with Mr. Beh to retrieve the said amounts allegedly from codefendant Konah and or to have conducted an investigation as promised is indicative of the fact

that co-defendant Slangar and co-defendant Konah jointly connived and conspired to steal, take and carry away the amount in question with the criminal and wicked intent to deprive Mr. Beh of the said amounts."

"The cardinal issue for the determination of this case is:

"Whether the Prosecution established a prima facie case against the codefendant Edward Slangar to warrant his conviction for the alleged commission of the crime of Theft of Property".

"...Our law provides in 1LCLR, Section 25.6, Sub-Section 1, at page 198 that "the best evidence which the case admits of must always be produced; that is no evidence is sufficient which supposes the existence of better evidence. Codefendant Slangar received a legal power of attorney from Mr. John P. Beh, Sr. to serve as his Attorney-In-Fact to manage and control the tenants on a parcel of land located at Paynesville City, Montserrado County. Co-defendant Slangar hired the services of co-defendant Emmanuel Konah as his retained legal counsel to assist him to take care of the said property. The both of them received several amounts of money from the said tenants occupying the said premises. Out of the said amounts received, only USD458.00 was remitted to Mr. John P. Beh, Sr. by co-defendant Slangar, without stating the names of the tenants who paid the said amounts.

"Wherefore and in view of the foregoing and the laws controlling, Co-defendant Edward N. Slangar is hereby adjudged "guilty" of the Crime of Theft of Property and sentenced to imprisonment for a period of three years and to make restitution of the amount of USD1,575.00 and LD24,000.00 without any further delay. The Clerk of Court is hereby ordered to issue a Commitment and have same placed in the hands of the Sheriff for service." "AND IT IS HEREBY SO ORDERED."

To the foregoing final ruling of the trial court, co-defendant Edward Slangar has appealed to the Honourable Supreme Court and filed an approved Bill of Exceptions containing six counts. Three counts thereof determined by this Court as relevant to the disposition of this case, are hereunder quoted verbatim:

1. That your Honour erred when in your final ruling you stated that the cardinal issue for the determination of this case is whether or not the prosecution established a prima facie case against the co-defendant Edward Slangar to warrant his conviction of the Crime of Theft of Property? And the answer is to the said issue above mention is "yes". The prosecution established a prima facie case against co-defendant Edward Slangar to warrant his conviction for the alleged commission of the Crime of Theft of Property. p/1 in bulk, P/2 in bulk, P/3 in bulk and P/4 in bulk constitute the best evidence which the case admit of " Even though among the five exhibits consisting of the Power of Attorney, cash receipts only one receipt in the amount of US275.00 (Two Hundred and Seventy Five United Sates Dollars) was signed by co-defendant Edward Slangar and he remitted to his principal, John P. Beh, Sr. the amount of USD500.00 (Five Hundred United Sates Dollars) as was shown by a letter of acknowledgement of the said amount by John P. Beh, Sr., the other receipts of money paid up to two tenants were signed by Emmanuel Konah.

2. That further Your Honour erred in your final ruling when you stated "the rebuttal witness for the prosecution, Mark Dennis informed the court that the co-defendant Slangar received from him the amount of USD250.00 and also receive from witness Morris Cooper the amount of USD250.00 on May 25, 2005 making a total of USD500.00. There is no proof to substantiate the rebuttal witness in that when one alleged he paid an amount to another, it must be proven by documentary evidence.

3. That also, Your Honour erred in your final ruling when you stated that "the refusal of co-defendant Slangar to have co operated with one Beh to retrieve the said amounts alleged from co-defendant Konah and or have conducted an investigation as promised is indicative of the fact that co-defendant Slangar and co-defendant Konah jointly connived and conspired to steal, take and carry away the amount in question with the criminal and wicked intent to deprive Mr. Beh of the said amount.

Resolution of this case requires consideration of one principal issue:

Whether the State proved a prima facie case against the defendant, consistent with law and practice, to sustain a guilty judgment?

To answer this question, we once again examine the case file.

The witnesses produced by prosecution generally related and recounted information they received from third parties. The first witness testified in chief that "the tenants told me that they had paid their rents to Counsellor Emmanuel Konah, who [the tenants indicated] was introduced to them by Mr. Slangar." This witness further testified that "the tenants told me that Mr. Slangar requested them to transact all business through Counselor Konah, that is payments of rents and other matters." He also said "the tenants told me that they had paid their rent for the year 2005 to Counselor Konah and Slangar and showed me receipts signed by Counselor Konah and Mr. Slangar." He also testified that of the amounts collected, "there is an amount of US$275.00. (Two hundred seventy five United States dollars) received from Joseph Togbah dated May 28, 2005 and signed by Mr. Edward Slangar and other amounts were collected by Emmanuel Konah upon the instruction of Mr. Edward Slangar." Also he said: " the amounts collected have never been remitted to my principal, Mr. John Beh."

To all intents and purposes, these testimonies were substantially hearsay; moreover, the general testimonies that the private prosecutor never received any money from codefendant Slangar were impeached by corroborated testimonies of defense witnesses, supported by Western Union remittance slip, which shows that Mr. John P. Beh actually received closed to $458.00 United States Dollars from defendant Slangar. To say the least, testimonies of prosecution witnesses were overwhelmingly based on what the witnesses were told by third parties.

Under our criminal law, practice and procedure, hearsay evidence is in-admissible and by itself cannot be a legal basis to sustain a criminal conviction. In the case: Witherspoon versus Republic, the Supreme Court defined hearsay in the following manner:

"*... The term "hearsay" is used with reference to that which is written as well as to that which is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself but rests also, in part, on the veracity and competency of some other person. Hearsay evidence, as thus described, is uniformly held incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge.*

That this species of testimony supposes something better, which might be adduced in the particular case, is not the sole ground of its exclusion. Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." Ibid, 6 LLR 211,216 (1938)

Also in the case: Anderson versus Anderson (9 LLR 301,307(1947), the appellant therein based his claim to justify eviction of his wife upon alleged use of some African medicine which could prove harmful to the appellant. But the appellant's claim was founded on what his ward had reported to him. The ward had reportedly told him that he saw appellant's wife on a night putting certain powdered concoctions in the food cooked for dinner for said appellant.

Passing on this issue, the Supreme Court said that the testimony was hearsay and therefore had no probative value. Ibid. 307.

Examining the case at bar within this context, this Court has observed that the general testimonies of prosecution witnesses fell short of providing evidence beyond reasonable doubt. Prosecution failed to establish that the amount of money paid to, and received by defendant Slangar was in excess of the amount he receipted and subsequently remitted to the private prosecutor. Of the six payment receipts produced by the prosecution and admitted into evidence, only one in the amount of US$275.00 (two hundred seventy five United States dollars) was issued by defendant Slangar. It is clear that payments of money supported by documentary evidence, as alleged in the indictment, largely point to Emmanuel

Konnah. Five of the six receipts were issued and signed by Emmanuel Konnah, who represented himself as Counsellor-At-Law. It is rather strange to note that although investigation conducted by the trial court established that said Emmanuel Konnah was seen in open court on the day the trial commenced, yet prosecution strangely failed to arrest, let alone bring Konnah under the jurisdiction of the court.

What the prosecution adduced at trial clearly cannot form a legal basis for conviction. This Court has repeatedly held that in order to sustain a juridical conviction, the following must be satisfied:

"(1) that the offense must be correctly charged in a valid indictment;

"(2) that only legal evidence should be placed before the jury which is asked to convict;

"(3) that the evidence thus sifted should satisfactorily establish the guilt of the accused beyond a reasonable doubt. [Our Emphasis] Blamo versus Republic,17 LLR 232, 235 (1966).

In the mind of this Court, the closest the prosecution came to establishing a prima facie case was when the rebuttal witness took the stand and the following question was posed to him:

Q. *"Mr. witness, Mr. Slangar, the defendant in the dock, whom you say you know is on trial before the honourable court for the commission of alleged theft of property for which when he was arraigned before this honourable court, he pleaded not guilty. Mr. witness, when the said defendant took the stand and while on the cross, he was asked a question...." That question was:*

"Mr. Witness, do you want to tell this court that you only have interest in collecting the various amounts from the tenants, but do not bother to know them after dealing with them for protracted period of time?" [Emphasis supplied]

To which he [defendant Slangar] answered as follows: "..... "I do not collect various amounts but rather received only US$ 275.00 from Mr. To2bah." [Emphasis supplied]

"To this answer, prosecution gave notice to court to produce a rebuttal witness to the effect of the receipts. Mr. Witness, you are now on the stand, you may proceed to rebut said answers given by defendant Slangar..."

The rebuttal witness then answered in the following words:

"2005 in the month of May 25 th, Morris Cooper and Mark Dennis went to Mr. Slangar's office and paid the amount of USD500.00. I, Mark Dennis, paid the amount of USD250.00 and Morris Cooper paid the amount of USD250.00 and I have a receipt to it that was issued by Mr. Slangar; this is all I know."

Prosecution followed with this question:

"Mr. Witness, you have just informed this court that receipt dated May 25, 2005, was issued to each of you, I mean you and Morris Cooper for the amount of USD250.00 paid by each of you to Mr. Edward Slangar. My question to you, would you be in the position to identify same when said receipts are given to you?" It was to this critical question counsel for defendant objected and the court sustained said objection on the ground that it was outside the pale of a rebuttal witness.

In the mind of this Court, this simply deprived prosecution a slim opportunity to prove its case beyond reasonable doubt as required by law. If allowed and admitted into evidence, the receipts testified to by the rebuttal Witness would have probably demonstrated and at best removed that reasonable cloud of doubt over the guilt or innocence of the defendant. Clearly, the missing receipts from the evidence adduced at the trial, creates in a reasonable mind a doubt which ordinarily operates in favor of the defendant.

This Court also notes with interest that while the trial court sustained defense objection to the identification and admission into evidence of payment receipts, yet the very court substantially based its judgment on those receipts. For in his ruling entered on June 21, 2006, the Resident Circuit Judge said:

"Further, co-defendant Slangar committed perjury when he told the Court that the US$275.00 that he received from witness Joseph Togbah was the only amount paid to him and he added his personal US$225.00 to increase said amount to US$500.00, out of which only US$458.00 was remitted to Mr. Beh.

"…The rebuttal witness for the prosecution, Mr. Mark Dennis, informed the court that co-defendant Slangar received from him the amount of US$250.00 and also received from Witness Morris Cooper the amount US$250.00 on May 25, 2005, making the total of US$500.00....."

This Court wonders how the trial court could sustain objection to admission of an instrument into evidence but at the same time would use the same document by reference to form its cogent basis of its judgment to sustain a criminal conviction. This is a reversible error.

It is a fundamental principle of criminal law that in every trial upon indictments the State, to convict, must prove the guilt of the accused with such legal certainty as will exclude every reasonable hypothesis of his innocence. Dennis versus Republic 6 LLR 269-70 (1938), Flomo Vs. Republic 26 LLR 51, 54-55. (1977).

As defined by this Court, legal certainty is a term which indicates certainty in point of law and fact, the court being sole judge of the law and the jury the judge of the facts. Ibid 6LLR 270.

In light of these circumstances, it is our holding that the evidence adduced by prosecution at the trial fell short of establishing the required legal certainty,

thereby creating room for reasonable doubt which generally aught to operate in favor of the defendant.

However, an examination of the case file reveals that exclusion of the receipts aforementioned, lent to depriving the trial of those relevant instruments, allegedly executed by the defendant, which were required to establish the crime as charged in the indictment. These circumstances tend to substantiate the point that this case was not handled by prosecution with due diligence. In the face of such a situation, this Court over and again has held:

Also in the case Bing versus Republic 18 LLR 378, 382 (968), the prosecution failed and neglected to produce the key witness who had actually apprehended a defendant on murder charge. Addressing the issue of missing evidence occasioned by prosecution's failure and neglect, Chief Justice Wilson speaking for this Court said:

"While we feel that prosecution has failed to establish the guilt of the defendant by the witnesses produced at the trial, we must confess that there is nothing in the record to prove that the testimony of the soldier could not have been obtained. For this reason, it is our opinion that this case should be remanded so that all the facts and circumstances available can now be produced at the time of the trial, and that substantial justice may be done..."Ibid. 18 LLR, 377, 382 (1968).

Additionally, in the case *Gauhoe and Gayzoe Versus Republic of Liberia 10 LLR, 204 (1949);* this Court held that "when neither the defense nor the prosecution in a murder trial exercised due care, diligence, and legal astuteness in protecting its client's or the State's interest, the Court will reverse the conviction and remand the case for new trial." [Emphasis supplied]

As it has always been maintained, courts should not simply function as mere umpire or referee in a contest between opposing parties or counsel; but a court or judge is charged by law and conscience with "fundamental duty of seeing that

truth is established and justice is done under the statutes and rules of law designed to bring about such truth, and his control of the situation...and without violence to rules of practice and procedure, that cases are heard and disposed of on their merits and, if consistent with the orderly administration of justice, the procedure should be favored which will result in a determination of the merits of the case." [Emphasis supplied] Kpolleh versus Republic, 36 LLR 623, 640-1 (1990)

Accordingly, while we hesitate to enter into any speculation concerning guilt of the appellant until same has been sufficiently established, we are equally of the considered opinion that the circumstances of this case do not entitle the defendant to acquittal. With diligence, it appears that missing evidence of all the facts and circumstances could be adduced at a subsequent trial.

WHEREFORE, and in view of all we have observed from the facts, law, and circumstances in the instant case, it our considered opinion that the ruling entered by the trial judge adjudging the defendant guilty, be and same is hereby reversed and the case ordered remanded to be tried regularly. The Clerk of this Court is hereby ordered to send a mandate to the court below to give effect to this judgment. AND IT IS HEREBY SO ORDERED.

Reversed and Remanded.