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CR. APP. 1/2011 & 1/2011

**IN THE COURT OF APPEAL OF SIERRA LEONE**

**BETWEEN:**

**FRANCIS FOFANAH KOMEH - APPELLANTS**
**JOHN MANS**

**AND**

**THE STATE - RESPONDENT**

**CORAM:**

**HON. MR. JUSTICE P.O. HAMILTON J.S.C.**

**HON. MRS. JUSTICE V.M. SOLOMON J.A.**

**HON. MR. JUSTICE S.A. FOFANAH J.**

**SOLICITORS**

**R.B. KOWA ESQ. FOR THE 1ST APPELLANT**

**A.S. SESAY ESQ. FOR THE 2ND APPELLANT**

**R.S. FYNN ESQ. FOR THE RESPONDENT**

**JUDGMENT DELIVERED THIS 27th DAY OF November 2012**
**HAMILTON J.S.C.**

This is an Appeal against the judgment of the High Court delivered by the Hon Justice N.C. Browne-Marke J.A. on the 18th January, 2011.

The 1st and 2nd accused persons (herein after referred to as the 1st and 2nd Appellants respectively) were charged on a three (3) Count indictment of Misappropriation of Public Funds and Abuse of Office. Count 1(one) which was

Misappropriation of Public Funds contrary to *Section 36 of the Anti-Corruption Act, 2008* related to both Appellants. Counts 2 (two) and 3 (three) which was Abuse of Office contrary to *Section 42(1) of the Anti-Corruption Act, 2008*; Count 2 (two) relates to the 2nd Appellant and Count 3 (three) is related to the 1st Appellant.

The 1st Appellant was found guilty on Counts 1 and 3 whilst the 2nd Appellant was found not guilty on Count 1 but found guilty on Count 2. They were convicted and sentenced accordingly. It is against this conviction and sentence that both Appellants have now appealed to the Court of Appeal.

The facts of this matter could be summarized as follows:

> *In July and September, 2008 two payment vouchers in the respective sums of Le14 million and Le30 million were made in favour of the Ministry of Agriculture Food Security and Vulnerability Survey and Mapping Project were sent to Lunyawca Ngegba Kaiwa (PW1) for processing. Later in the same year it was discovered that the respective moneys were paid into the Project. The 1st Appellant who was an employee of the Accountant General's Department was asked to investigate. Early the following year PW1 (L.N. Kaiwa) found out that a re-direction letter had been sent to Bank of Sierra Leone in his name and that of the Accountant-General which letter they never signed. He could not tell who signed it on their behalf.*
>
> *However two cheques in the respective sums of Le14 million and Le30 million found their way into an account which was opened at the Makeni Branch of the Sierra Leone Commercial Bank. The said Account was opened by the 1st Appellant which Account was authorised by the 2nd Appellant who*

*was then the Branch Manager of the Bank. Later the sum of Le43, 885,000/00 was withdrawn from this Account by the 1st Appellant and Account Number 613481 was debited in that amount. At the request of one Tarawallie who is said to be a friend of the 1st Appellant this money was paid into Account Number 613481 at the Congo Cross Branch of Sierra Leone Commercial Bank. There was an agreement made about this re-payment of the Le43,855,000/00 which stated that the money was to be refunded on the approval of the 1st Appellant which agreement was signed by Tarawallie, PW8 (Askia M Kamara) and PW9 (Mathew Sallu Yokie). The 1st Appellant visited them and thanked them for all what they did.*

It is against this brief background that the Appellants were charged on a three (3) count indictment as follows:-

**COUNT 1**

**STATEMENT OF OFFENCE**

Misappropriation of Public Funds contrary to *Section 36(1) of the Anti-Corruption Act, 2008.*

**PARTICULARS OF OFFENCE**

Francis Mohamed Fofanah Komeh and John Mans on a date unkown between 15th October, 2008 and 6th December, 2008 at Makeni in the Northern Province of the Republic of sierra Leone misappropriated public funds from the Consolidated Fund in the sum of Le44,000,000/00 by diverting it to a Sierra Leone Commercial Bank Account No.006-61348-10-00-01 and later withdrawing it there from.

**COUNT 2**

**STATEMENT OF OFFENCE**

Abuse of Office contrary to *Section 42(1) of the Anti-Corruption Act, 2008.*

**PARTICULARS OF OFFENCE**

John Mans being the Manager Sierra Leone Commercial Bank Ltd. Makeni Branch on or about 6th December, 2008 at Makeni in the Northern Province of the Republic of Sierra Leone abuse his office by improperly conferring an advantage on Francis Mohamed Fofanah Komeh to with the withdrawal of the sum of Le44,000,000/00 from Account No.006-61348-10-00-01 without using the usual procedure.

**COUNT 3**

**STATEMENT OF OFFENCE**

Abuse of Office Contrary to *Section 42(1) of the anti-Corruption Act, 2008.*

**PARTICULARS OF OFFENCE**

Francis Mohamed Fofanah Komeh being an Accountant at the Accountant-General's Department on or about 6th December, 2008 at Makeni in the Northern Province of the Republic of Sierra Leone abused his office by inproperly conferring an advantage on himself to wit: the sum of Le44,000,000/00.

On this indictment the Appellants were tried and convicted as follows:

**COUNT 1:** 1st Appellant – Guilty: Le30 million or 3 years imprisonment.

2nd Appellant – Not Guilty

**COUNT 2:** 2nd Appellant – Guilty: Le30 million or 3 years imprisonment.

**COUNT 3**: 1st Appellant – Guilty: Le30 million or 3 years imprisonment.

It is against this conviction and sentence that both appellants have each appealed to the Court of Appeal on the following grounds:

The 1st Appellant's appeal is on three (3) grounds and the 2nd Appellant is on six (6) grounds: The grounds of appeal of the 1st Appellant are as follows:-

1. *The Learned Trial Judge erred in overruling the defence's submission that the 1st Accused had no case to answer and held that the essential elements of the offences charged in the indictment have been established by the prosecution and both accused persons have no case to answer.*

2. *The Learned Trial Judge erred in Law in convicting and sentencing the 1st accused on the indictment since the signing of the indictment contravenes Section 130 in Part IV of the Criminal Procedure Act No.32 of 1965 by the Commissioner of the anti-Corruption Commission (ACC) signing the Indictment instead of a Law Officer.*

3. *The Learned Trial Judge in evaluating the evidence allowed himself to be carried away by the testimony of PW8 and hence basing his judgment on circumstantial evidence which does not point to the accused thus lacking the required evidence supportive thereof.*

The grounds of appeal of the 2nd Appellant is a follows:-

*(1) The Learned Trial Judge erred in Law in failing to properly consider the ingredients of the offence of Abuse of Office and consequentially failed to*

*consider whether the essential ingredients of the offence were proved by the prosecution.*

*(2) The Learned Trial Judge erred in Law in failing to evaluate the evidence as adduced in respect of the Count of Abuse of Office and to apply the appropriate law to such evidence and thereby effectively denied the Appellant the prospect of being acquitted of the offence as charged in the indictment.*

*(3) The Learned Trial Judge erred in Law in failing to consider adequately or at all the role played by the Appellant and the legal effect and consequences of the role in the opening of the account and the withdrawal of money from the very account in relation to the count of Abuse of Office.*

*(4) The Learned Trial Judge erred in Law and fact by stating that the Appellant facilitated the opening of the account and the withdrawal of money from same and that the Appellant's conduct was "clear evidence of a dereliction of duty".*

*(5) That the verdict is unreasonable and cannot be supported having regards to the evidence adduced.*

In this appeal the grounds of appeal will be dealt with as they are contained in the Notice of Appeal and the submitted synopsis. The grounds of appeal will be dealt with separately as they affect each of the appellants.

I shall now consider the grounds of appeal in relation to the 1st Appellant Francis Fofanah Komeh. Counsel in his synopsis of argument abandoned ground one.

**GROUND 2**

The Learned Trial Judge erred in Law in convicting and sentencing the 1st accused on the indictment since the signing of the indictment contravenes *Section 130 in Part IV of the Criminal Procedure Act No.32 of 1965 by the Commissioner of the Anti-Corruption Commission (ACC)* signing the indictment instead of Law Officer.

Counsel for the Appellant quoted *Section 5 of the Anti-Corruption Act 2008* which defines the functions of the Commissioner and submitted that it excludes the signing of indictments.

Learned Counsel further submitted that *Section 7(1) and (2) of the Anti-Corruption Act, 2008* gives the Commissioner the power to investigate and prosecute offences under the Act. Counsel went on to ask – "Does this authority to prosecute means signing of indictments when there is a specific *Act (Criminal Procedure Act 1965*) which provides for that or can prosecution include the signing of indictments?" Counsel went on to refer to *Section 2 of the Criminal Procedure Act, 1965and Section 89(1) and (2) of the Anti- Corruption Act No.12 of 2008* directs and gives power to the Commissioner to prosecute under the Act.

Counsel further submitted that an indictment may be deemed to have been preferred without a previous committal for trial. Counsel asked is "preferred" synonymous with "signing"? Learned Counsel then submitted that *Section 89* does not derogate in any way from the *Criminal Procedure Act, 1965* particularly in criminal trials unlike *Section 89 of the Anti-Corruption Act, 2008* which only gives

the Commissioner Anti-Corruption Commission the right to prosecute offences under the Act.

Learned Counsel for the State/Respondent submitted that for purposes of prosecution of offences under the Anti-Corruption Act the Commissioner is a Law Officer under the Constitution. *Section 2 of the Criminal Procedure Act, 1965* defines a Law Officer to mean the Attorney-General, Solicitor-General, Parliamentary Counsel or State Counsel and the effect of the *Anti-Corruption Act, 2008* was to invest in the Commissioner some of the powers in respect of criminal prosecutions from the Attorney-General and Director of Public Prosecutions to the Commissioner.

Counsel further submitted that the 2008 amendment of the Constitution was intended to act in the capacity of a Law officer for purposes of prosecution under the *Anti- Corruption Act*.

Firstly, it must be noted that *Section 2 of the Constitution of Sierra Leone (Amendment) Act, 2008 (Act No.9 of 2008)* provides:

> *"The Constitution of Sierra Leone, 1991 is amended by the repeal and replacement of paragraph (a) of Subsection (4) of Section 66 thereof by the following paragraph:-*
>
> > *"(a) to institute and undertake Criminal Proceedings against any person before any Court in respect of any offence against the Laws of Sierra Leone except any offence involving corruption under the Anti-Corruption Act..."*

This *Constitution of Sierra Leone (Amendment) Act, 2008 (Act No.9 of 2008)* was signed on 22nd July, 2008 and did commence on 31st July, 2008. It is trite law that the Constitution is the Supreme Law of the land and if this is read properly the Commissioner was then authorized to sign indictments as of 31st July, 2008.

Similarly, *Section 89(1), (2), (3) and (4)* in my humble opinion does give the Commissioner of the Anti-Corruption Commission the right to sign indictments. I shall quote in full *Section 89(1), (2), (3) and (4) of the anti-corruption Act 2008*:

*(1) Where the Commissioner is of opinion that the findings of the Commission on any investigation warrant a prosecution under the Act, he shall do so in Court.*

*(2) An indictment relating to an offence under this Act shall be preferred without any previous committal for trial, and it shall in all respects be deemed to have been preferred pursuant to a consent in writing by a judge granted under Subsection (1) of Section 136 of the Criminal Procedure Act, 1965 and shall be proceeded with accordingly. (Emphasis added)*

*(3) On a trial on indictment **preferred** under this Subsection, an extract of the findings of the Commission, signed by the Commissioner to the effect that a particular person or particular persons are implicated in any offence under this Act shall, without more, be sufficient authority for **preferring** that indictment in respect of such offence as is disclosed in or based on the report of those findings. (Emphasis added)*

*(4) An indictment preferred under this section shall be filed and served on the accused together with the summary of the evidence of the witnesses which*

*the Commissioner relies on for the proof of the charge contained in that indictment and the names of such witnesses shall be listed on the back of the indictment". (Emphasis added)*

In my humble opinion reading *Sub-Section 2, 3 and 4 of Section 89 of the Anti-Corruption Act, 2008* clearly shows that the Commissioner is given power not only to prosecute but also to sign indictments by the use of the word *"preferred"* in the various *Sub-Sections*. The requirement for the Attorney-General and Minister of Justice to give his consent to institute prosecution in corruption matters is now obsolete. This ground lacks substance and is accordingly dismissed.

**GROUND 3**

The learned Trial Judge in evaluating the evidence allowed himself to be carried away by the testimony of $PW^{8}$ and hence basing his judgment on circumstantial evidence which does not point to the accused thus lacking the required evidence supportive thereof.

Counsel for the 1st Appellant in his synopsis asked what are the compelling circumstantial evidence linking the 1st accused with Counts 1 and 3 of the charge? Learned Counsel then submitted that from what the Learned Trial Judge highlighted in his judgment and relied on to convict nothing circumstantial and compelling have been cited. The Learned Trial Judge went on to say that because the name of the 1st accused appeared on Exh. $H^{1\&2}$ it is conclusive that he opened the account though the 2nd accused said he wrote the name on it.

The Learned Trial Judge at Page 231 paragraph 49 of the records in dealing with this issue of circumstantial evidence said:

> *"..... 1st accused in his testimony maintains his stance of complete innocence. In exhibit "L" he denies complicity in the Commission of the charges in the Indictment. He had nothing to do with any of the transactions in question. He did not open the Food Security Project account numbered 613481, he did not per exhibit "J3" the letter to the Bank of Sierra Leone authorizing the crediting of account numbered 613481, Sierra Leone Commercial Bank Ltd., Makeni; nor did he sign or participate in the making of exhibits "H1-3". Lastly, that he did not withdraw the sum of Le43,855,000/00 from that account; nor did he in any way participate in its withdrawal. It is true there is no direct evidence linking him to exhibit "J3" but the circumstantial evidence linking him with it is compelling. The circumstantial evidence points to him, and to him alone. Circumstantial evidence could in many instances such as this one, be more compelling and convincing than direct evidence. If I believe the circumstantial evidence leads to no other conclusion than that 1st accused is responsible for the events in Makeni ....."*

It is trite law that where there is no direct evidence, circumstantial evidence is the best to be relied upon. However, such evidence must be narrowly examined. to be sufficient for a conviction since such circumstantial evidence must point to only one conclusion and that it was the accused who had committed it – *R v. Tapper (1952) A.C. 480.* In order to draw an inference of the accused persons guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference. The Court should not hesitate to draw such presumption or inference so long as it is cogent and compelling as to convince a

jury no rational hypothesis other than the inference that the fact can be accounted for *see R v. Tapper Supra.*

The Learned Trial Judge did at *Pages 231 to 23[illegible] of the records at paragraphs 49 to 51* of his judgment fully dealt with the legal issues and the facts especially the circumstantial evidence and *alibi* raised by the 1st Appellant in detail.

After a full and clear evaluation of the evidence or record the Learned Trial Judge did rightly find the 1st Appellant guilty and convicted him. The Court of Appeal will not interfere with the findings of fact of the Learned Trial Judge except there is established a miscarriage of justice, a perverse decision or a violation of some principles of law or procedure. In this appeal there is nothing that was urged by learned Counsel for the 1st Appellant to bring the findings of guilt based on the facts within the ambit of the exceptions. The appeal of the 1st Appellant fails and is accordingly dismissed.

I shall now consider the grounds of appeal in relation to the 2nd Appellant John Mans whose conviction is on one count of Abuse of Office contrary to *Section 42 of the Anti-Corruption Act, 2008.*

The five grounds of appeal raised could be summarised as follows:-

That the Learned Trial Judge –

(i) *failed to properly consider the ingredients of the offence of abuse of office (ground 1);*

(ii) *failed to evaluate the evidence in respect of the offence of abuse of office and apply the appropriate law to such evidence (ground 2);*

(iii) *failed to consider adequately the role played by the Appellant and the legal effects and consequences of opening the account and the withdrawal of money (ground 3);*

(iv) *erred in law and fact by stating that the facilitated the opening of the account and the withdrawal of the money from the same and that the Appellant's conduct was "clear evidence of a dereliction of duty" (ground 4);*

(v) *The judgment is unreasonable and against the weight of the evidence (ground 5).*

The grounds of appeal would be considered together as the essence of the entire grounds as a whole is whether the conduct of the 2nd Appellant in the opening of the account and the withdrawal of money from the said account by the 1st Appellant was such that it amounted to an abuse of office by the 2nd Appellant and also whether his conduct was dishonest according to the ordinary standard of reasonable and honest people. It is for the appellate Court to determine whether the findings of the Learned Trial Judge is unreasonable and cannot be supported having regard to the evidence.

Counsel for the Appellant in his synopsis cited the case of *R vs. W (2010) EWCA Crime 372* and the submitted that the Appellant may have compromised certain procedures in the opening of the account but had no fraudulent corrupt or oppressive intent in doing so. He further submitted that the appellant's conduct does not fall within the threshold set in the case of *R vs. W*.

The Learned Trial Judge in his judgment at *Page 234 Paragraph 54* did admit that the Appellant had no fraudulent, corrupt or oppressive intent to amount to an abuse of office when he said:

> *"As regards the 2nd accused I have to consider both his statement, and his evidence on oath. Apart from minor discrepancies, his version of events remains the same. He was concerned with and participated in, however passive a manner, the opening of the account. He was concerned with, and participated in authorising the withdrawal of the sum of Le43,855,000/00. He was clearly involved in, and facilitated both transactions. Unfortunately, there is no evidence before me that he partook of the loot, or in any way derived any material or monetary benefit from these transactions. The act which results in the misappropriation of public funds, must be done willfully in the sense I have described above. If there had been such evidence, I would have unhesitatingly concluded that he had the required intent to misappropriate. I have no alternative but to give him the benefit of the doubt in this respect".*

Counsel for the Appellant submitted that the conduct of the 2nd Appellant was not improper within the meaning of *Section 42 of the Anti-Corruption Act, 2008* although he may have compromised certain procedures in opening the account and withdrawal from it without having any willful conduct.

Learned Counsel for the Respondent submitted that the meaning of "improperly" in *Section 42 of the Anti-Corruption Act, 2008* comprises conduct which is willful and which constitutes a high degree of misconduct amounting to an abuse of public trust and in the instant case which involves the acquisition of property by fraud the

misconduct must involve dishonesty. In *R vs. W (2010) EWCA Crime 3R Penry – Davey L.C.J. said:*

> *"The prosecution had to prove that the Appellant willfully – that is to say, deliberately misconduct himself to such a disgrace as to amount to an abuse of the public trust in that office holder, without reasonable excuse or justification ..... the prosecution must prove misconduct of a high degree. We are not talking here of a mere bending of rules or Cutting Corners ..... to amount to an abuse of public trust a mistake, even a serious one, will not suffice either. The prosecution must prove that the office holder has fallen way below the standard expected of him". (Emphasis added).*

The Learned Trial Judge in his judgment at *Page 234 Paragraph 54* of the records stated:

> *"..... Unfortunately there is no evidence before me he took part of the loot or in any way derived material or monetary benefit from these transactions..."*

In my humble opinion therefore the 2nd Appellant had no fraudulent, corrupt or oppressive intent which amounted to an abuse of his office.

In dealing with culpability in relation to the conduct of any person in a public office *Lord Widgery C.J. in Rv. Dytham (1979) 69 Cr. App R. 722 at 727-728* whilst dealing with culpability in abuse or misconduct in public office said:

> *"When misconduct in a public office is alleged to have been committed in circumstances which involve the acquisition of property by theft or fraud, and in particular when the holder of a public office is alleged to have made improper claims for public funds in circumstances which are said to be*

*criminal, it must be proved that the accused acted dishonestly. It is not enough that his behavior was irregular or improper. (Emphasis mine)*

Similarly the Court of Appeal in Hong Kong in the Final Appeal case of *Shum Kwok Sher v. Hksar (Final Appeal No.1 of 2002) at Paragraph 56* of the judgment *Sir Anthony Mason NPJ* said:

*"There must be very serious departures from proper standards before the criminal offence is committed and a departure not hereby negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's dues in the office holder. A mistake even a serious one will not suffice ..... There must be a serious departure from proper standards before the criminal offence is committed ..... the motive with which a public officer acts may be relevant to the decision whether the public's trust is abused by the conduct." (Emphasis Added)*

From the totality of evidence as contained in the records against the 2nd Appellant the basic question was whether the evidence establishes an intention that he used his office for a purpose other than the public good, for example, for dishonest, partial, corrupt or oppressive purpose. The evidence in the records clearly gives a negative answer.

Having considered in detail the grounds of appeal of the 2nd Appellant and having regard to all what has been said, there is a doubt as to the guilt of the 2nd Appellant which must be resolved in his favour. The totality of the evidence before the Court has not established the charge beyond reasonable doubt in relation to the Count for which he was found guilty.

On the whole and having regard to all what has been discussed above I hold that the appeal of the 2nd Appellant succeeds and is accordingly allowed. His conviction and sentence are hereby set aside and in substitution therewith I enter judgment for his acquittal and discharge. If any fine was paid that it be refunded to the 2nd Appellant.

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**HON. MR. JUSTICE P.O. HAMILTON J.S.C**

**I AGREE:**.....

**HON. MRS. JUSTICE V.M. SOLOMON J.A.**

**I AGREE:**.....

**HON. MR. JUSTICE A.S. FOFANAH J.A.**

*REF: POH/HJ*