IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN

THE STATE

VS

FRANCIS MOHAMED FOFANAH KOMEH

AND

JOHN MANS

COUNSEL:
R S FYNN ESQ for the State
R B KOWA ESQ for 1st Accused
A S SESAY ESQ (with him, JS FORNAH-SESAY esq) for 2nd Accused

JUDGMENT DELIVERED THE 19TH DAY OF JULY,2010.

1. The Accused persons are charged in a 3 Count Indictment with the following offences: Count 1, Misappropriation of Public Funds Contrary to Section 36(1) of the Anti-Corruption Act,2008, the particulars being that both accused persons on a date unknown between 15 October,2008 and 6 December,2008 at Makeni misappropriated public funds from the consolidated fund in the sum of Le44million by diverting it to a Sierra Leone Commercial Bank account No. 006-613481-10-00-01 and later withdrawing it therefrom. In Count 2, the charge is Abuse of Public Office contrary to Section 42(1) of the 2008 Act. The particulars are that the 2nd accused being the Manager of the Makeni Branch of the Sierra Leone Commercial Bank on or about 6 December,2008 abused his office by improperly conferring an advantage on the 1st accused to wit the withdrawal of the sum of Le44million from the same account as in Count 1. In Count 3, the 1st accused is charged with the same offence of Abuse of Office contrary to Section 42(1) of the 2008 Act in that being an Accountant at the Accountant-General's Department, on or about 6 December,2008, he abused his office by improperly conferring an advantage on himself, to wit: the sum of Le44million.
2. 11 witnesses testified for the prosecution, and at the close of the prosecution's case on 7 July,2010 both Messrs Kowa and Sesay made no-case submissions on behalf of their respective clients.

3. The prosecution's case briefly put, is that in July,2008 two payment vouchers in the respective sums of Le14million and Le30million in favour of the Ministry of Agriculture's Food Security and Vulnerability Survey and Mapping Project, were sent to PW1 for processing. Both payment vouchers and their attachments were tendered as exhibits A pages 1-8 and B pages 1-6 respectively. Later that same year, it was discovered that the respective amounts of money had not been paid to the Project. PW1 asked 1st accused who was an employee of the Accountant-General's Office to investigate. Early the following year, PW1 found out that a re-direction letter had been sent to the Bank of Sierra Leone in the names of himself and the Accountant-General. He said neither himself, nor the Accountant-General had signed that letter. But he could not say who had signed on their behalf. Two cheques in the respective amounts of Le14million and Le30million found their way into an account which was opened at the Makeni Branch of the Sierra Leone Commercial Bank (SLCB). The prosecution claims the account was opened by the 1st accused, and that its opening was authorised by the 2nd accused who was the Branch Manager. Further, the prosecution claims the total sum of Le43,855,000 was withdrawn from this account by 1st accused. The evidence led shows that account no. 613481 was indeed debited in that total sum, and that the money was handed over by PW6 to PW7 who in turn handed it over to 2nd accused. Later, PW8 at the request of one Ibrahim Tarawallie said to be a friend of 1st accused, paid over the said sum to Tarawallie, who paid it into account No. 613481 at the Congo Cross Branch of the SLCB. PW8 was a witness to conversations between 2nd accused and Tarawallie about what 1st accused was supposed to have done which would jeopardise his, 2nd accused's 18 years of service with SLCB. Tarawallie signed an agreement, exhibit K, with PW8 for the repayment of the money. The agreement recorded that the sum of Le43,855,000 had been allegedly withdrawn by 1st accused from the SLCB Makeni Branch. The money was to be refunded to PW8 on the approval of the 1st accused on whose behalf Tarawallie was acting. The agreement was signed by PW8, Tarawallie and PW9 respectively. Later, PW8 said 1st accused visited him and thanked him for what he had done, as Tarawallie had told him everything. 1st accused said he would discuss the refund with Tarawallie.
4. The 1st accused's recorded interview with ACC investigators was tendered as exhibit L. It is a denial of the offences charged. 2nd accused's

recorded interview was tendered as exhibit M. In it, 2nd accused narrated how he came to be involved in the opening of account no. 613481. He was approached by 1st accused whom he had known for some time. He said further that the physical cash was withdrawn from the account on 6 December,2008 though the cheque used was only processed on 9 December,2008. When asked why he allowed the withdrawal, he said at page 8 in answer to Q23: "*Mr Francis Fofanah Komeh being a well-known personality to both the bank and local council, I authorised the payments. After referring him to my junior worker I did not receive any complaint and I did not receive feed back from them to make me change my mind about the opening of the account.*" At page 16, he admitted the money was taken into his office by PW7, Nancy Amara and PW11 in the presence of 1st accused., though he says the money was not handed over to him.

5. Counsel for the accused persons contend, that on these facts, their respective clients have no case to answer. Mr Kowa says no evidence has been led by the prosecution to prove or to show 1st accused's complicity in either of the offences with which he is charged. There was no evidence that he opened the account in question nor that he had anything to do with it's opening; there was no evidence that he withdrew monies from that account, or was involved in the withdrawal of monies from it. As regards the evidence of PW8, he submits that this witness only dealt with Tarawallie who was not called by the prosecution. He did not address the piece of evidence given by PW8 about 1st accused's visit to him, and the subject-matter of their discussions. Mr A S Sesay canvassed the argument that as the 2nd accused had not signed any of the documents tendered in evidence, he was not culpable. He did not facilitate the opening of the account in question. Further, that 2nd accused did not participate in the diversion of funds, nor in the withdrawal of funds from that account.
6. Both Counsel in my respectful view, have adopted a very restrictive interpretation of the word "Misappropriate". For their edification, I shall adopt what I said in my Judgment in THE STATE v MANNEH & ANOR; THE STATE v WELLINGTON & ANOR and lastly in THE STATE v HAMZA SESAY & ANOR. "*Mr Wright has also argued that in the circumstances of the case, 1st accused could not have misappropriated the sum of Le419,200,000 as alleged in Count 1, since, the moment that sum was credited to the account of Mabella, it ceased to be the property of SLRTA. Further, that Misappropriation entails the application of*

another's property to one's own use. Whilst these concepts may be applicable to the Law of Larceny, they are not, in my considered Judgment, applicable to the offence of Misappropriation of Public Funds or Revenue under the Anti-Corruption Act,2008. There is Misappropriation of public Funds or Public Revenue, where, according to Section 36(2) of the Act, a person commits an act, whether by himself, with or through another person, by which a public body is deprived of any revenue, funds, or other financial interest or property belonging or due to the public body. In the case of THE STATE v WELLINGTON & ANOTHER, I explained, just as I had done in THE STATE v MANNEH & ANOTHER, what misappropriates means. "Misappropriate" is not in my view, a term of art. It is much wider than "appropriation" in the United Kingdom Theft Act,1968. Appropriation in that Act involves the assumption of the rights of the owner by the Accused. Here, the wilful commission of any act which results in the owner losing funds belonging to it, amounts to misappropriation. There is Misappropriation also whether the owner of the funds consented or not to the deprivation of funds." There is no requirement that an accused must necessarily be employed by the public body which loses funds or revenue. Anybody who causes a public body such as the SLRTA, to lose funds or revenue could be held culpable of the offence.

7. Further, the essential element in establishing that an accused person has abused his office, is that whilst being a public officer, he has improperly conferred an advantage on himself or someone else. Improperly conferring an advantage could consist, as in this case, of the act of facilitating or causing money to be paid to a person to whom that money is not due. The sum of Le44million was intended for the Food Security Project; it was diverted into an account opened at the behest of 1st accused, and with the authorisation of 2nd accused. As 2nd accused was at the material time an employee of a Bank wholly owned by the Government of Sierra Leone, he is a public officer for the purposes of the Act. 1st accused is clearly one also, as he was an employee of the Accountant-General's Department. There is the presumption also in Section 44(2) of the Act, "*that a public officer shall be presumed until the contrary is proved, to have made use of his office or position for an advantage where he has taken any decision or action in relation to any matter in which he or a relative or associate of his, has a direct or indirect interest.*" But that is a matter I shall return to at the end of the day.

8. In his Answer, Mr Fynn summarised the evidence led, and submitted that the prosecution had led sufficient evidence to put the accused persons to their election.
9. In my view, there is evidence before me that there was a wilful act which resulted in the Government of Sierra Leone through the Consolidated Fund, losing money: money which was intended for the Food Security Project was paid into the wrong account, and a substantial portion of that money was withdrawn through both 1st and 2nd accused. That the account was reimbursed through PW8 and Tarawallie, does not detract from the criminality of the initial diversion of funds, and their subsequent withdrawal. There is evidence before me, which if believed at the end of the day, shows that the 1st accused was involved in the diversion of the two cheques from the genuine account, into the account opened in Makeni by himself, with the concurrence of the 2nd accused; that both accused persons were involved in the opening of the account in Makeni; that both accused persons were involved in making withdrawals from that account; and that both accused persons were involved in making restitution to that account. A person who steals a TV set from another is not absolved of the crime by merely returning it after the crime has been discovered. What matters is his intention, his mens rea, at the time the act was committed. It is that mens rea which converts the appropriation from an innocent act, such as borrowing with the intention to return the property later, into the criminal offence of Larceny or Theft or Misappropriation. I have no evidence before me, in any event, that there was any intention on the part of any of the persons involved in this matter to make reimbursement before the loss had been discovered. However, that is an issue which would be dealt with when, if at the end of the day, I decide that either or both accused persons are guilty of the respective offences with which they are charged.
10. At this stage, my duty is clear, and I'll again adopt what I said in the case of the STATE v HAMZA SESAY & ANOR. "*At this stage of the proceedings, proof beyond a reasonable doubt is not required of the prosecution; what is required is that I should be satisfied that the 1st accused has a case to answer; i.e. that I should call upon him to present his defence. The principles applicable to a No-Case submission have been well set out by me in THE STATE v ARCHILLA & OTHERS and in THE STATE v BAUN & OTHERS. "When a No-Case submission is made at the conclusion of the prosecution's case, the burden imposed on the*

prosecution is less than that imposed on it at the end of the trial. At this stage, the true test to my mind, is that set out by LORD LANE, LCJ in the Court of Appeal Criminal Division in GALBRAITH [1981] 1 WLR 1039 at 1042B-D: "....If there is no evidence that the crime alleged has been committed by the Defendant, there is no difficulty. The Judge will of course stop the case.....where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.....where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury...." The Learned Editors of BLACKSTONE'S CRIMINAL PRACTICE 2002 Edition have succinctly summarised the position at paragraph D14-27 page 1431. "if there is no evidence to prove an essential element of the offence a submission must obviously succeed: if there is some evidence which - taken at face value - establishes each essential element, then the case should normally be left to the jury. The Judge does however, have a residual duty to consider whether the evidence is inherently weak or tenuous....." GALBRAITH has been further explained by the Privy Council in DALEY v R [1994] 4 All ER, 86 per LORD MUSTILL at page 94 g&h: "a reading of the judgment in R v Galbraith as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job." Our Court of Appeal in a Magisterial Appeal, SIAKA STEVENS & ANOR v COMMISSIONER OF POLICE [1960-61] Vol 1 SLLR 208 at 212 per AMES,P has held that where there is just a mere scintilla of evidence, the accused person should be acquitted on a No -Case Submission. Though I am trying this case by Judge alone, the principles set out above apply here also. If I hold the view, that on one possible view of the facts, I could at the end of the day, come to the conclusion that the 1st accused or the 2nd accused is or are

guilty of the offences with which he or they are charged, it will be my duty to call upon either or both accused persons to present a defence.

11. I have applied these principles to the instant case, and I have come to the irresistible conclusion that the essential elements of the offences charged in the Indictment have been established by the prosecution, and that both accused persons have a case to answer. The no-case submissions made on their behalf are overruled. I shall therefore proceed to put them to their election.

19/07/13

THE HON MR JUSTICE N C BROWNE-MARKE, Justice of Appeal