

The NRA Case/The State v. Allieu Sesay, Samuel Cole, Franklyn Pratt, Gloria Gabisi, Fatmata Ojubara Sesay before Hon. Mr. Justice Ademusu, 28 June 2011

FACTS: Counts 1,3,5 charged Mr. Sesay with wilful failure to comply with procurement procedure contrary to s. 48(2) (b) of the ACA 2008 *in awarding* contracts worth Le218,500,000 to Taria Ents. for the supply of air conditioners, contracts worth Le344, 900,000 to Tabod International for the provision of local area network at Cline Town and contracts worth Le450, 000,000 to Cee Dee Investments for providing ICT infrastructure at Customs House; counts 2, 4, and 6 repeat ad verbatim counts 1,3 and 5 respectively. Counts 7, 8 and 9 charged him under s. 128(1) ACA *with conspiring* with Mssrs. Cole, Pratt, Ms. Gabisi and with other persons unknown, to wilfully fail to comply with procurement procedure in tendering those contracts. Counts 13 through 30 charged Mr. Sesay with abuse of his office as NRA Commissioner General contrary to s. 42 (1) ACA by improperly awarding 18 contracts worth about Le 50 million to Fatma Allie Enterprises (FAE) owned by his wife Fatmata Ojubara Sesay; the same facts support the abuse of position charges in counts 31 to 48 contrary to s. 43 of the ACA 2008. Count 49 charged him with s.45 (1) of the ACA for failing to disclose to the NRA a direct, personal interest in FAE. Counts 10-12 charged him with knowingly misleading the ACC contrary to s. 127 (1) (b) ACA *by stating that:* the NRA service providers' databases *neither contained his wife's name*, nor that of any business in which she had an interest and that FAE *did not have transactions with the NRA*. Mr. Sesay was allegedly paid by Mrs. Sesay a total of \$14,000 for helping secure contracts for FAE; hence, the charges of offering an advantage to a public officer as a reward, contrary to s. 28 (1) (c) ACA, as counts 50 and 52, *and* accepting an advantage as a reward, contrary to s. 28 (2) (c), under counts 51 and 53. The same facts give rise to charges of peddling influence; counts 54 and 56 under s. 31 (2), i.e. that Mrs. Sesay gave Mr. Sesay an advantage *for using his influence to secure contracts*, and counts 55 and 57 under s. 31(3), that Mr. Sesay accepted that advantage as *consideration for his using his influence*. All Accused pleaded not guilty to the charges and relied on their interview statements, except for Mr. Sesay who testified.

Alfred Labor, former acting Senior Procurement Manager, Head of Procurement Unit (PU) and member of the Procurement Committee (PC) NRA, testified that Mr. Sesay wanted full control over the procurement process for the Asycuda contracts and that Mr. Sesay replaced all lists of contractors Labor, Lavalay (local Crown Agents Rep.) and Ganda (IT Director, NRA) compiled with his own, dictated the winner of the contract, and demanded Labor heed *only his* instructions as Mr. Sesay wanted to determine the awards outside the procurement process and felt the recommendations of the Extended Procurement Committee (EPC) on bidding applications was an obstacle. According to Labor, contractual awards should be determined by the PC based on an Evaluation Report. Labor testified that Mr. Sesay instructed him to ensure FAE's contractual awards, which he did. Labor testified that Mr. Sesay approved the Asycuda contracts, but also admitted that Mr. Sesay wrote a letter saying guidelines on contractual awards should always be observed. Labor admitted in his statement to having signed a fake minutes of a 16th July procurement meeting, renounced this in court, asserting no such meeting was held and then says he faked the minutes under Mr. Sesay's instruction. Labor was sacked from the NRA upon an internal inquiry into the DFID projects.

Mr. Sesay testified to being the NRA Vote Controller, responsible for its daily management, was responsible for notifying bidders of contractual awards and for signing contracts. He said that although the EPC on 14 July recommended further action pre-awards, that EPC meeting constituted a conclusive approval of contractual awards to Taria, Cee Dee and Tabod so he went ahead and awarded these contracts. He said he directed that the recommended actions be taken, but did not order precisely how. He said he granted Taria permission to install media ACs when all out of Kelvinator ACs as stipulated in the contracts and that he informed Charm (NRA's Policy and Legal Affairs Director and Chairperson of the PC) and Labor. He denied all Labor's allegations saying he could not have met Labor on the date they allegedly talked about Gabisi's contract as his passport showed he was then in the US. He said he signed NRA cheques to FAE and admitted that FAE was in the NRA suppliers' database. He said that FAE's letter to the NRA prompted him to instruct the Admin. and HR Dept. to update their database and to inform its Acting Director and the PU that Mrs. Sesay had an interest in FAE, but that he, Mr. Sesay did not and that FAE should not be treated preferentially. Charm admitted receiving this letter and minuting it to Labor. Mr. Sesay and Charm testified that all FAE contracts were handled strictly by the PU, being below the threshold of the Public Procurement

Act (PPA) i.e. Le15 million. Mr. Sesay denied telling or influencing Labor or anyone to give FAE contracts and said the he responded to the ACC notice based on his understanding of it, by saying that NRA transactions concerned business establishments and rarely individuals and that their service providers database did not have the name Fatmata Ojubara Sesay. He said he asked his wife to transfer €5000 to him in Brussels to buy a car for her business. He produced the relevant email, the car's bill of lading in Mrs. Sesay's name, *the indemnity form he signed when he could not present the original bill of lading* and an invoice.

The ACC contested the nondisclosure of the relationship between First Fidelity Company and Cee Dee Investment as partners and the fact that Samuel Cole and Franklyn Pratt were subscribers to First Fidelity and shareholders in Cee Dee Investments, companies that both tendered bids for the ICT infrastructure contract. DFID commissioned accounting firm PKF to carry out an audit of its grant to the NRA of £620,000. PKF found that the Asycuda contracts were not approved by the EPC; the funds were not used in accordance with the NRA-DFID MOU; the contracts were awarded without taking the actions raised by the DFID procurement consultant; the contracts were issued by the NRA and signed by Mr. Sesay without certification by the DFID engineer, that a brand of ACs differing from contractual terms had been installed with Mr. Sesay's approval without consulting the DFID engineer/consultant. DIFD then halted payments to the NRA. DFID engineer Vagg, an EPC member testified that Labor gave them a list of 5 contractors to invite to bid in each contract and when they requested the profiles of these 15 companies they only got back 3 identical ones. Vagg discovered one of these companies was a boutique and reported this. Vagg complained of still not seeing the bidding documents by time the bid opening date was set. TS. Koroma, a DFID procurement consultant produced 3 evaluation reports of the bids which, which Vagg says mirrored his own actions by not recommending any of the listed contractors, causing the PC not to recommend any contractors.

JUDGE'S REASONING: The charges are unsupported by cogent evidence; the Prosecution generally fails to meet its burden of proof. ACC investigators tended not to confront the Accused with the charges in interviews, failing to elicit needed evidence. Counts 1, 2,3,4,5 and 6 (see above) failed, since Mr. Sesay did not influence the decisions of the PC, never taking part in its meetings; Labor apart, no other member of any procurement organ said they were influenced by Mr. Sesay. Mr. Sesay did not tell the PC directly or through Labor to violate the procurement rules. Instead Labor testified that Mr. Sesay told the Evaluation Committee in writing that they should always observe procurement guidelines. Based on his overall responsibility, any failure to see signs of a flawed procurement process are allegations of negligence and vicarious liability; torts not crimes. Counts 7, 8 and 9, the conspiracy charges fail since the substantive offence, i.e. wilful failure to comply, could only be committed by a public officer not private companies. Further, the partnership between Cee Dee and First Fidelity is legitimate and not itself evidence of collusion. The PPA 2004 does not expressly prohibit a parent company and its subsidiary from bidding for the same contracts and the principles of free enterprise allow this; the tendering for the same contract by Cee Dee, First Fidelity and Tabod does not infer a conspiracy by the 3 and these companies performed their contractual obligations.

Count 10 and 11 concerning knowingly misleading the ACC fail; although Mr. Sesay's letter said that the NRA service providers database did not contain the name of Mrs. Sesay, a subsequent letter from Charm did disclose to the ACC that Mrs. Sesay's name was indeed in the NRA database (Count 10). Further, Mr. Sesay never said that the NRA service providers' database did not contain the name of any business in which Mrs. Sesay had an interest, but that the NRA transacted not with individuals but with companies and exceptionally with landlords (Count 11). Count 12 charging Mr. Sesay with misleading the ACC by failing to disclose that FAE, *an entity in which Mrs. Sesay had an interest did transact business* with the NRA also fails since the Prosecution adduced no evidence that Mrs. Sesay had an interest in FAE, that FAE transacted business with the NRA or that the name FAE was in the database.¹ Count 49, the conflict of interest charge fails, since Mr. Sesay and Charm testified that Mr. Sesay disclosed to the NRA that FAE was owned by his wife but he had no financial interest therein, that she should not be treated preferentially.

¹ However, see *Sesay* Judgment, p 71; "Abuse of Office Contrary to S. 42 (1)...There is irrefutable evidence that FAE supplied all the items required to the NRA at various times for which payments were approved by the 1st Accused and others who deputised for him." Further, the evidence supporting the Judge's finding on Count 49 contradicts the Judge's findings on Count 12. See **Analysis** below, specifically point **III. Erroneous legal, factual findings.**

Counts 13 to 38, the FAE charges fail. The Prosecution made no attempt to prove that Mr. Sesay a public officer knowingly abused his office in the performance of an act and the charges hinge solely on the testimony of Labor. Further, Mr. Sesay cannot be criminally liable for these awards, since they were *actually done by Labor*. Mr. Sesay and Charm testified that the PU handled contracts below Le15 Million without referring to Mr. Sesay; he is not responsible for the conduct of subordinates. Any exercise of undue influence on Labor would be a Tort, not a crime. Counts 50, 51, 52 and 53 on offering and accepting an advantage and counts 54, 55, 56 and 57 on peddling influence, all concerning the money transfers to Belgium fail. Mrs. Sesay would not reward Mr. Sesay with \$12000 about Le48 million when the contracts were worth Le55 million. Money transfers are not uncommon among spouses; the ACC has abused the presumption in s. 97 ACA. ACC investigators themselves testified to not knowing Mr. Sesay's explanation (supported by documentation), that funds were wired to Belgium to buy a car. The Prosecution admitted having no evidence that the transfers were made as rewards.

The Prosecution relied inordinately on the dubious self-contradictory Labor dismissed for his involvement in the procurement process. He says he was Mr. Sesay's confidant but was constantly coerced by Mr. Sesay with dismissal threats, that Mr. Sesay minuted the PC to follow strictly the procurement rules yet secretly instructed him to bend those rules, that Mr. Sesay wanted complete control and told him to ensure that the Asycuda contracts were given to Cole, Pratt and Gabisi as listed on a paper which he could not produce at trial. His preparation of fake minutes suggests he was corrupting the PU.

VERDICT: All Accused were acquitted and discharged on every count.

APPLIED LAW: The law on conspiracy does not criminalize intent among two or more, but rather an agreement between them to do unlawful act by unlawful means; *R v. Mulcahy 1868 L.R. 3HL 306*. The prohibited act is the agreement itself and the prohibited mindset is the intention to play a role in the agreed scheme; *R v. Anderson, 1986 AC 27 H.L.* Mere association without participation in a common design is not enough. The test is whether the parties had a common purpose; *The State v. Boahene (1963) 2 G.L.R. 554*. Acts clearly proved against some defendants may be used against all the defendants, as evidence of the nature and objects of the conspiracy; *R v. Stapylton Esdaile and Brown (1857) 8 Cox 69*. An agreement can be inferred from the circumstances. The Accused benefits from the presumption of innocence; the Prosecution must prove the Accused's guilt beyond a reasonable doubt; *Woolmington v. DPP (1935) A.C. 402*. A reasonable doubt is a rational or conscientious doubt free from influence, prejudice or fear. The Accused needs prove nothing but to raise a reasonable doubt; *Chan Kan alias Chan Kai v. R. (1952) A.C. 206*; *John Brown Akosa v. the C.O.P (1950) 13 WACA 43*; *George Kwaku Danso & Anor v. The King (1950) 13 WACA 16*; *R v. Hepworth and Farnley (1955) 2 Q.B. 606*. The standard of proof, if the burden is shifted on to the Defence is the balance of probabilities; *R v. Carr-Briant (1943) 29 Cr. App. R. 76 CCA* and the presumption in s. 97 ACA does effect such a shift. The Prosecution must adduce all evidence on which it intends to rely as probative of guilt of the Accused before the close of its case. The Prosecution must behave with exemplary fairness in securing the conviction of the right person; *R v. Dwyer, (1925) 2 K.B. 799 CCA*. Suspicions no matter how numerous and grave do not make for proper charges. The corporate veil can be lifted where used to cloak violations of the law; *Tesco Supermarket v. Natrass (1972) A.C. 153 H.L.*, but not just because someone is a member of more than one company since a company is a distinct entity from its members; one can lawfully be a member/shareholder in as many contracting companies as possible. Under s.127 (1) (b) ACA, the Accused was charged with knowingly misleading the ACC, meaning to intentionally lead into error of thought or action. Knowledge may be proved by an irresistible inference from all the evidence; *R v. Cohen (1951) 1 K.B. 505*, *R v. Iregbu 4 WACA 32*. The Prosecution's supporting authority on the term, *wilful*, in the context of wilful failure to comply with procurement procedure is *The State v. Sheku Tejan Koroma, 11 March 2010* which cites *Sheppard (1980) 3 All ER 899*, but J. Ademusu distinguished that case from the present, saying *wilful* usually concerns a positive action, but in *Sheppard*, it meant a wilful omission/negligence.

ANALYSIS: Statements that the ACC sought to "capitalize" on Sesay's clumsily worded reply to its notice, that it was on a "fault finding spree," that Labor simply "surrendered himself to intimidation," appear to have no judicial value. The judge's reasoning did however stress lack of investigative and prosecutorial diligence.

I. Case preparation: *1. Investigator witnesses' unfamiliarity with crucial case data;* A. Investigators

admitted ignorance of focal points of the trial: the PPA and PPR, the NRA, of Mr. Sesay being the vote controller *and* head of NRA, and were also ignorant of his per diem when travelling, that he was in Belgium in 2009 and admitted having no specific evidence supporting the reward allegations. 2. Non-exhaustive investigative/prosecutorial techniques A.) Investigative failure to confront the Accused with the charges/suspect circumstances, necessary as most Accused simply rely on their statements; B.) not clarifying Mr. Sesay's statement that he directed *generally* that EPC recommendations be acted upon C.) not clarifying from Mr. Sesay the portions of the letters where he claimed that he so directed D.) not clarifying from Mr. Sesay what his understanding was of the ACC notice around which he framed his obscure reply E.) not clarifying the significance of his asking that the database should be renamed from suppliers to potential suppliers upon including FAE F.) not pointing out the compatibility of a car purchase account with their reward theory G.) saying "other persons unknown" in the conspiracy charge, when a sufficient number of parties were identifiable H.) not countering the perception that, "the Prosecution places too much reliance" on Labor, by demonstrating that Counts 1-9 were supported not just by Labor's evidence but instead by cumulative circumstantial evidence (below).

II. Cumulative circumstantial evidence indicating a flawed procurement; 1. Demby testified that the EPC's actions points did not come back to it. 2. Demby testified that Vagg who should have awarded the contracts ended up asking him who awarded the contracts. 3. Ganda, an EPC member said that he learnt of the awards before he had even assessed bid proposals. 4. Three NRA employees named on the evaluation report denied authorship. 5. Lavaly, a PC member describes the Evaluation Report as incomplete. 6. Charm testified that the DFID reps. queried why ICT providers were not included in the short list for the ICT contract. 7. MP traders and Choithrams denied bidding docs. purporting to be theirs. 8. The NRA-Taria contract requiring written amendments for any contractual changes was not complied with. 9. The evaluation committee and the EPC notwithstanding, it was Mr. Sesay who informed TS Koroma of the approved change to Media ACs indicating his direct line of communication with Taria. 10. Vagg testified certain shareholders misrepresented their addresses in bidding documents, noted in the Evaluation Report. 11. Mr. Sesay admitted Labor *could not enter into contract* and was subject to his disciplinary powers and that the PC was answerable to him, yet asserted that it was not his responsibility to ensure contracts were not awarded to sham companies.

III. Potentially erroneous legal, factual findings: Contradicting the finding that Mr. Sesay could only be vicariously liable, 1. Mr. Sesay signed the Asycuda contracts, affirmed by Mr. Sesay, Labor and Cole, indicating personal responsibility for awarding them. 2. Mr. Sesay also signed cheques for FAE. 3. Contradicting the findings, *there was* evidence of the NRA transacting business with FAE in the form of bank payment slips and there was evidence that Mrs. Sesay had an interest in FAE via Mr. Sesay's letter to HR conceding the same. 4. Contradicting the finding that Mr. Sesay **did not fail** to disclose the details sought by the ACC, about whether his wife's name or the name of her business was in the NRA service providers' database or the fact that the NRA did transact business with FAE, note that the letter which discloses these details to the ACC is from Charm responding to the 2nd ACC notice, Mr. Sesay having failed to so disclose in response to the 1st ACC notice.

IV. Precedential consistency: Judge's reference to ACC judgment of *The State v. Sheku Tejan Koroma, 11 March 2010*, where J. Sey cites the UK case *Sheppard 1980* in construing the term, wilfully.

V. Re Governance: Shortlists for restricted bidding could be more transparently compiled in the midst of any of the procurement organs and the reasoning behind their choices subject to an obligation to publish.² Pratt said that although First Fidelity had never before done IT installation, it would have subcontracted this work, had it won either of the 2 contracts for which it bid. The fact that ICT providers were not included in the short lists for the ICT contracts troubled DFID reps. The PPA 2004 does not expressly exclude bidders lacking the technical expertise, but does list it among the (optional) criteria for consideration in determining the award of contracts: s. 21 (1) PPA 2004; *criteria set by the procuring entity, may include – professional and technical qualifications*. The Parliamentary review of the PPA could create a more compelling obligation or procuring entities could adhere more closely to the intent inherent in this provision. A single channel of information between the Vote Controller and the PC/PU (Sesay-Labor) appears ill-considered.

² See Snapshot **III. Conspiracy and Procurement**, p. 18 and Findings and Recommendations.

MEDIA REVIEW: Prior to investigations, the press appeared to recognise Sesay's professional competence, but by the investigations phase, the press was divided with some criticism of his allegedly opulent lifestyle and connections with the political establishment, allegedly impeding investigations. The judgment was contextualised against longstanding allegations of NRA corruption, prior ACC NRA prosecutions, the then imminent FCC case and the preceding Lukuley case. The judgment mostly aroused shock with allegations of political interference, legal analyses on its dangerous precedent for conspiracy and contestations of concepts like; conflict of interest, vicarious liability, and corporate liability. The press struggled with conveying the facts, since the judge's reasoning appeared to misconstrue the Prosecution's arguments. Media dissatisfaction with the judgment gave rise to personal attacks on the ACC and its personalities, bemoaning PR prosecutions lacking sufficient evidence. Post-Sesay, allegations of NRA corruption continued to be reported especially the undocumented disbursing of Le 1 billion from the NRA SLCB account in 2011 and alleged attempts to repress an internal audit. Some press called for Sesay's reinstatement and reported Sesay's receipt of an award from NRA staff for winning his case.

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