The Freetown City Council (FCC) Case/The State v. Herbert Akiremi George Williams, Bowenson Frederick Philips, Sylvester Momoh Konehni, Arthur Kwesi-John, Desmond Thomas, Franklyn Garber, Alimamy Turay, Aiah Brimah, Mohamad Allie Shaaban before Hon. Mr. Justice JBA Katutsi 10 August 2012

FACTS: Count 1 charged Williams, the FCC Mayor and Philips the Chief Administrator under s. 128 ACA 2008, with conspiring with persons unknown, to misappropriate Le744,450,000 by hosting a 2 day musical concert. Counts 2 to 7 charged Williams, Philips, Konehni, the acting treasurer, Kwesi-John, Deputy Chief Administrator under s. 48 (1) ACA with failing to pay PAYE tax to the NRA totalling Le 430,412,642 in 2009 and 2010 and charged the four for failing to pay NASSIT[1] contribution for FCC staff of Le106,627,188 in 2010. Counts 8 to 9 are charges of misappropriation under s. 36 (1) ACA. Count 8 charged Williams, Philips and Thomas, head of Cashier's office, with misappropriation of market dues of Le55, 589,100 in 2009. Count 9 charged Williams, Philips and Thomas with misappropriation of municipal licences fees of Le24, 317, 300 in 2009. Count 10 charged Turay, FCC Municipal Trade Officer, with misappropriation of market dues of Le22, 470,000 in 2009 and 2010. Count 11 charged Williams with misappropriating Le10, 000,000 from FCC's *Skye Bank* account in 2010, purporting to be payment "in respect of" *Morgan Heritage* Concert. Count 12 charged Brimah, the Development Planning Officer with misappropriating in May 2009 Le9, 800,000 purporting to be payment for councillors' needs assessment. Count 13 charged Garber, FCC civil engineer, with misappropriating in 2009, Le9, 225,000 purporting to be payment for rehabilitation work at Hargan Street. Count 14 charged Brimah with misappropriating Le2, 815,000 purported to be DSA for participants at a retreat. Count 15 charged Williams, Philips and Thomas with misappropriating Wharf Landing fees of Le2, 063,400 between October and December 2009. Count 16 charged Williams, Philips and Kwesi-John with misappropriating Le400, 000,000 purporting to be NPA payment for electricity, in 2009. There is no indication of count 17.Count 18 charged Williams with misappropriating $9000 purporting to be payment for *Morgan Heritage*'s excess baggage between 2010 and 2011. Count 19 charged Williams with misappropriating $10,000 drawn from FCC's Sierra Leone Commercial Bank (SLCB) account, claimed to be payment for the *Morgan Heritage* concert. Count 20 charged Williams, Philips and Konehni with misappropriating Le79, 980,000 supposedly for relocation of evictees from the site for a shop centre, Fisher Street. Count 21 charged Shaaban, a businessman, with misappropriating Le800, 000,000, purported payment for construction of the shop centre, Fisher Street. Count 22 charged Williams and Philips of misappropriating in 2009, Le13, 442,500 purporting to be payment made to Zenobean Enterprises for swivel chairs. Count 23 charged Williams and Philips of misappropriating in May 2009, Le7, 640,000 purporting to be payment made to one Ibrahim Kamara as incentive for the Revenue Enforcement Team. Count 24 charged Williams, Philips, Konehni, and Kwesi-John under s. 48 (2) (b) ACA with wilfully failing to comply with the procurement procedure for services in contracting the services of *Morgan Heritage* for $130,000 for a 2 day concert. Count 25 mirrors 24, but only concerns Williams and was for the services of *Rugged Musical Set* contracted for $35,000.

JUDGE'S REASONING: Count 1 is dismissed since conspiracy charges must not prejudice the Defence; *Verrier v. DPP (1967) 2 AC 195*, likely to occur here since the Prosecution admitted to charging conspiracy under the wrong section. They argued that was remediable under s. 148 (1) CPA which permits the Court to order amendments *but since the section charged never did create an offence, it could not now be amended to introduce an offence never part of the committal proceedings*.[2] It's also unadvisable to charge a conspiracy where the supporting evidence is simply evidence of the actual commission of substantive offence (s) charged*; State v. Fodday Bangura Mohammad*.[3]

Counts 2-7, the NRA and NASSIT charges fail since ACC prosecutions are not part of the enforcement mechanisms in their governing statutes. S. 48 (1) (d) ACA criminalizes failure to pay taxes, levies, charges, which NASSIT *social security* contribution does not qualify as. Re PAYE tax, the ACC only need become

[1] National Social Security and Insurance Trust.
[2] On a direct counterpoint to this angle of reasoning, see Snapshot **III**, p. 1, notably, heading **1. Conspiracy: A. Pleading**, for the findings in ***Ken Gborie*** and ***Katta***, (where the same drafting error was made), that the ACA simply imported preexisting Common Law offences, that the Accused was not prejudiced in his Defence since he must have understood the charge of Conspiracy in order to have pled to it and that s. 148 (1) CPA1965 makes such amendments possible.
[3] Ibid, for a direct counterpoint. See notably, pp. 2-3.

involved where there is corruption and would need to establish the Accuseds' responsibility for payment of taxes and failure to pay, due to fraudulent or unlawful reasons. The governing statutes[4] do impose an obligation on the "*employer*", here the FCC, to remit sums withheld from employees. The employer is a legal person acting through human agents, but all 4 Accused could not simultaneously have been agents. There had to have been one agent whose responsibility it was to act. However, like other MDAs, the FCC, had set up a payment plan with the NRA in 2011 due to financial constraints so that failure to pay was not unlawful or fraudulent. Further, no evidence indicates that the monies withheld from FCC staff salaries left the FCC coffers. Therefore, the FCC appears to have been selectively targeted for prosecution.

Count 8-9 and 15, the charges of misappropriation of market dues, municipal licences and wharf landing fees fail. The procedure is for revenue collectors to normally take cash to audit dept. for verification resulting in a stamped analysis form, before paying money at the cashier's, where receipts are issued to them. An internal audit revealed that the receipts issued by the cashier's office for market dues and municipal license tallied with the daily collection analysis form, but the audit identified discrepancies worth Le2, 630,400 between monies collected[5] and paid into cash office ***and*** the amount registered by the cashier in the cash and deposit register, concluding that this was due to the cashiers and revenue collectors. It recommended frequent, on the spot checks to ensure transparency in the cash office and that Williams and Philips ensure that the money be retrieved from the parties concerned, but the FCC did not act on these recommendations. The audit report's author[6] agreed it was a draft. The external audit found inadequate control over revenue collection and reporting, and a discrepancy of Le 60,748,000 between daily market dues collection sheets/record of the supervisor and receipts for the period of January to December 2009, later stated to be Le60, 821,700, but made no findings on municipal licence fees and wharf landing fees. The FCC responded to the external audit saying that its finding could be due either to leakages in revenue collection, or to duplicative calculations. The Court reasoned that Williams as Mayor had nothing to do with the collection of all these fees. His duties under s. 11 (3) (E) Local Government Act (LGA) 2004, to "*ensure that the financial affairs of the local council are properly managed and controlled*", cannot extend to revenue collection and discrepancies in financial records. Philips, Chief administrator under s. 31 (4) (a) LGA was "*responsible for financial and resource management and daily administration*" and under s. 31 (5) LGA, was to "*ensure accountability and transparency in the management and delivery of the local council's service*." Under s. 33 (2) LGA, FCC staff were responsible to him. Philips was not however interviewed about market dues, municipal license fees or wharf landing fees. He played only administrative roles in revenue collection and although he did sit on the external auditors' recommendation, it is not beyond a reasonable doubt that this inaction was covered by s. 36 (1) ACA. The Prosecution contended that Thomas, as Head Cashier was responsible for collecting revenue from revenue collectors, but since PW11admitted to inconsistencies in his report[7] and stated that the receipts for market dues and municipal licenses tallied with the daily analysis form, Thomas is given the benefit of the doubt.

Count 10 is upheld against Turay. Uncontroverted evidence showed that ticket books worth Le22, 470, 000 were issued to him and the internal audit found that they were not recorded into the market fees issue ledger. Yet still, Turay refrained from commenting on the audit conclusion which was adverse to his case. Where the evidence is adverse to the Accused and where he does have evidence, he should provide his own account, his right to silence notwithstanding. Since Turay did not account for ticket books issued to him, he is deemed to have caused the FCC to be deprived of revenue.

Count 11 is dismissed. The relevant cheque was signed by Williams, Philips and Konehni, but no expenditure voucher was drawn up for it. The Accused's evidence was uncontroverted and supported by

[4] The NRA and NASSIT Statutes.

[5] Presumably, the records employed here to indicate the amount collected, would be the daily collection analysis form and the receipts issued by the cashier, since these are the sources of data the internal audit first refers to and since the judgment mentions no other such record employed by the internal audit; the ***FCC case***, p.18. See also Snapshot **IV**, pp. 27 and 28. Notably, heading **2. Modes of Control: G. Audits.**

[6] PW11, Abdul Karim Fofanah.

[7] PW11 may have admitted to inconsistencies in his report but never admitted that the two of his findings discussed by the Court contained inconsistencies or were inconsistent with each other. See also Snapshot **IV**, final para., p. 30. Notably, heading **2. Modes of Control: G. Audits.**

PW7's testimony that, Williams spent the Le10, 000,000 that she handed to him on the hiring of a crane, fuel and local artists. PW2[8] confirmed Williams' evidence that PW2 was given money to pay for a generator; Le800, 000 according to PW2. Also, there was a fuel receipt for Le 1,760,000 in the ACC's possession.

Count 12 is upheld against Brimah. Apart the cheque and the payment voucher, other supporting documents were not provided to Audit Service SL upon its request for all unsupported payments relating to this sum. FCC management told auditors that the absence of supporting documents may have been due to inappropriate archiving system and movement of documents. Brimah's witness[9] was deemed of dubious credibility since he testified to being paid public money without signing for it.

Count 13 is upheld against Garber. His withdrawal of Le9, 225,000 from the FCC account is evidenced by a cheque in his name supported by a payment voucher but there are no documents supporting further expenditures. Audit Service SL asked for supporting documents for this and other unsupported expenditures, but received none. Garber's caution statement does not address how it was spent. The Prosecution proves its case through Garber's failure to account.

Count 14 fails. Brimah withdrew Le46, 672, 000 from the FCC account evidenced by a cheque in his name with ID attached, from which according to the budget for the "*sectoral planning retreat*", Le26,025,000 was meant for DSA for 78 participants for 3 days. The ACC contends that the list of participants who signed for the receipt of DSA indicates that Brimah only spent Le23, 210,000 on DSA, with an unspent Le2, 815,000 going unaccounted for. The Court queries the accuracy of this, given the ACC investigator's [10] misstatement that Le46, 672,000 was meant as DSA. Since there was no other independent evidence of an auditing nature to support the ACCs claim, the Prosecution fails to meet its burden of proof.

Counts 16 and 17 fail. They were not withdrawn on the Prosecution's request, (in their realization that they were unsubstantiated), given the late phase of the proceedings and interests of justice.

Count 18 the excess baggage charge fails. The contract stated that *Morgan Heritage* should be reimbursed upon presentation of airline receipts for excess luggage. The Defence did not tender these receipts in Court but instead tendered a chit written and signed by Albert Cook[11] on behalf of *Morgan Heritage* claiming $9000 as payment for "*backline rental*" and excess baggage. The Prosecution adduced a copy of a BMI audit coupon for $480 for excess baggage issued in the name of Mr. M. Morgan for flights from Freetown to eventually Miami on 1 January 2011. PW3 testified that M. Bah, an FCC official told him that he'd personally paid Cook the equivalent of $9000 and gave him a receipt allegedly signed by Cook, which the ACC contends is fake but fail to prove beyond reasonable doubt. All the Defence has to do is to raise the issue warranting reasonable doubt.[12] The Prosecution failed to call the FCC Accountant, listed as its witness, entitling the Court to presume that his evidence was adverse to the Prosecution. Since the Prosecution fails to prove its case, the Accused have simply been given the benefit of the doubt.

Count 19 the charge against Williams of misappropriating $10,000 fails since the cumulative effect of the evidence on record does not conclusively point to William's guilt and he is entitled to the benefit of the doubt. Williams explained that he paid $4000 for *Rugged Musical set*, $5000 to Albert Cook and another $1000 as per diem to *Morgan Heritage*; expenditures unsupported by documentation. In testifying, Williams said PW7[13] gave him the proceeds of the request for payment, a fact that she, PW7 confirmed. She said that from this, $4000 was paid to *Rugged*, $5000 was paid to Cook for a mini-concert held at Lagoonda, since PW8[14] could not pay then, although he later repaid the FCC. PW8 himself confirmed this saying it was the FCC treasurer who made the payment. PW3 identified the receipt from PW8 allegedly issued by Cook for the $5000 but said he couldn't tell whether or not that $5000 came from the $10,000 allegedly

[8] Suleiman Bah.
[9] Alusine Allieu. The ***FCC*** case, p. 21; "*the Accused had elected to give evidence, when it came to his turn he changed his mind*."
[10] PW3, Maada Konneh, ACC Investigator.
[11] Cook received payments made out to *Morgan Heritage* but there's no description of his role in relation to *Morgan Heritage*, except to say that he collected payment, "*on behalf of Morgan Heritage*"; the ***FCC*** case, p. 25.
[12] A reasonable doubt as to the Accused's guilt is raised here by the Defence adducing evidence of a chit signed by Cook purporting he was paid $9000 for *Morgan Heritage*.
[13] Fatmata Mamadi Kanneh, Senior Administrative Officer.
[14] Mr. Emile Carr, presumably of Lagoonda.

misappropriated by Williams. The Court reasoned that PW3 simply ignored a very important document that he was confronted with and that it was unclear why he did so. Williams claimed that a receipt addressed to him for $11,000 paid to *Rugged* includes $4,000 sourced from the $10,000, the subject of count 19.[15] The receipt indicates the $11,000 was itself part payment for hire of musical equipment totalling $35,000 for the concert and indicates a balance of payment remaining of $24,000. The Court reasoned that this detailed receipt was not followed up by the ACC.

Count 20, the relocation charge fails. The Ministry of Trade and Industry provided the FCC with Le879,980,000 for constructing a shop centre at Fisher Street. Le800,000,000 was given to *Waka Fasta* Construction company, out of which Le40,000,000 was income tax. Le 79,980,000 was meant for paying squatters. The ACC argued that Williams, Philips and Konehni were the signatories to all FCC accounts but unable to explain what happened to the Le79, 980, 000 suggesting that the Accused had the burden of proving their innocence. In contrast, Williams testified that the Le79, 980,000 was never withdrawn from the FCC account and the FCC account statement of 1 April to 30 November 2010 showed no withdrawal of Le79, 980,000.[16] PW3 said tenants and squatters still occupied the market, that construction had not yet commenced and that although the Ministry of Lands had to provide land for relocation, the evidence indicated that the FCC did not pay the Ministry of Lands for squatters. Count 21, the *Waka Fasta* charge, fails. Shaaban was paid Le800 million as advance payment from a contract worth Le3.4 billion, and which was inclusive of Le40 million as withholding tax. At the time these charges were preferred, Shaaban had not constructed the shop center because the site was still occupied by squatters and tenants. The ACC misappropriation charge here even comprised the tax deduction. A minister's ordering Shaaban to return the money including tax is unlawful and violates the spirit of laissez-faire since the latter was simply engaging in lawful business. This incident concerns the law of building contracts and does not concern the ACC.

Count 22, the swivel chair charges fail. The local purchase order in evidence was worth Le14,150,000 but ACC claim the chairs were never purchased or delivered. PW6[17] testified that on his assumption of duty he received no records of goods supplied to the FCC before he started, but that he eventually found the items in the store, of which he identified photos. The ACC could also have used s. 56 (1) (A) ACA to summon staff of Zenobean Enterprises to confirm this supply.

Count 23, the incentive charge fails. The cheque and payment voucher indicate payment to Ibrahim Kamara[18] as incentive for Revenue Enforcement team, but the ACC claim this was a scheme for misappropriation and that Williams was obligated under s. 11 (3) (e) LGA, to properly manage and control the FCC's financial activities including revenue collection. Ibrahim Kamara's interview statement to PW3 confirmed that the FCC decided to give incentives to revenue collectors and PW3 testified that the list of recipients' signatures[19] indicated the money was an incentive. Both PW7 and PW11, a Prosecution witness deemed credible by the Court, confirmed that the FCC decided to provide incentives for revenue collectors. PW11 says he signed the document for receipt of Le100,000. Hence, the Prosecution witnesses' testimonies favoured the Accused. Even PW3 admitted that there was no evidence supporting count 23.

Count 24, the procurement charge concerning *Morgan Heritage* succeeds against Williams, Philips and Konehni and fails against Kwesi-John. Count 25 the procurement charge concerning *Rugged* succeeds against Williams. The *Morgan Heritage* concert was to provide revenue for buying school buses but it ended up losing Le744,450,000 of taxpayers' money. Procurement activities are daily administered by the FCC procurement unit (PU), under which is found the procurement committee (PC)[20] and the procedure for procuring services depends on the threshold. In an emergency, a written request justifying the urgent provision of the services sought, is made to the NPPA[21] to waive the standard methods. Muhamad John

[15] Exhibit DD1-2 is a request for payment of the $10,000, although the Court does not make clear whether this request spells out the use to which the requested funds would be put to; the ***FCC*** case, p. 26.
[16] A more recent statement does not appear to have been adduced; judgment delivered in August 2013.
[17] Sahr John Allieu, FCC Store Keeper.
[18] FCC employee, Member of Team of Revenue Collection Officers; the ***FCC*** judgment pp. 30-31.
[19] Although Ex QQQ 1-5 is not described in so many words in the judgment, PW11 states at the ***FCC*** judgment p. 31; "*This is Ex QQQ (…) I am looking on page 1 (…)There is my signature next to my name, yes I signed acknowledging receipt of Le100, 000*."
[20] The ***FCC*** judgment, p. 32.
[21] National Public Procurement Authority.

Musa[22] confirmed that he told the FCC that the *Morgan Heritage* Concert was a service. Yet, Williams and Philips, despite knowing of the FCC procurement process, ignored it in actively procuring the services of *Morgan Heritage*. The head of the FCC PU[23] testified that the PU was not consulted for either the *Morgan Heritage* or *Rugged* contracts. Philip's letter told Williams that the FCC could not afford to pay $91,000 to *Morgan Heritage* and to revert to their deposit at Crown Agent Bank, UK for this and to refund that account upon receipt of sponsorship funds. It is beyond a reasonable doubt that *Morgan Heritage* was invited by Williams and Philips and that neither the FCC PC nor NPPA were involved in this venture. Konehni is implicated since along with Williams and Philips, he signed the request addressed to Crown Agents for them to transfer $91,000 to the FCC. Further, Williams single-handedly secured the *Rugged* Contract costing $35,000. The Prosecution proved its case against all but Kwesi John against whom there was insufficient evidence.

VERDICT: Williams is convicted on counts 24 and 25 and fined Le 170 million. Philips and Konehni were both convicted on count 24 and fined Le 120 million each. Garber is convicted on count 13 and fined Le10 million. Turay is convicted on count 10 and fined Le25 million. Brimah is convicted on count 12 and fined Le 10 million. Failure to pay all fines within 1 month would result in a prison term of 3 years. Kwesi-John and Shaaban are acquitted of all charges. All other counts fail. [24]

APPLIED LAW: S. 36 (2) (74) of the Court's Act No. 31 of 1965 provides that subject to the provisions of the Constitution of Sierra Leone and any other enactment, the Common Law, the doctrine of Equity and the state of general application in force in England on the 1st day of January 1880, shall be in force in Sierra Leone. The essence of conspiracy is an agreement between two or more persons to carry out their criminal scheme; *Mulcahy v. R (1868) L.R. 3 H.L.* S. 148 (1) CPA permits the Court to order an amendment of charge at any stage of the proceedings. A charge should not be amended/"*included*" if it leads to unfairness to the defence; *Verrier v. DPP (1967) 2 AC 195.* It's unadvisable to charge a conspiracy where the supporting evidence is simply evidence of the actual commission of substantive offence (s) charged*; State v. Fodday Bangura Mohammad*.[25]

The Prosecution carries the burden of proof beyond reasonable doubt with a few exceptions. This burden means that proof need not reach certainty, need not be beyond the shadow of a doubt, but must carry a high degree of probability and "*doubt*" does not accommodate remote possibilities in favour of an Accused; *Miller v. Minister of Pensions (1947) 2 ALL E.R. 332*. Doubt warranting an acquittal must be rational and not stemming from timidity, passion or influence.[26] The Accused does not bear the burden of proving his innocence. He who alleges must prove that which he alleges. The Prosecution must stand or fall by its own case so that where its own witnesses provide evidence adverse to its own case it is particularly salient.[27] If a party fails to call a witness they would have otherwise called, the Court can presume that that witness was not called because its evidence was adverse to that party.

Misappropriation under s. 36 (1) ACA occurs where a public body is deprived of any revenue, funds or other financial interest or property belonging to it by the wilful act of a public official acting by himself or with or through another person. The state of mind required by the law, wilfulness, should be directed at that particular act that constitutes the crime. The Prosecution therefore must prove intent and actual commission of the intended act.

The effect of s. 48 (2) (b) ACA is to criminalize the non-observance of rules governing the disposal and general treatment of public revenue/property by persons whose functions entail the exercise of various modes of access to, and generally control of, such public revenue/property. The Accused under this section must be a person whose functions concern a.) The administration b.) The custody c.) Management d.) Receipt e.) or Use, of any part of public revenue/property. This provision also criminalizes the non-

[22] NPPA Member/Employee.
[23] Fudie Jangah Konneh.
[24] The ***FCC*** judgment, p.19 states that Thomas is acquitted; however, p. 34 states that he is convicted of count 8. He appears to have been acquitted since there is no mention of him in the Sentencing Judgment, 15 August 2012.
[25] See **Judge's Reasoning** above at p. 1 for a discussion of the law on Conspiracy.
[26] The ***FCC*** judgment, p. 11.
[27] The ***FCC*** judgment, p. 21; "*Prosecution must stand or fall by the evidence of their own witness*."

observance of applicable procurement procedures. This non-observance should be accompanied by a wilful or negligent frame of mind. Re counts 2-7, charged under s. 48 (1) (d) ACA, note that "*fraudulently*" means to dishonestly take the risk of prejudicing another's right and that "*unlawfully*" means acting without lawful justification or excuse.

ANALYSIS: **I. Case preparation:** *1. Non-exhaustive investigative/prosecutorial techniques*: Out of the 25 counts/charges here, 6 succeeded against 7 of the 9 Accused. 19 charges were brought against Williams, with 2 succeeding, counts 24 and 25; 15 charges against Philips, with 1 succeeding, counts 24; 6 against Konehni, with 1 succeeding, count 24; 6 against Kwesi-John, which all failed; 3 against Thomas, which all failed,[28] counts 8 and 2 against Turay, with 1 succeeding, count 10. The ***FCC*** case perhaps best exemplifies the finding "*Non-exhaustive investigative/prosecutorial techniques*." Botched outcomes apparently stemmed from the pre-trial phase. But for 3 instances of mainly legal defects (Conspiracy, NASSIT and NRA charges), all failed counts inhere evidential lapses. Analysis of these lapses as per the count through the dual prisms of failures to exercise investigative and prosecutorial diligence would be repetitive; both are present across most of the failed counts. For clarity, the lapses may be analysed via 4 cross-cutting factors; 1.) the preferment of charges with little or no supporting evidence; 2.) the preferment of charges with some evidence which failed to meet the reasonable doubt standard; 3.) the provision by prosecution witnesses of evidence supporting the Accused; 4.) apparent imperfect sculpting of the charges. *All* 4 categories underline that investigative and evidence analysis methods apparently tended to be inadequate while the 4th category bears pertinently on the drafting of the charges and crafting of the prosecution case theory.

Counts 2-7, 16-17, 20-23[29] falls into category 1; it's puzzling how charges could have been proffered in such circumstances especially where even ACC investigators testify in support of this void, see PW3's testimony under counts 20 and 22. Counts 8-9 and15, 14, 18, fall into category 2. Re categories 1 and 2, query the Prosecution's yardstick for pre-trial evaluations of the sufficiency of evidence for trial, against what is known of the Defence case.[30] Re category 2, the failure to meet the standard of proof appears to result from failure to diligently investigate/pursue all discernible leads:[31] in counts 8-9 and 15 the Prosecution did not pre-empt queries about the discrepancy between the audit findings, it did not adduce audit findings supporting count 14, did not call as witnesses persons appearing to have crucial information on count 18 and made no attempts to disprove the receipt authenticating the contested expenditure. Re category 3, the failure to uncover that its witnesses had evidence supporting the Accused despite interviewing them inheres a lack of both prosecutorial and investigative diligence, seriously calling into question the adequacy of witness prepping by the Prosecution.[32] Category 4 can be further subdivided into; A.) Flawed drafting; B.) Inexhaustive conceptualisation of the applicable law.[33] Count 1 clearly falls into group A. Counts 2 to 7 fall into category 1 and into both groups A and B of category 4. Counts 8 - 9 and 15 fall into group B. Inexhaustive conceptualisation of the underlying legal groundwork and mechanics for prosecuting certain acts, may tend to lead to category 2 situations; a case with ***some*** supporting evidence, but failing to meet the reasonable doubt standard.

- **On Category 4**

Counts 8-9 and 15 charged Williams, Philips and Konehni with misappropriation for shortfalls in revenue collection. On a general, practical level, these charges raise the following issues: "*indirect perpetration*" of a crime, which in turn raises issues of superior responsibility/liability, causation/attributability of fault, the existence of obligations to act, (which could have been fleshed out by referring to Due Diligence (DD)

[28] Some haziness here. The ***FCC*** judgment, p. 19, says Thomas was acquitted whereas p. 34 says he was convicted, but the FCC Sentencing Judgment does not mention him.
[29] Reference **Judge's Reasoning** section above for clarification.
[30] See also Snapshot **II.** Notably, heading **1. Non-Exhaustive Approaches to Securing Evidence A. General**, see, 1st para. p. 3, making the point that a prosecution should not be brought where there is no reasonable prospect of a conviction. The Prosecutor must objectively assess whether the evidence disclosed a prima facie case i.e. was of such sufficiency, admissibility, substantiality, credibility, reliability that a judge would conclude that the Accused was guilty beyond a reasonable doubt. Reference sources making this point at, FN 9 of p. 3, Snapshot **II.**
[31] See Snapshot **II.** Notably, heading **1. Non-Exhaustive Approaches to Securing Evidence A. General**, see specifically pp. 1-2.
[32] See **II, 1. Non-Exhaustive Approaches to Securing Evidence B. Inadequate Witness Preparation**, p. 4.
[33] Both limbs of Category 4 correspond to Snapshot **II. 2. The Defective Framing of Charges** and **3. The Failure to Hone in on the Crux/ Potential Trial Clinchers**, pp. 4-6.

notions)[34] and a failure to perform them/omissions. Primarily, the Prosecution must on the basis of at least the most fundamental/rudimentary facts, properly conceptualise the legal basis of the case. Based on logic and intuition, legal concepts are selected that would frame the circumstances as clearly criminal. It's submitted that exhaustively conceptualising the case, may mean understanding the correlation and interaction between relevant, possibly different sources ***and concepts*** of law inter se and in relation to the facts. The Prosecution naturally fits legal concepts together appropriately to produce the desired/most plausible case theory; "*good law*." Doing so enables evidence seeking efforts to be channelled productively and not dispersed disparately to support the legal limbs of the case as identified. Naturally, the conceptual/legal basis of case is progressively re-crafted where the evidence anticipated is absent or the evidence uncovered affects and alters the conceptualisation.[35] In sum, 1.) The case must be clearly and it submitted ***exhaustively*** conceptualised 2.) The conceptualisation must be clearly articulated between all relevant team members (investigators, prosecutors etc.) 3.) The conceptualisation should be committed to memory as far as is possible, *as a step-by-step process and reiterated*, so that it serve as an overall guide to efforts. It is submitted that although the verbal economy required at trial may not accommodate the employ of conceptual aids (see below) in Prosecution submissions, the use of such aids may well be helpful to the Prosecution in the interests of clarity of vision and the re-assessment of its own tack.

- ***Conceptual Scheme*:** Here, presumably the Accused, not the direct perpetrators, were charged for challenges in identifying the direct perpetrators and/or for policy reasons, including the promotion of efficient organisational management. The exercise of establishing criminal culpability is threefold;[36] the establishment of a legal obligation, a breach of that obligation and the clear identification of fault on the part of the Accused causing that breach. There is no doubt that **the obligation** to not dishonestly deprive a public body of public funds exists, evidenced in the fact of any contrary conduct being criminalised; s. 36 (1) ACA. **The breach**/the existence of a fact contrary to that obligation, is in the (dishonest) loss/deprivation to the public body of public funds. Here, efforts to prove the loss/deprivation may have evinced lapses; the Prosecution, true to its burden, could have pre-empted the Court's contestation of the lack of direct correspondence between the audit findings it adduced indicating losses in revenue collection, by explaining their interrelation and background.[37] Diligent prepping *might* also have prompted explanations that the inconsistencies in PW11's report did not affect its findings. Proving **fault**/responsibility for causing the loss/deprivation, means proving that the Accused committed the unlawful act[38] with an unlawful frame of mind;[39] Misappropriation is defined as acting willfully and *with dishonest intention* to deprive a public body of public funds.[40]

⇒1.) Posession of the Unlawful Frame of Mind: Fault/responsibility for causation bears most pertinently on the unlawful frame of mind.[41] The unlawful frame of mind for misappropriation under s. 36 ACA is wilfulness which as per case law comprises both intention and recklessness. However, since case law also requires the Accused to have acted with *dishonest intention* to deprive the public body of public funds, it is submitted that the recklessness limb of wilfulness cannot apply to misappropriation. The requirement for a dishonest intention best encapsulates the illegitimacy of the Accused's act/omission, since dishonest

[34] Due Diligence may have differing statutory definitions, but under Common Law is generally the exercise of a standard of reasonable prudence, responsibility, consistency, vigilance, advertence, thoroughness, attentiveness or care that would avoid a claim of negligence. It is a *fair attempt* that is expected from, and ordinarily exercised by, a reasonable and prudent person under the circumstances, or the verifications and precautions taken to prevent foreseeable risks; *Perry v. Cedar Falls, 87 Iowa, 315, 54 N. W. 225*; *Dillman v. Nadelhoffer, 1G0111*. It operates in both civil and criminal negligence cases. As to why DD obligations (in Negligence) could be referred to, see the arguments below.

[35] See Snapshot **II.** Notably, heading **1. Non-Exhaustive Approaches to Securing Evidence A. General**, last para., p. 3.

[36] Reference Superior Responsibility in International Criminal Law, see. art. 28 ICC Statute which sets out a similar 3 step procedure to establishing liability; obligation/authoritative position of Accused, actual or constructive knowledge about the misdeeds of subordinates and omission to take necessary and reasonable measures to prevent/ punish these subordinates.

[37] Part of the basic, "*know your facts*!"obligation.

[38] See ***Lukuley*** judgment interpreting s. 36(2) ACA and citing in support, *Gomez [1993]1 All ER 1 HL* and *Gosh [1982] 2 All ER 689*; "*acting* (…) *to deprive* (…)." In other cases, this requirement for *dishonest intent* is expressed in the requirement for *dishonest appropriation*.

[39] Ibid; "(...) *Willfully* and with *dishonest intention* (…)."

[40] Ibid.

[41] "*The most culpable mens rea elements (are…) foresight and desire on a subjective basis*"; Unnamed, (2016), https://en.wikipedia.org/wiki/Criminal_negligence. In other words, intent and knowledge.

intention suggests that the misappropriation is done (maliciously) to the personal benefit of the Accused or another.[42] Although the Accused's omission here may have effected a deprivation to the public body of public funds and may have amounted to an unlawful interference with public body's rights over public funds, the judgment showcases no evidence of the Accused's omissions inhering a dishonest intention. Although not addressed by the Court, this determination would ordinarily have been the clincher; a factor which if well-considered may have altered prosecutorial emphasis.

Insights into constructs of personal liability would have revealed the need for *focusing more on proving dishonest intent*. To have framed the charges in terms of criminal omission/s, stemming from obligations to act so as to avoid undesirable outcomes, mirrors similarly framed DD obligations.[43] Yet, DD is a defence countering allegations of Negligence (failure to exercise a duty of care to avoid the materialisation of obvious risk), by asserting that the Accused did exercise a reasonable standard of care (take all reasonable steps/precautions to avoid...) Negligence, (i.e. conduct which is carried out in spite of/in ignorance of a risk which would have been obvious to the reasonable person), parallels one form of recklessness, *Caldwell recklessness*, acting while failing to see a risk which the reasonable person would have.[44] Contemplating these concepts would have underlined that the Prosecution's case was structured so at to meet the recklessness limb in the wilfulness requirement in s. 36 ACA, rather than the requirement for *dishonest intent*, which it is submitted is the rightful standard, articulated in key authorities on misappropriation;[45] **thinking of the law in these terms would have driven home the critical need to adduce evidence of *dishonest intent*.**

For both recklessness and intention, it would have been necessary to trace/chart the hierarchy/chain from direct perpetrator to Accused and ***evidentially***, the nature of the ***relevant*** interaction between all the offices in between, to understand the ***informational flow***. It may be more practical to try more "nearly situated" superiors, since the more removed a superior is from the direct perpetrator, the more arduous the evidential burden. Recklessness[46]/intention could also be proved by adducing evidence of "*good*", legitimate, longstanding and standard practices obtaining under the Accused's predecessor/s, which may have obtained under the Accused also and which align with their legal obligations. This would establish legitimate expectations regarding the Accused's conduct and the obvious nature of the risk regarding which they were inadvertent, or which they must have intended. Recklessness/intent require proof that the Accused had the opportunity to gain knowledge and to act. Secondly, the knowledge requirement is necessarily twofold; 1.) The awareness of the Accused that he should exert control/supervision over subordinates 2.) The awareness of the Accused of risk/likelihood of shortfalls in revenue collection if he did not.[47] Recklessness/intention could however possibly be disproved by uncovering an information block, absolving the Accused of any culpable mindset. Inasmuch as the evidence adduced in support of intent tends also to lend itself to support of recklessness, the two frames of mind are clearly distinct. Further, dishonest intent goes beyond an intent to effect the circumstances intrinsic to the crime, since it involves an intent to act dishonestly. ***Exhaustive conceptualisation would have meant contemplating these concepts and employing them if necessary as cognitive points of reference.***

⇒ 2.) The Unlawful Act: The Prosecution did not allege that the superiors' positive act caused the offence, but alleged the Accused's failure to exercise the requisite level of what was essentially, *control and supervision* over the activities of subordinates, (i.e. an omission), grounding the Accused's obligations to act in the LGA 2004. Therefore, the Prosecution had to prove that the offence of misappropriation was committed/caused through ***the mode*** of an omission, a failure by the Accused to fulfil the aforementioned

[42] By analogy Fraud under US law is an offence characterised not by negligence but by intent; Pickholz M. G. and Pennisi M. C., (2012), *Defining and Re-Defining Due Diligence: In Search of a Standard*, NYSBA Inside, Vol. 30, Issue 38, http://www.duanemorris.com/articles/static/pickholz_pennisi_nysba_win12.pdf

[43] See FN 34 above.

[44] *R v. Caldwell [1982] AC 341*. The contrasting objective standard of recklessness is Cunningham Recklessness; *R v. Cunningham [1957] 2 QB 396.*

[45] Ibid at FN 40; "*Acting willfully and with dishonest intention to deprive*."

[46] For the purposes of this argument, recklessness and negligence are both conceived of in terms of inadvertence of obvious risk.

[47] Negligence standards for example require simply the exercise of precaution sufficient to prevent the foreseeable; *R v. Steinberg's Ltd. (1976), 26 C.P.R. (2d) 109*.

obligations. Again, it is submitted that although this was neither a civil or criminal negligence claim,[48] **simply contemplating DD notions**[49] would have guided the Prosecution in more precisely defining the Accused's obligations to act by identifying concrete actions, beyond the broadly and vaguely framed LGA provisions; "*ensuring proper management and control of financial affairs*," "*responsibility for resource and daily management*," "*ensuring accountability and transparency in the management and delivery...*"[50] The ACA is not any more explicit about the actions the Accused should have taken since it is a charging statute, criminalising certain conduct/acts and mainly empowering the Prosecution to bring charges. It gives basic definition to corrupt acts, with the majority of concepts underlying the ACA offences needing to be defined by reference to some other source of law; common law/statute.[51] Aside the charging statute, it is submitted that the Accused's obligations/***the law on the mode of liability/the form of commission of the offence***, would have benefited from greater precision. At the very least, thinking in terms of DD notions would have signalled the need for the collective construal of the LGA in conjunction with secondary regulatory instruments such as internal policy documents[52] to flesh out the Accused's obligations in concrete and practical terms, revealing exactly what should/could have been done in the circumstances i.e. the legitimate expectations. As a conceptual aid, note that the test for whether DD was exercised was not just that of a reasonable person, but that of a reasonable "*practitioner*" in an area of specialized skill, knowledge or ability.[53] On another note, since causality can only be established where the omission is alleged to have effected the unlawful outcome (here, the deprivation), there must be at least more than one incidence of said omission; the allegations in FCC do align with this view.[54]

In instances where the contested corrupt act appears to inhere an exchange element, there are a number of charges that may be proffered. Where this is not the case, yet the Prosecution still contests that the Accused's conduct was illegitimate and corrupt, the Prosecution is cautioned against habitually resorting to charges of misappropriation as fall-back, catch-all, default provisions enabling prosecution of seemingly illegitimate acts; Misappropriation is a legal term of art, not a lay term. The cases reviewed make apparent a latent/tacit presumption of misappropriation for failure to provide supporting documentation; misappropriation was charged in these circumstances in the ***ABC***, ***Lukuley***, ***Magbity***, ***Doah***, and ***FCC*** cases, (note however, that specifically in counts 8 ,9 and 15 the charges of misappropriation in the ***FCC case*** do not concern missing documentation). The charges of misappropriation based on absent documentation were upheld in all but the ***Doah*** case, the latter distinguishing itself on the basis of the lack of investigative diligence regarding existing documentation and the nature of the funds in question.[55] The closest thing to a fallback charge in the ACA is s. 48 (2) (b)[56] since failure to comply with applicable procedure/law is a more malleable/plausible argument in most circumstances.

II. Potentially erroneous factual findings: In weighing the evidence against Turay for count 10, the Court appears to ground its view mostly on PW11's evidence,[57] which is self-contradictory on the fact of Turay having received the ticket books. PW11 states at one point that, "*Market tickets (were) issued to (...) Mr. Turay*";[58] and that "*A7 was a Municipal Trade Officer – receipts issued to him were not recorded in the*

[48] Criminal/gross/aggravated negligence involves very high levels of negligence resulting in personal injury of loss of life. Criminal negligence in an organisational context tends to involve allegations concerning occupational/work health and safety against individual supervisors and corporations.

[49] DD and reasonable diligence are the same thing, and the test for reasonableness is a question of fact; *R v Centre Datson Ltd*., 29 CCC 2d 78 (1975). What amounts to DD is a question of fact; *Canada Steamship Lines, Ltd. v. Scottish Metropolitan Assurance Co. Ltd*., 46 Quebec KB 305 (1928). See also FN 53 below.

[50] Refer to para. 2, p. 2 above for applicable sections of the LGA.

[51] Note that even the s. 36 (2) ACA itself does not comprehensively define Misappropriation since interpretations of wilfulness and unlawful appropriation are derived from case law.

[52] For example, employees' manual/handbook, best practices manual etc.

[53] *R v Centre Datson Ltd*., 29 CCC 2d 78 (1975). DD is not measured by any absolute standard, but depends on the relative facts of the special case; *Perry v. Cedar Falls, 87 Iowa, 315, 54 N. W. 225*. It is the degree of care required in a given situation; *Soper v. Canada, [1998] 1 FCR 124*. Therefore, DD obligations differ depending on the context which determines the referential sources; the relevant subject matter, the individual's office/designation, the concerned body, etc.

[54] Count 8 re market dues is for all of 2009, count 9 re municipal licences is for all of October 2009 through all of December 2009 and Count 15 re wharf landing fees, is for all of October 2009 through all of December 2009.

[55] See Snapshot **IV. Control and Management of Public Funds**, p. 14.

[56] See ***Daoh*** case summary, para. 3, p. 3.

[57] The ***FCC*** judgment, p.19; "*What can be deduced from the above evidence is*…"

[58] Ibid.

market fees ledger."[59] PW11 however later states that, "*I have no evidence that the books were received by the Accused*."[60] Apparently based on PW11's evidence, the only evidence discussed here, the Court found that the contested ticket books were "*uncontrovertibly*" issued to A7[61] and that they evaporated into thin air, so that the Accused was convicted of this count.[62] The Court did not explain how it resolved this contradiction.

III. Re Governance: Note that the FCC benefited from loans and overdraft from First International Bank and Rokel Commercial Bank (RCB) with the latter providing on January 2011, a loan worth Le5, 000,000,000. The FCC internal auditor testified that the FCC could not meet its obligations to NASSIT and NRA because of financial constraints affirmed by the FCC senior admin. officer. J. Katutsi describes the FCC as being in the financial doldrums and Williams testified that before he left office in November 2011, the FCC balance at RCB was in the negative. Query then how the FCC could have made the ill-advised *Morgan Heritage* decision using its "rainy day" stash in an unfeasible venture. The Accused were able to access the reserve account easily raising the question of the choice and pairing of signatories to such accounts and the permissible financial thresholds for access by such signatories.[63] In the ***Sesay*** and ***FCC*** cases, concern is expressed over anti-corruption becoming stifling to common and legitimate business practices, in recognition of the integrality of free enterprise to liberal economies.[64] In the ***FCC*** case, the order of a cabinet minister for the Accused to return a contractual advance payment was pronounced unlawful and in violation of the laissez-faire principle. Here the ACC was clearly advised to "*steer clear from this type of interference*" and for business disputes to be resolved via other forms of commercial law.[65] In ***Sesay***, the judge opined that a conjoined relationship between bidders for the same contract/s should not *without more*, be taken as evidence of collusion, referring to the absence of any such prohibition in the PPA 2004[66] and that to infer as much would greatly curtail investment opportunities and investor's rights violating the principle of free enterprise.

IV. Re Information Management: Again, the need for thorough record keeping at every level is buttressed by PW6's evidence, that on assuming his post he received no ledger for goods previously received at the store. There's a host of FMR provisions on this scenario;[67] including Reg. 188 (1) which requires an accurate stores' ledger to be kept for every store, Reg. 22 (1) which requires Vote Controllers to ensure that whenever one officer relinquishes his responsibilities to another for any store, the stocks and store ledgers are properly examined so that there is no doubt about what is handed over and Reg. 221(3) which says that the officer taking over shall check the accuracy of the stores records as against stock. Also, note that the FCC management attributed the absence of supporting documents for the expenditures giving rise to Count 12 to an ***admitted*** inappropriate archiving system and movement of documents.

MEDIA REVIEW: Williams had been in the press before this. In 2010 his agenda and achievements were noted *but he complained about revenue collection being insufficient for administering the FCC*. Reports on the FCC Mayor et al. affair are sparse online and exhibit the same tendency as other cases to err on technical details where the charges and defendants are numerous; the errors concern the number of indictees/convicts, the actual details of the convictions and a blurring of the details of the convictions and allegations. In August 2012, *Africa Review* reported on the case in the context of "*proportional ethnic representation*." The public was likely misinformed about the convictions, since the Press itself reports that the public was irate at Williams' being fined Le170 million compared to the 1.2 Billion he "***embezzled.***" Both sides seemed to claim a victory in the press. Otherwise there is sparse factual coverage of the pre and actual trial process online. CARL reported on the trial's efficiency and expeditiousness but was concerned about proliferate

[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] The ***FCC*** judgment, p.20.
[63] See Snapshot **IV. Control and Management of Public Funds**, the ante-penultimate paragraph, p. 21.
[64] The ***FCC*** case, p. 29, where very strong statements are made to this effect.
[65] The ***FCC*** case, p. 29.
[66] Public Procurement Act 2004.
[67] Snapshot **I. Information/Knowledge Management**, p. 3, FN 8.

charges. Swit Salone reported that the view of one CSO, *Network Movement for Democracy and Human Rights*, was that this judgment should affect the FCC's approach to taxation and increase transparency.

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