The GAVI Funds Case/The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M. Roberts, before Hon. Mr. Justice M.A. Paul, 24 May 2013

FACTS: GAVI[1] gave the GOSL $23,152,974 for 2008-2011. The DPI[2], MOHS[3] was responsible for implementation of the GAVI programme. The DFR[4] was to disburse these funds on request from implementers. However, the GAVI draft audit (07.12.12) identified the non-involvement of the DFR and a lack of accountability in financial management: deficient procurement, weak internal financial controls, weak record management and weak external audit work. These irregularities totalled $1,142,823. Donor funds including the GAVI grant were mixed in the MOHS' EPI[5] account held at the Sierra Leone Commercial Bank (SLCB). Dr. Ken Gborie, the DPI Director and a signatory to the DPI's Union Trust Bank (UTB) account, had to approve GAVI and other donor funded projects. Dr. Magbity was the DPI's Principal M&E[6] Officer and a signatory to the DPI account. Roberts was the owner of *Rolaan Enterprises*. To implement donor program activities, the DPI would request funds from the CMO[7] and PS[8], MOHS.[9] On approval, funds would be transferred to the DPI account. ***Standard procedure*** was for the FO[10] to draw up the cheque according to the instructions in the approval, submit it to the signatories for endorsement, then cash it, and for expenditures to be documented.

All 3 Accused pleaded not guilty to all offences. Count 1 charged Ken Gborie and Roberts under s. 128 with conspiring with other persons unknown to misappropriate Le46, 237,500 in 2009. Count 2 charged Roberts under s. 37(1) ACA with misappropriating Le51, 375,000 in 2009. Count 3 charged all 3 with misappropriating Le242, 400,000 in April 2011. Count 5 through 14 charged Magbity with misappropriating funds totalling Le446, 820,000 through 2008 and once in 2012. Counts 4, 15 and 16 charged Ken Gborie with misappropriation totalling Le161, 570,000 in 2012. Count 17 charged Ken Gborie and Magbity under s. 48 (2) (b) ACA with wilfully failing to comply with procurement law when contracting 7*8 Enterprises* for car hire in 2012. Counts 18 and 19 charged Ken Gborie and Magbity respectively under s. 28(2) (a) ACA with accepting an advantage as a reward in 2012 in the sum of Le 62.5 million and Le47.5 million respectively from "*78"* for awarding a vehicle rental service contract to it. The Accused did not testify or call evidence, but relied on their unsworn statements.[11]

JUDGE'S REASONING: The Court overruled the Defence arguments of no case to answer, that the ACC Commissioner was not a Law Officer and lacked the legal capacity to sign the indictment, and that s. 128 ACA did not provide an offence of conspiracy. It held that the Prosecution's evidence warranted responses from the Defence, that the ACC Commissioner was competent to sign ACC indictments, (referring to *Francis Fofanah Komeh & Anor v. The State, Cr. App. 1/2011 of 27th November, 2012, (Unreported)* which determined that he could), held that based on the uncontroverted appellate decision of *The State v. Alphajor Bah & Ors, of 23/10/12, (Unreported)*, s. 128 ACA did create the offence of conspiracy and that the ACC could regardless charge conspiracy under the Common Law, which under s.74 of the Court's Act 1965 and ss. 176 and 177 of the 1991 Constitution was part of the laws of Sierra Leone. The Court denied the application for permission to appeal so that a case would be stated on these issues before the Court of

[1] The Global Alliance for Vaccines and Immunization.
[2] The Directorate of Planning and Information, MOHS.
[3] Ministry of Health and Sanitation.
[4] The Director/ate of Financial Resources, MOHS.
[5] The Expanded Programme for Immunisation, MOHS.
[6] Monitoring and Evaluation Officer.
[7] Chief Medical Officer.
[8] Permanent Secretary.
[9] ***Ken Gborie*** judgment; pp. 52 and.64, as per the evidence of Ken Gborie. Also see p. 43, as per the evidence of ACC Investigator, Musa Jamiru Bala Jawara, PW1.
[10] Finance Officer. ***Ken Gborie*** Judgment, pp. 53 &. 64; Ken Gborie's evidence suggests FOs were attached to units, but he also refers to an "*FO (...) for the GAVI Project Fund*," at p. 52. Magbity also suggests that FOs were attached to units at p. 90. In fact, FOs are attached to programmes, although a single accountant may act as FO to several small programmes simultaneously and so appear to be attached to a unit. See pp. 22-25 of Snapshot **IV. Control and Management of Public Funds; 2. Modes of Control;** E. Finance Officers (FOs).
[11] ***Ken Gborie*** Judgment, p. 33; "*(...) the accused persons neither gave nor called evidence (...) They made interview statements to the Anti-Corruption investigators, upon which they rely, for their defence. They are unsworn extra-judicial statements containing (...) denials.*"

Appeal. Defence counsel then kept filing motions calling for the recusation of J. Paul, whom he alleged was biased. It was held that the application for case stated should not be lodged with a Court after it had determined the very questions intended to be stated. Subsequently, Defence counsel, "*in clear abuse of process*," filed an application before the Supreme Court seeking a review of these already determined questions. Defence counsel was absent without an explanation on both dates given for filing a closing address. Instead the Court received a request from Defence counsel for it to stay/halt proceedings pending the Supreme Court's review pursuant to their application. J. Paul cautioned Defence counsel[12] against being held in contempt, referring to his warning to another counsel in *Hassan Mansaray v. The State, Misc. App. 445/13 of 25th November, 2013* where he employed *Rondel v. Worsely (1967) 1 Q.B. 443* to define the duties of an advocate.

The Defence argued that the particulars of the counts prejudiced the Accused by not giving reasonable information regarding the nature of the charge as required by s. 51(1) CPA 1965 and the rules in the 1st schedule made under s. 50 CPA 1965.[13] This was because Ken Gborie and Magbity were referred to respectively in all the particulars of offences as, "*Director of Planning and Information and Principal M & E Officer* ***of GAVI HSS support project with MOHS***"[14] and because certain counts concerned activities funded by donors other than GAVI. These arguments were held to be late and without merit, since the ***Accused had conceded to being tried upon the indictment by pleading not guilty***; s. 133 (1) CPA; *The State v. Solomon Hindolo Katta & Ors. of 3/4/14, (Unreported)*; *Oba Kpolor v. The State (1991) INWLR (PT. 165) 113*; *Ikomi v. State (1986) 3 NWLR (PT. 28)*. Their plea and non-objection during the trial to the form of the indictment signalled they understood the charges and were not prejudiced. Consequently, they could now only object to the form of the indictment with the leave of the Court; s. 133 (2) CPA.

Defective charges must ***prejudice*** an Accused's defence for a conviction to not be affirmed at appeals. Rule 3(4) (b) of the 1st Schedule made under s. 50 CPA 1965 only requires the particulars of offence to mirror the provisions of the statute creating the offence; this was met by the impugned counts, since they clearly state "*misappropriation of donor funds*" and are offences in law. As such, the Prosecution complied with s. 51(1) CPA 1965 as the charges provided the particulars necessary for giving reasonable information. Regarding the Accuseds' rightful designations, note that misdescriptions in the indictment regarding the Accused's occupation/residence do not prejudice the Accused where the particulars of offence and the summing up are sufficiently clear on the crime alleged and where the evidence proved that offence against the Accused; *R v. Ayres (1984) AC 447*. The Accused did occupy the alleged positions in the DPI and were involved in the implementation of GAVI and other donor funded programmes implemented by the DPI with funds in the DPI's UTB account, to which they were signatories. Omissions in the particulars of offence to mention the specific donor are merely technical defects and do not render the indictment a nullity. The ACC investigation looked at donor projects other than GAVI[15] and all counts identified the specific programme so that the donor was identifiable. Whether the allegations of misappropriation related to GAVI funded activities or not, the evidence supported charges of misappropriation. Defence submissions recognised that certain counts concerned activities funded by donors other than GAVI.[16] The Accused admitted to signing the cheques ***and*** being directly involved in the implementation of donor programmes, so they did know some cheques and charges pertained to donor funds other than GAVI's and could identify those donors. They were as such not prejudiced by the charges.

[12] "*Defence counsel*" here is used more specifically to refer to Counsel for Roberts; C.F. Margai & Associates represented by Charles F. Margai and R.B. Kowa. The Court notes that Defence Counsel in the appeal of ***Francis Fofanah Komeh*** was R.B. Kowa.

[13] This is of course to ensure that an Accused fully appreciates the nature of the allegation against him to sufficiently prepare his defence. Refer to **Applied Law** section below.

[14] HSS means Health System Strengthening.

[15] ***Ken Gborie*** judgment pp. 22, 28, 48; PW1 testified that the ACC investigation included other donor projects/programmes.

[16] ***Ken Gborie*** judgment pp. 22; Counsel for 1st Accused submitted that count 3 relates to the (SARA) activity funded by Global fund, and that counts 4 and 18 related to an activity funded by the World Bank. Counsel for the 2nd Accused submitted that counts 6 to 14 related to activities funded by Global Fund and WHO. ***Ken Gborie*** judgment pp. 29; Such information could only have come from the 2nd Accused, who knew the difference having been involved in matters to which they relate. Learned counsel could only have come by such information though the 1st Accused and not necessarily through assumptions from exhibits tendered by the Prosecution.

The ACC investigation and the GAVI draft audit found that the DFR's function of effecting payments to implementers of donor funded projects was usurped by Ken Gborie, Magbity and M. Amara.[17] In late 2011, the senior PS, MOHS addressed a request to EPI and DPI that *financial management* of health projects/programmes not managed by fiduciary agents should be centralized within the DFR.[18] The evidence is that Ken Gborie, Magbity and A. Amara "financially managed donor funds." Ken Gborie said funds for programme activities were disbursed by the FO, DPI, but he did not know the latter's name suggesting he only ever bypassed him. It was instead M. Amara who presented them with the cheques relating to counts 3, 4 and 5 which correspond to counts 17 and 18.[19]

Regarding count 2, the facts are that on 24 March 2009, the DPI submitted a request for Le127, 870, 000 to be transferred to the DPI account for the assessment of the impact of the new *HMIS* form[20] under the GAVI programme, scheduled for between 5 and 19 April 2009. Roberts owner of *Rolaan* was paid Le 51, 375 000 for vehicle hire[21] out of the transferred funds. Ken Gborie and Magbity could not produce the relevant impeachable documentation. Robert's said that he received Le51, 375, 000 from the DPI for hire of 10 vehicles which he said he sourced from elsewhere.[22] There were no documents with the car registration numbers as required. The fuel receipts attached showed that more than half of the fuel was bought from one location, whilst the activity was to be carried out simultaneously in 13 districts.[23] The GAVI draft audit's forensic analyses found that these fuel invoices were falsified. MOHS produced *Rolaan's* tax clearance certificate and proforma invoice which although they should have been submitted prior to payment are dated 4 September 2009 and 20 April 2009 respectively. The receipt of 7 May 2009 also post-dated the activity. Both the ACC investigation and the GAVI draft audit noted these discrepancies; that the receipt, proforma invoice and tax clearance post-dated the activity as indicated by DSA vouchers. Roberts claimed not to be able to remember the names of persons from whom he sourced his vehicles, and although he said he maintained business records for 2 years, searches of his office and home revealed no records with these car providers. Further, this activity budgeted for motorbikes not car hire. All this and his lack of cooperation during interview underlined his dishonesty, and underlined that he knowingly received money for which he provided no service. Although s. 94 ACA obligates Roberts to explain on a balance of probabilities the legitimacy of this payment, he provided no credible answers.[24]

Regarding count 3, Ken Gborie and Magbity signed a cheque for Le242, 400,000 to Roberts for car hire for the SARA activity funded by Global Fund scheduled for April 2011. *Rolaan* provided a receipt dated 14 April 2011 for leasing out and fuelling of16 cars for 15 days. This receipt predated the very cheque for payment, dated 15 April 2011.[25] Strangely, the receipt bears the same date as the proforma invoice which did not mention vehicle registration numbers. The coincidence of the date of the proforma invoice and receipt mean that Roberts' could not have been paid Le242, 400, 000 since the proforma would have factored in that M. Amara and Magbity provided most of the vehicles on that date.[26] Although Ken Gborie admits signing this cheque, he says he cannot recall what it was for, or what *Rolaan* was. Ken Gborie and Magbity should not have signed this cheque presented by M. Amara, (not an FO but an alternate signatory to the DPI account), should have insisted on adherence to procurement procedure and verified the relevant supporting documents. Ken Gborie provided no evidence of the supporting documents on which he signed the cheque and the DPI has no evidence that the approved procurement procedure was followed. The Court held that the

[17] ***Ken Gborie*** judgment pp. 41, 42, 62; per the evidence of PW1.
[18] ***Ken Gborie*** judgment pp. 62-63; Letter from Senior PS, MOHS 26 October 2011; "*Transfer of Management of GAVI Fund and other accounts to the DFR, MOHS*."The SPS requested for all documents relevant to the operations of the GAVI Fund and other accounts to be immediately submitted to the DFR.
[19] See immediately below on these counts. There is no mention in the judgment of M. Amara preparing the cheque for payment of Le51, 375,000 to Roberts as per count 2, or the cheque pertaining to counts 6-14.
[20] ***Ken Gborie*** judgment pp. 40-41; This was "*an assessment of the impact of newly harmonised forms, on data quality and timeliness of reporting*."
[21] ***Ken Gborie*** judgment, p. 41; See letter from the Director of Transparency and Accountability with GAVI Alliance saying the sum of Le51,375,000.00 was in connection with the GAVI HSS activity for which Le127,870,000 was paid into the DPI account.
[22] ***Ken Gborie*** judgment, p. 45.
[23] ***Ken Gborie*** judgment, pp. 41-42; as per the evidence of PW2, ACC Investigator, Felix Lansana Tejan Kabba. The claimed location of fuel purchase was No.1 Camp Lane, Tankoro, Kono District.
[24] See **Applied Law** section below on s. 94 ACA.
[25] ***Ken Gborie*** judgment, p. 56. Note the typo that the proforma invoice submitted by the 3rd Accused to DPI is dated 14 April 2014.
[26] ***Ken Gborie*** judgment, p. 57.

Prosecution could not be expected to do more than it did; it provided every document the MOHS submitted and tried to secure relevant documents from Roberts. Only the Accuseds' provision of evidence would have better facilitated clarity. The Accused despite the clear public interest in doing so, did not provide a credible account to possibly create a reasonable doubt. Although Roberts claimed he kept his business records for 2 years, the fact that he could provide no relevant document proves he hired ***no*** vehicles out to DPI for SARA. He claimed he paid the cheque into his bank account, then gave M. Amara and Magbity part of the Le242, 400, 000 to pay them for providing cars/other car providers.[27] He claimed not to remember the contact details and the amount paid to other car providers he dealt directly with. Consequently, investigators could not contact them. Roberts claimed not to be able to recall the breakdown in figures of the allocations of the Le242,000,000. His uncooperativeness during his interview and the murkiness of his evidence infers conscious impropriety/ dishonesty. The Court must draw its conclusions based on the evidence before it; *R. v. Sharmpal Singh.* It can be inferred from the conduct of the 3 Accused that the Le 242, 400, 000 routed through *Rolaan* and given by Roberts to M. Amara ***was*** for the personal benefit of Ken Gborie and Magbity. They are therefore convicted of count 3.

Counts 4, 5, 17, 18 and 19 concern a WB funded PBF[28] monitoring project for which Le995, 000, 000 was transferred to the DPI account by MOFED[29] upon Ken Gborie's request. Ken Gborie and Magbity signed cheques prepared by M. Amara worth Le180, 180,000 on 2 April 2012 and worth Le235, 420,000 on 17 May 2012, made out to Gbao/"*78"* for car hire. Although all procurements must be done within institutional procurement structures[30] (institutional head, PC,[31] PU,[32] and Evaluation Committee), the head of MOHS' PU was unaware of the "*78"* contract. This particular contract did not go through the national competitive process as it should have. S. 1(c) of the 1st Schedule to the PPA 2004 requires contracts above Le 300 million to be published. Regs. 45 (1) and (2) PPR[33] and s. 46 (2) PPA[34] state that the PC must first approve the sole-source procurement method and s. 46 (1) PPA states that sole-source procurement is permitted only when the service/provider is exclusive, a continuation of prior service, or for an emergency. Contrary to these rules, M. Amara simply called Gboa over the phone to submit a proforma invoice. In fact, to cloak this award with legitimacy, 2 proforma invoices were submitted with no other supporting documents. Ken Gborie argued that it was M. Amara, the FO and Magbity who directly procured "*78."* However, there was no evidence of the FO procuring "*78"* and the FO's evident un-involvement here, suggests illegitimacy. Ken Gborie requested funding for this activity, signed the cheques to "*78"*, benefited Le62.5million from the contractual award, and bypassed the FO by dealing directly with M. Amara. Therefore, he wilfully ignored procedure in procuring the services of "*78"*. Magbity argued that he could not be charged with s. 48 (2) (b) ACA since procurement was not part of his duties. However, he was directly involved in procuring "*78"* by signing the cheques with Ken Gborie. If he simply signed the cheques unquestioningly, he may have been negligent (blind eye dishonest), but still criminally liable under s. 48 ACA. However, no honest person who was a signatory accountable for donor funds, with his level of intelligence and experience as Principal M & E Officer, and knowledge of procurement law, would sign such cheques, without asking questions. To do so indicates he was dishonest and ***wilfully*** failed to comply with procurement law. Ken Gborie and Magbity were motivated from the outset to ignore procurement law because of the benefit they derived from doing so. They are therefore guilty of count 17.

This benefit was in the form of payments made by Gbao after he received his cheque, to Ken Gborie and Magbity, on the instruction of A. Amara. Ken Gborie benefited Le47.5 million and Magbity benefited Le 62.5 million These payments were according to Ken Gborie and Magbity, for the hiring of cars from other sources, since, they claim, most of Gbao's cars were faulty. However, Ken Gborie and Magbity gave inconsistent accounts of Gbao's suggestion on replacing cars. Ken Gborie said that Gboa assigned the responsibility of securing 12 vehicles to the DPI and said he would repay DPI. Magbity said that Gbao asked

[27] ***Ken Gborie*** judgment, p. 55; "*Michael Amara and Edward Magbity (…) brought some vehicles so I gave some money to them for that.*" Roberts also says at p. 55 that he gave M. Amara money ;"*(...) so that he can pay the owners*."
[28] Performance Based Financial Monitoring.
[29] Ministry of Finance and Economic Development.
[30] ***Ken Gborie*** judgment, p. 55; Unless donors specify other procedures, which must still be within the National Procurement System.
[31] Procurement Committee.
[32] Procurement Unit.
[33] Public Procurement Regulations 2006.
[34] Public Procurement Act 2004.

that car owners be referred to him directly, so that he referred *Letto Car Rental Services* directly to Gbao, although payment, he claimed was routed through him. It was out of place for Ken Gborie, Director DPI and principal signatory to the DPI account to act as go-between for payment of 4 hired vehicles. Although the two Accused claimed they did pay the car providers, the monitoring returns did not contain the payment voucher Ken Gborie claimed they signed, nor the receipt Magbity claimed they provided. They are therefore guilty of counts 18 and 19.

These payments to Ken Gborie and Magbity were not legitimate "*kickbacks*" as argued by the Defence. In *The State v. Michael Amara, 19 September, 2013* "*kickbacks*" sourced from legitimate payments were held not to be misappropriation. However, the Gbao's payments to the Accused were sourced from illegitimate payments, so could not be legitimate kickbacks.[35] The fact that M. Amara prepared the cheques, then instructed Gbao to pay Ken Gborie and Magbity suggests that the cheques were prepared with their interests in mind. Prior to the Le 62.5 million being paid into Ken Gborie's SLCB account, it on 30 May 2012 contained Le 1, 963, 305. Still, he withdrew Le 10, 250, 000 and Le 5 million on 4 June 2012 and Le 45 million on 5 June, 2012 from it. Magbity withdrew the Le 47.5 million purportedly meant for payment to *Letto Car Rental* and paid it into his savings account. The fact that "*78"* was used as a conduit to misappropriate the sums in counts 4 and 5 is clear evidence of dishonesty. All this impropriety surrounding the payments to "*78"* exposed a scheme by Ken Gborie and Magbity to misappropriate the Le 62.5 million and Le 47.5 million sourced from donor funds. They are therefore guilty of counts 4 and 5.

Counts 6 to 14 concern 9 DPI UTB cheques Magbity cashed as evidenced by attached copies of his ID,[36] and bank statements reflecting these withdrawals. Magbity, who was not a programme implementer says he could not recall why he cashed them. MOHS did not provide any documentation supporting these withdrawals, despite the ACC request for records of disbursements (receipts, payment vouchers) regarding GAVI funding. It was held that Magbity was experienced, knowledgeable and intelligent, so that he could not claim to not remember why he withdrew a total of Le399,320,000 from the DPI account, especially since most withdrawals took place within short intervals. Magbity as Principal M & E Officer led the drafting GAVI HSS project proposal and agreed with management on use of the pre-existing MOHS' GAVI EPI account for payment of GAVI HSS funds. His role involved coordinating the setting up of information systems to help monitor and assess the MOHS programmes. He therefore knew when the GAVI funds came through/were paid in. Although he identified the role of FO as disbursing funds for supervision and identified various persons who'd held the office, he admitted that the FO was uninvolved in these withdrawals. He identified the DPI account signatories before he was added as an alternate signatory from 17th November 2008 as Dr. Clifford W. Kamara, former Director DPI, and Dr. Duramani Conteh[37] later Ag. Director DPI. Based on the consistency of handwriting, the 9 cheques were written and signed by Dr Duramani Conteh and also signed by Dr. Clifford Kamara. Magbity as the beneficiary gave no credible explanation about these withdrawals, but remained silent to shield himself, Drs. Kamara and Conteh who signed the cheques without lawful authority, suggesting they colluded with Magbity to use him as a conduit for funds for themselves.[38] The public interest in Magbity's account trumped his right to silence. His evasiveness in light of his intelligence and experience evinces dishonesty. All circumstances concerning counts 6 to 14 collectively indicate Magbity's guilt so that he is convicted on those counts.

Although the Accused were not compellable witnesses, testifying, calling evidence or even making unsworn statements in Court, might have provided credible explanations creating reasonable doubt. Their failure to do so suggests they have no credible justification for their conduct, especially not one that would have stood up to questioning. Not calling M. Amara as a witness raises a presumption against them that his evidence would not have been in their favour; *The State v. Anita Kamanda, (Unreported), 10th July, 2013*.

VERDICT: Ken Gborie was convicted of counts 3, 4 and 17. He was sentenced to 6 years imprisonment per each count. He was fined Le80.8 million on count 3, fined Le62.5million on count 4 and fined Le100 million

[35]Note however, that popular understandings of the term kickback is simply the same as an ordinary bribe. See https://en.wikipedia.org/wiki/Kickback_%28bribery%29. See also; http://www.merriam-webster.com/dictionary/kickback.
[36] ***Ken Gborie*** judgment, p. 84; copies of his identity card and driver's license number.
[37] ***Ken Gborie*** judgment, p. 90; Dr. Conteh was a medical statistician in the MOHS, who became Ag. Director, DPI and consequently signatory to the DPI account.
[38] ***Ken Gborie*** judgment, p. 90.

on count 17. Magbity was convicted of counts 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 17. He was sentenced to 6 years imprisonment per each of these counts. He was fined Le 80.8 million on count 3, Le 47.5 million on count 5, Le 30 million on count 6, Le 60 million on count 7, Le 65 million on count 8, Le 45 million on count 9, Le 53 million on count 10, Le 30 million on count 11, Le70 million on count 12, Le 30 million on count 13, Le 30 million on count 14 and Le 100 million on count 17. Roberts was convicted of counts 2 and 3. He was sentenced to 6 years imprisonment per each count and fined Le51, 375,000 on count 2 and Le80.8million on count 3. The Accused were discharged on counts 1, 15 and 16, conceded by the Prosecution. Since convictions were secured on counts 4 and 5, counts 18 and 19 were dismissed. For all the Accused, imprisonment terms were concurrent. They were to remain in prison until payment of the cumulative fines.

ANALYSIS: **I. Precedential consistency:** The Court referred to the sentence *in The State v. Solomon Katta and Ors, Unreported, 3 April 2014,* to make the point that the sentence should reflect the gravity of the offence where the Accused are public officers that have breached the public trust. It referred to *The State v. Francis Gabiddon & Ors, Unreported, 9 June 2009* where the Supreme Court held that in all circumstances the public interest outweighed that of the Accused. J. Paul also referred to his own prior ruling in *Hassan Mansaray v. The State, Misc. App. 445/13, 25 November, 2013*, where he reminded another Counsel of *Rondel v. Worsely (1967) 1 Q.B. 443* on the duties of an advocate**;** although not replicated in ***Ken Gborie***, he immediately prior to referring to *Rondel*,[39] had stated that Counsel should realise that their paramount duty is to the Court and to promote justice, not to treat the Court contemptuously.[40]

II. Re Governance: In reaching its sentence, the Court factored in the value of the Rule of Law (equality before the law), the clear public interest and the fact that the 1st and 2nd Accused are public officers who betrayed the public trust. It elaborated on the deplorable conditions of the SL health care system, and how the Accuseds' acts of misappropriation of grants, meant to alleviate the suffering of the populace, would only exacerbate this state of affairs and serve as a disincentive to donors. It appears to have factored in Prosecution Counsel's submission that sentences should serve as a deterrence given the state of corruption nationwide,[41] possibly his submission on restitution evidenced by the imposition of fines. The Court ignored Prosecution Counsel's submission concerning the Court's powers under s. 131 ACA to, in addition to any other penalty, ban convicts under the ACA from pursuing the activity giving rise to the commission of the offence.

APPLIED LAW: An indictment must be properly framed before arraignment; *R v. Newland 87 Cr. App. R. 118*. Any ruling by a Court to amend the indictment is binding until set aside by an appellate Court.[42] The ACC Commissioner is competent to sign ACC indictments; *Francis Fofanah Komeh & Anor v. The State, Cr. App. 1/2011 of 27th November, 2012, (Unreported)*. The Defence must not wait till its closing submissions to object to defects in the indictment,[43] or even to object to amendments to the indictment.[44] An Accused concedes to being tried upon an indictment by pleading to its charges; s. 133 (1) CPA and *The State v. Solomon Hindolo Katta & Ors. of 3/4/14, (Unreported)*; *Oba Kpolor v. The State (1991) INWLR (PT. 165) 113*; *Ikomi v. State (1986) 3 NWLR (PT. 28)*. An Accused who pled to the charges, can only object to not being properly upon his trial by reason of some defect, omission or irregularity relating to the depositions or committal or any other matter arising out of the preliminary investigation with the leave of the Court; s. 133 (2) CPA.[45] An appeals court may hold that a trial which proceeded upon a defective indictment, inhered an irregularity resulting in an unsafe conviction; *R v. Ayres (1984) AC 447*. No conviction can stand based on particulars of offence that disclose no criminal offence or charge an abolished offence; *R v. Ayres (above)*. Misdescriptions in the indictment regarding the Accused's occupation/residence do not prejudice the Accused where the particulars of offence and the summing up are sufficiently clear on the crime alleged and where the evidence proved that offence against the Accused; *R v. Ayres (above)*. A conviction is unsafe only

[39] ***Ken Gborie*** Judgment, p. 17.
[40] ***Ken Gborie*** Judgment, p. 16.
[41] ***Ken Gborie*** Judgment, p. 106, as per Prosecution Counsel, Mr. Kanu and sentence at p. 108.
[42] ***Ken Gborie*** Judgment, p. 11.
[43] ***Ken Gborie*** Judgment, p. 23.
[44] ***Ken Gborie*** Judgment, p. 11.
[45] ***Ken Gborie*** Judgment, p. 23-24 directly quotes s. 133 (2) CPA and further contextualises it at p. 23 as being here, an objection against a perceived formal defect in a charge.

where the particulars don't support a conviction for that offence; *R v. Thompson (1918) I Cr. App. R. 252*. A conviction will not be quashed simply because of a departure from good practice; *R v. Graham (1997) 1 Cr. App. R. 302*. A defective indictment, which describes an offence known to law and does not prejudice an Accused's defence is not a nullity; *R v. McVitie (1960) 44 Cr. App. R.* 201; *R v. Nelson (1977) Cr. App. R. 119*. S. 4 of the Indictments Act 1915 aimed to prevent the quashing of a conviction upon a mere technicality which caused no prejudice. Since s. 5 of the Indictments Act 1915 concerned the same subject matter as s. 51 CPA 1965, it should inform its interpretation.[46] S. 5 Indictments Act (not cited in the judgment) empowers the Court to order the amendment of a defective indictment before or at any point during trial unless to do so would incur an injustice. S. 51 (1) CPA 1965 requires that the particulars of an offence in a count must give reasonable information as to the nature of the charge. This would ensure that an Accused fully appreciates the nature of the allegation against him to sufficiently prepare his defence. Rule 3(4) (b) of the 1st Schedule to the rules made under s. 50 CPA 1965 states that the particulars of offence need only mirror the provisions of the statute creating the offence.

Under English law, no statute shall be construed to have retrospective operation unless that statute clearly states so, or unless it arises by necessary and distinct interpretation; Maxwell on the Interpretation of Statutes.[47] **Therefore,** an Accused may be charged under a new law for committing an act/offence, but the act must have been an offence when it was committed; *The State v. Adel Osman & Ors, SC Misc. App. 1/88 of 13/4/88 (unreported)*; *Lowe v. Dorling (1906) 2 KB 772*; *Rex v. Wright (1758) 1 Burr 543*. Hawkin's Pleas of the Crown (1824 Ed.) p. 239 states that, where a statute incorporates an already existing criminal offence and nothing in the more recent law excludes the operation of the prior law, both laws can be used to prosecute an Accused. S. 18(1) (e) of the Interpretation Act 1971 states that; "*The repeal or revocation of an Act, unless a contrary intention appears, shall not affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Act had not been repealed(...)*" S.141 (1) ACA 2008 repeals the ACA 2000, but misappropriation existed under the ACA 2000 continues to exist under the ACA 2008. *The State v. Alphajor Bah & Ors, of 23/10/12, (Unreported)* held that s. 128 ACA (without more) did create the offence of conspiracy. S.74 of the Court's Act 1965 and ss. 176 and 177 of the 1991 Constitution make the Common Law part of the laws of Sierra Leone. In reality, s. 176 in sum says that the rules and instruments pre-existing the 1991 constitution as part of the laws of Sierra Leone, carry over. S. 177 (1) similarly says that the existing law continues to exist under the 1991 constitution and should be construed accordingly.[48] S. 28(2) (a) ACA makes it an offence for a public officer to solicit/accept/obtain for himself without lawful or adequate consideration, (or agree/attempt to do so), an inducement/reward, for an act/omission in his official capacity. J. Paul states that s. 1 ACA defines a public body as a body which performs public/statutory duties for the benefit of the public, not for private profit; *DPP v. Holly (1977) 1 All ER 316*. In reality, the more generic parts of s. 1 ACA, on "public body" define it as — (j) a body established by an Act of Parliament or out of moneys provided by Parliament or partly or wholly out of public funds; (n) established to render any voluntary social service to the public (…), which receives (…) donations for the benefit of the people of Sierra Leone.

The Accused's unsworn extra-judicial statements which were not put to cross-examination had no evidential value.[49] Exclusive reliance on such statements meant the Accused relied exclusively on the Prosecution's case; *Akinyemi v. State (2001) 2 ACLR 32*. Exclusive reliance on the Prosecution's case prejudices the Defence since the factual issues it depends on will have to be proven in this way; *Nwede v. The State (1985) 3 NWLR 444*. An Accused by opting not to testify deprives the Court of the opportunity of listening,

[46] Note that the Court erroneously states at p. 27 that it is s. 4 Indictments Act 1915 that covers the same subject matter as s. 51 CPA.. However, s. 51 CPA addresses the sufficiency of the information contained in charges and expresses very generally the circumstances under which objections to the form or content of the indictment will be overruled, i.e. where they fail to comply with the rules under the CPA. Related is s. 5 of the Indictments Act 1915 which deals with the Court's power to amend the indictment. On the other hand, s. 4 Indictments Act like s. 52 CPA addresses "*Joinder of Charges*," a complete non-issue here.
[47] ***Ken Gborie*** Judgment, p. 84; "The law looks forward not back."
[48] Ss. 176 and 177 of the 1991 Constitution are not directly quoted in the judgment; ***Ken Gborie*** Judgment, pp. 13 and 14.
[49] ***Ken Gborie*** Judgment, p. 33; "*(...) to be acted upon by the Court must form part of the sworn evidence of the defence (...)*"

weighing his account against the Prosecution's and of assessing his demeanour/credibility.[50] The Court draws inferences from and bases its conclusions on the evidence adduced, it cannot be dissuaded from reaching a firm conclusion by speculating upon what the Accused might have testified; *The Queen v. Sharmpal Singh (1962) 2 WLR 238*. A party who fails to call as a witness, a person <u>*whom it alleges was closely connected with the facts*</u> raises a presumption against itself that that potential witness' evidence was adverse to its case; *The State v. Anita Kamanda, (Unreported), 10th July, 2013*.

S. 37(1) ACA criminalises the dishonest appropriation of donations made to a public/private organisation for the benefit of the people of Sierra Leone, by a person in the management of that body. The Prosecution must prove that 1. the Accused was a member/officer in the management of a public/private organization; 2. that property was misappropriated; 3. that the misappropriated property was donated to that body for the benefit of the people of Sierra Leone; 4. that such misappropriation was undertaken dishonestly.[51] An appropriation itself is the act of taking control of something meant for another. In misappropriation, the unlawful act is the use of the property/funds of another person for ones' own use or other unauthorized purpose, including to the use/benefit of another. An owner has "a package of rights" including the right to authorize the use of the property. Misappropriation means doing an act expressly or impliedly unauthorized by the owner which may individually or collectively amount to an adverse interference with, or the usurpation/assumption of the rights of the owner; *The State v. Anita Kamanda, (Unreported), 10 July 2013*; *R v. Morris (1983) 3 All ER 288 at 293*; *R v. McPherson (1973) Crim L R 191*; *Anderton v. Wish (1980) 72 Cr. R. 23*. The owner's consent is irrelevant; *Lawrence v. Metropolitan Police Commissioner (1971) 2 All ER 1253*; *R v. Gomez (1993) 1 All ER 1*. The unlawful frame of mind is dishonesty. Dishonesty is conscious impropriety, <u>*not*</u> carelessness. However, dishonesty is sometimes difficult to distinguish from incompetence; *Manifest Shipping Co. Ltd. v. Uni – Polaris Insurance co Ltd (2003) 1 AC 469*. Dishonesty is not determined on a subjective moral standard. The Accused's genuine belief that his conduct did not fall below the standard of honest conduct is irrelevant; *Barnes v. Tomlison (2006) EWHC 3115*. Honest conduct is a question of fact determined on the basis of the Accused's subjective attributes (experience, knowledge, intelligence and motivations), against an objective standard of honesty; *R v. Feely (1973) Q B 550; R v. Gilks (1972) 3 All ER 280*; *R v. Ghosh (1982) Q B 1053*; *R v. Roberts (1987) 84 Cr. App. R. 117*. The Court bases that objective standard of honesty on the standard of lay and ordinarily decent people.[52] Dishonesty means an awareness of things that ought to have been questioned but were not, and deliberately turning a blind eye to facts which one suspects. The test therefore is whether the Accused knew that his acts would be recognized as dishonest by lay men and ordinarily decent people. "*Kickbacks*" sourced from legitimate payments do not amount to misappropriation; *The State v. Michael Amara, 19 September, 2013*. S. 37 (1) ACA does not require the Accused to be a member of a public body.

An advocate's duties to the Court including to promote justice and to not treat the Court contemptuously are stated in; *Hassan Mansaray v. The State, Misc. App. 445/13, 25 November, 2013*; *Rondel v. Worsely (1967) 1 Q.B. 443*. The Prosecution carries the burden of proof beyond reasonable doubt throughout the trial; *Woolmington v. DPP (1935) AC 462*; *Nasiru v. State (1999) 2 NWLR (PT. 589) 87*. Reasonable doubt does not mean beyond all iota of doubt; *Solomon Hindolo Katta case (supra)*. Reasonable doubt need not be certain but must be highly probable; *Miller v. Minister of Pensions (1947) 2 All ER 372*. Reasonable doubt is the sort of doubt one employs in dealing with matters of importance in one's own personal affairs; *R v. Walters (1969) 2 AC 26*. All doubts must be resolved in favour of an Accused.[53] Where the Prosecution has established a prima facie case, the evidential burden shifts to the Defence which must ensure on a balance of probabilities that there is sufficient evidence before the Court to require the Prosecution to disprove the defence beyond reasonable doubt. The Defence tends to shoulder the evidential burden where the disclosure of certain facts lie peculiarly within the knowledge of the Accused.[54] Where a defence is based on any exception or qualification, the Accused bears the burden of proving that the exception applies; See *R v. Edwards (1975) Q.B. 27*. Under certain common law exceptions, e.g. the insanity defence under the

[50] ***Ken Gborie*** Judgment, p. 34.
[51] ***Ken Gborie*** Judgment, p. 36.
[52] ***Ken Gborie*** Judgment, p. 37.
[53] ***Ken Gborie*** Judgment, p. 38.
[54] ***Ken Gborie*** Judgment, p. 30.

M'Naghten Rules,[55] the Accused bears the burden of proof on a balance of probabilities. The Court stated that s. 94 and s. 97"*are couched in reverse – burden terms*" and held that that s. 94 ACA obligated the Accused to explain on a balance of probabilities the legitimacy of the payment he received. In fact, s. 94 says that the burden of proving a Defence of lawful authority/reasonable excuse lies on the Accused for any offence under the ACA. What the Court seems to suggest is in fact that s. 94 and s. 97 work conjunctively to shift the burden of proof to the Accused. This is because it is s. 97 that states that where proved that the Accused accepted an advantage, a rebuttable presumption operates against the Accused that the advantage was an inducement/reward unless the contrary is proved.

Corruption offences are very often incapable of proof by direct evidence since the perpetrators operate covertly; *Public Prosecutor v. Yuvaraj (1970) AC 913*. Direct evidence of an offender's mental state is often unavailable, it would have to be inferred from objective facts. Circumstantial evidence is important for inferring the commission of corruption offences. A case may be based on circumstantial evidence alone. Circumstantial evidence constitutes a network of facts cast around the Accused; they may be unsubstantial, salient but not cohesive enough, or salient, coherent and cohesive leaving the Accused with no plausible argument or alibi. The Court must consider the cumulative effect of all the facts before it, and determine whether they leave no other reasonable inference but the guilt of the Accused. Many, varied circumstances all pointing in the same direction and independent of one another, may cumulatively be overwhelming proof of guilt, although each on its own incurs an innocent interpretation; *R v. Dickman (1910) Crim App. R. 320*; *R v. Tapper (1952) A.C. 480*. The Accused although tried jointly must have the case against each of them treated separately. Evidence which is only applicable to or which inculpates only one Accused cannot be treated as evidence against the other Accused. An Accused is entitled to an acquittal if there is no evidence direct or circumstantial, establishing his guilt, independent of the evidence against his co-Accused.[56]

S. 48(2) (b) ACA makes it an offence for persons having access to and or some amount of control of public revenue and public property to wilfully or negligently fail to comply with the rules on procurement. S. 48(4) ACA defines public property as real or personal property, public funds, and money consigned to a public body. Public funds are any monies that are meant to benefit the people of Sierra Leone and under s.1 ACA they can be donations or loans. Under s. 48(2)(b) ACA, the Prosecution need not prove that the Accused is a public officer only that he had access to and/or some control over the property, in the forms of management or disposal thereof and that the Accused wilfully or negligently failed to comply with the law relating to procurement procedure. S. 2(c) of the 1st schedule to the PPA provides that shopping procedures shall be used when the estimated value of the procurement of services is below Le60 million. S. 3(c) of the 1st schedule states that national competitive bidding shall be used when the estimated value of the procurement of services is below Le 300 million. Regs. 45(1) and (2) in Part 4 and 8 PPR 2006 treat sole-source procurements. S. 1(c) of the 1st Schedule to the PPA 2004 requires contracts above Le 300 million to be published. Regs. 45 (1) and (2) PPR and s. 46(1) and (2) PPA state that the PC must first approve the sole source procurement method. Reg. 45 (1) PPR and s. 46 (1) PPA state that ***sole-source procurement*** is permitted only when the service/provider is exclusive, a continuation of prior service or for an emergency.

There is no need for an expert when an opinion can be formed on the facts; *R v. Rickards (1918) 13 Cr. App. Rep. 140*; *R v. Turner (1974) 60 Cr. App. R. 80*; *DPP v. Jordan (1977) A C 699*. Practicing his right to silence, (even against the clear public interest in his giving his own account to create a reasonable doubt in his favour), may give rise to adverse inferences; *R v. Howell (2003) Crim. L.R. 405*. An adverse inference can be drawn where an Accused remains silent on a fact relating to/a charge; *R v. Dervish & Anori (2001) EWCA Crim. 2789*; *R v. Argent (1997) 2 Cr. App. R. 27*. Circumstances to be taken into account in drawing an adverse inference of the Accused's guilt include; the Accused's age, experience, knowledge, personality, mental capacity, state of health, sobriety and legal advice; *R v. Howell (2003) Crim. L.R. 405*.

The State v. Solomon Katta and Ors, Unreported, 3 April 2014 affirmed that the sentence should reflect the gravity of the offence where the Accused are public officers that have breached the public trust. *The State v. Francis Gabiddon & Ors, Unreported, 9 June 2009* affirmed that re sentencing, the public interest

[55] ***M'Naghten's Case*** , 8 Eng. Rep. 718 (1843); The central issue of this definition may be stated as; "*Did the defendant know what they were doing, or, if so, that it was wrong?*"
[56] ***Ken Gborie*** Judgment, p. 38.

outweighed that of the Accused in all circumstances. The Court under s. 131 ACA can in addition to any other penalty it imposes, ban convicts under the ACA from pursuing the activity giving rise to the commission of the offence.

MEDIA REVIEW: The press widely clamored for international pressure in demanding accountability and to maintain scrutiny of the process and later recognized that national and international pressure was effective in securing the suspension of funds and prompting the ACC investigation. The media recognized that the investigations covered other international donations. ***Ken Gborie*** was contextualised against the other GAVI fund trials, all totalling 29 indictees. Coverage was more opinionated at the indictment and verdict phases with widespread demands at these phases for accountability at the ministerial level, particularly for investigations into the Finance and Health Ministers. The verdict was lauded, but also contextualized against the ACC's loss of other GAVI fund trials, with fines being lamented as usually much lower than the total loss. The ACC used the verdict as a PR opportunity to showcase its progress and tactfully laud the judiciary's recognition of the gravity of corruption offences by convicting on a number of charges. The media homed in on pivotal justice issues; inter-investigative collaboration (GAVI, ACC, UN (Z. Bangura)), covering testimony on the procurement process, J. Paul's complaint about pressure from high places to frustrate the judgment,[57] and the public's concern that this event might discourage donors. Some factual errors on the reporting on indictees, saying all Accused were National Health Service Senior Personnel, errors on the charges, errors on how GAVI and ACC investigations informed each other. Unlike the judgment, the media reported that the audit uncovered shell accounts. [58]

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