The GAVI Funds case/The State v. Kizito Daoh, Alhassan L. Sesay, A.A. Sandy, Edward Bai Kamara, Duramani Conteh before Hon. Mr. Justice Abdulai Charm
24 October 2013

FACTS: Each Accused was charged with 4 counts of misappropriation of donor funds contrary to s. 37(1) ACA 2008, allegedly committed in Freetown between 2008 to 2011. All Accused were staff of the Ministry of Health and Sanitation (MOHS). Daoh, the Chief Medical Officer was charged with misappropriating twice the sum of Le 4,368,000 and twice the sum of Le7,894,466. Sesay, the Director of Primary Health Care was charged with misappropriating thrice the sum of Le4, 368, 000 and once the sum of Le5, 803,267. Kamara, Permanent Secretary was charged with misappropriating thrice the sum of Le4, 368,000 and once the sum of Le7, 894,466. Conteh, Director of Hospital and Laboratory Services was charged with misappropriating twice the sums of Le4,368,000 and twice the sums of Le5,803,267. Sandy, Director of HR and Nursing Services was charged with misappropriating twice the sum of Le4,368,000 and twice the sum of Le5,803,267.

The GAVI Draft Audit Report 2012 on the GAVI Grant for 2008 to 2011, required the MOHS to ensure that all recipients of funds, provide the *Health System Strengthening*[1] Finance Officer (FO), within 2 months after the activity, with a technical activity report containing detailed expenditure and supporting documentation; including fuel invoices, signatures of per diem/DSA[2] recipients and proof of location visited. There could be no forthcoming funds without these docs. Domestic sources of written obligations on accounting for expending public funds are the Financial Management Regulations 2007 (FMR) and Government Budgeting and Accountability Act 2005 (GBAA) which require the retirement of public funds, but not the submitting activity reports. The GAVI Draft Audit found that undocumented expenditures of its grant tallied at $442,078, unjustified disbursements at $556,487, overcharged procurement tallied at $100,872 and diversion of assets at $ 43,386. The GAVI Audit demanded these findings be investigated. A meeting of senior MOHS management including Daoh, Sesay and Conteh was held. Together they sought to get the docs. needed. On arrival, the GAVI team reduced the figures from $ 1,143,000 to $523,303 due to some documentation but there was still no documentation for supervision activities, fuel purchases and training etc.

All Accused admitted requesting, receiving and signing for funds for monitoring work in the provinces. Requests would state the purpose, have a budget, payment voucher, names and signatures of the requesters. Sandy asserted that in two of the situations alleged, he did not sign for the funds. Daoh provided no receipts, retirement for funds or report saying it was instead the Project Managers' responsibility. Sesay and Sandy claimed they submitted reports to the DPI, Sandy's in the form of his actual work products. Kamara argued he was not responsible for such reports. The central issue was the identification of the Accuseds' obligations concerning the funds received and this turned on the categorization of the funds. Regulatory instruments require imprests (lump sums) for the implementation of an activity to be retired, but not per diem, although imprests could include per diem. **The ACC argued** that the Accused were obliged to retire the funds as *they were* imprests and that even if the sums were DSA for team members, the obligation to retire still held; the Accuseds' failure to submit activity reports to the Directorate of Planning and Information (DPI), MOHS and to retire funds indicated misappropriation, since it could not be verified that they expended the funds as they alleged. Their admission to taking these funds in the absence of documentation meant there was dishonest misappropriation; there were no provincial visits. **The Defence argued** that the ACC's evidence did not meet the standard of proof beyond reasonable doubt of every element of every offence charged. The relevant regulations required only imprests and not per diems be retired. The Prosecution had failed to investigate and to disprove the Accuseds' assertions that the work was done and to disprove Sandy and Sesay's contentions that they submitted reports. **The evidence** demonstrated that the requests submitted by the Accused for GAVI funds, mentioned not imprests but fuel money and DSA for the Accused and their drivers.

JUDGE'S REASONING: Failure to retire funds or submit reports does not necessarily negate project implementation or equate to misappropriation. The Prosecution's evidence does not demonstrate a requirement to "*retire*" per diem for self or team members although it does indicate an obligation on the Accused to submit an activity report to the DPI within a deadline, (source GAVI Audit). Imprests, not DSAs

[1] MOHS' GAVI supported HSS programme.
[2] The terms per diem, Daily Subsistence/Living Allowance (DSA/DLA) are used interchangeably.

are subject to retirement, except if expressly so provided. The recommendation in the GAVI Draft Audit does not say that DSA should be "retired." What matters is that a DSA recipient performs the activities for which it is given. Since the amount provided for the trips was calculated on the mileage to be covered, it could not have been an imprest and hence was not subject to retirement. Had the fuel been paid for from an imprest given, there would have been an obligation to retire the entire imprest and provide receipts for fuel. The Prosecution has to prove every element of each count alleged; it did not attempt to disprove Sandy's assertions that what he submitted to DPI were his reports by calling for witnesses from DPI, nor to disprove the trips by calling on site witnesses and drivers to prove that they did not go to. Since the Prosecution does not seek to clarify which Accused attached some receipts to implementation requests, the Court could not take it upon itself to do so. As the evidence does not establish guilt beyond a reasonable doubt, the Court must acquit. Costs are awarded to the Defence pursuant their application under s. 138 ACA.

VERDICT: All Accused are acquitted on all charges with costs awarded from the consolidated fund.

APPLIED LAW: The Accused were charged jointly but face individual charges of misappropriation, so that the evidence against each is considered separately. For the charge of misappropriation of donor funds under s. 37(1) ACA to hold, one does not have to be a public officer or affiliated with a public body, but only needs to be part of an organization which receives donations for the public. J. Charm applies misappropriation in a sequence slightly altered from the usual,[3] by firstly considering the issue of proof of access by the Accused to public funds/property, and secondly whether the Accused used these for himself or unauthorized purposes. He determined the GAVI funds were public funds and all Accused, public officers. S. 138 ACA (a reimbursement provision), applies on an acquittal, where the Accused have suffered loss of self esteem and incurred financial loss for legal representation, and where a careful analysis of the evidence would have revealed that it was too tenuous for the Prosecutor to press charges.

ANALYSIS: **I. Case preparation:** Lack of investigative/prosecutorial diligence deprives the Prosecution of legitimately contesting the Court's reasoning. *1. Prosecution witnesses' and Investigator witnesses' unfamiliarity with crucial case data;* This is highly detrimental since it suggests an ill-motivated prosecution. Testimonies of Prosecution witnesses evince the lack of an anticipatory approach to likely Defence examination strategies. Investigators are expected to grasp not just the fundamentals (case theories, key legal concepts, common facts) but also crucial data on which the case hinges, tending to concern bureaucratic processes and concepts not evident in the ACA 2008, since ACC prosecutions are based on implicit/explicit breaches of these; knowing the suitable standards for adherence is vital to clearly identifying breaches. ACC Investigator, PW1[4] could not differentiate between DSA and an imprest, yet testified that the retirement of DSA depended on the instructions. He did not know the hierarchical structure of the MOHS. PW2[5] testified inaccurately that both the FMR and GBAA provide for the retirement of per diem. Similarly, PW3[6] testified that the requirement to retire applies to both imprests and per diem, but self-contradicts by stating that there is no regulation requiring retirement of DSA. He testified that he was unaware of the charges against the Accused.

2. Non-exhaustive investigative/prosecutorial techniques: Investigations appear to have been less than tightly knit; key issues were not verified. PW1 testified that mission sites were not investigated. DPI reps. were not interrogated/examined about a retirement Sesay claimed to have made, nor about the report he claimed to have submitted, nor about the 2 activity reports Sandy claimed he submitted. Also *not verified* were the receipts appended for fuel purchase to certain fund requests, Conteh's claimed retirement to the DPI, and the channel for reports and receipts as described by Conteh. Although Sandy submitted 2 reports to the ACC, the ACC contended that Sandy submitted no activity reports. Sandy's claim of not receiving/signing 2 requests was not investigated/countered. If case preparation had involved levels of planning, moving from the general to the specific at every trial phase, more targeted evidence could have been factored in and adduced to counter denials; re Sandy for e.g.; Forensic Document Examiners, Handwriting Experts etc. With regards

[3] See below at Analysis, **III. Precedential consistency**.
[4] Felix Lansana Tejan-Kabba, then ACC Chief Investigations Officer.
[5] Joseph Teckman Kanu, Permanent Secretary (PS), Ministry of Social Welfare, Gender and Children's Affairs, former PS, MOHS.
[6] Lawrence Sawber Caulker, then Deputy Accountant General, MOFED.

to not probing/calling relevant evidential sources, J. Charm here reconfirmed[7] a principle of the ***FCC, Lukuley,*** and ***Ken Gborie***[8] cases; the Court may infer their evidence is unfavourable to the party who fails to do so.

When PW1 is confronted by a retirement of funds submitted by Sesay, he retorts that what was required from Sesay was the submission of a report not retirement, although he then admits that Sesay submitted 2 reports to him. Here, knowing in advance the circumstances which operate in favour of an Accused, allow for sculpting clear and precise responses which incorporate their existence yet demonstrating their insufficiency to meet clear legal prescriptions. The Court alerted the Prosecution to the need for a precision driven approach including clarifying which of the Accused attached receipts to project requests. ***This clarification may have skillfully underlined the existence of the obligation as against non-compliant Accused*** and helped emphasize that the Draft Audit Report did indeed source the obligations of providing fuel invoices and a list of signatures for DSA recipients which were not met with by other Accused; obligations never overtly acknowledged by J. Charm. The obligations in the GAVI Draft Audit postdated the implementation of these activities, but query their likely reference to any preexisting understanding/agreement between MOHS and GAVI (?), an avenue not explored here. Identifying and addressing contentious areas, including the interaction between domestic law and donor instructions should trump obvious aspects of the case.

Charges centering on the Accuseds' alleged omissions do not negative the Prosecution's ***positive*** obligation to adduce sufficient evidence to support its allegations. Here, the sum of the Prosecution's evidence of misappropriation, was the alleged fact of a material void i.e. the absence of receipts/reports in the face of alleged obligations to provide them. The Prosecution did not adduce evidence in support of this alleged fact of an omission, but sought to employ a vacuum as evidence in itself of misappropriation. Logically, this could not meet the standard of proof in relation to each element of the offence; prosecutorial proof of a case cannot exist by default and the Accused bears no burden to prove their innocence. The Prosecution should not build its case on its perceived absence of evidence favourable to the Accused, or on the omission of the Accused, *unless*, this is what the elements of the offence clearly require. The omissions alleged are not enlisted in the ACA as modes of commission of the crime of misappropriation without more. In fact, failure of financial accountability through documentary evidence is not listed at all as a mode of commission under s. 36 (1) ACA. Indeed, as J. Charm notes, the Prosecution approached the issue as a strict liability offence by automatically equating the failure to account as misappropriation - quite a leap! Strict liability offences simply require the commission of the prohibited act (the required mental frame is inferred), so that the burden of proof is reversed and placed on the Accused. The Prosecution stated that; "*the circumstances indicated dishonesty since there is no other reasonable explanation of why senior officials will with such impunity avoid accounting for funds*."

Construing breaches of other sources of obligations (e.g. GBAA, FMR, GAVI Audit Report etc.) with offences under the ACA is doable where the provisions correlate; a prohibited act under, or breach of another instrument could be used to flesh out, either forms of commission of an offence under the ACA (co-relate more directly with the actus reus) or to buttress/flesh out the requisite attitude (co-relate more directly with the mens rea). S. 48 2 (b) ACA, for failure to comply with procedures, however is a catch all for maladministration in general; the challenge is in construing the latter as criminal. Charging a breach of s. 48 here, would have provided a better framework for channeling prosecutorial efforts so that in the process of uncovering relevant information about how and why the Accused failed to comply, any discerned motivations might then be adducible as evidence supporting a charge under s. 36(1) ACA.

II. Potentially erroneous legal findings: J. Charm states that "any" doubt will be resolved in favour of the Accused, but later refers to the accurate "reasonable doubt standard."

III. Precedential consistency: See above[9] on drawing the inference that evidence not called by a party does not favour them. A departure from the usual sequence in applying the law on misappropriation, i.e. the tests

[7] Citing *The State v. Anita J. Kamanda*, Unreported, 10 July 2013; *Fox v. Police*, 12 WACA 215, *Awosile v. Sotunbo* (1986) 3NWLR (PT, 29) 471; *NSC (Nig) Ltd. v. Inns-Palmer* (1992) INWLR (PT. 218) 422 and *Obor v. Rivers State Housing and Property Development Authority* (1997) 9 NWLR (PT. 521) 425.
[8] Citing *R v. Howell* (2003) Crim. L.R. 405; *R v. Argent* (1997) 2 Cr. App. R. 27; *R v. Dervish & Anori* (2001) EWCA Crim. 2789.
[9] See under heading *2. Non-exhaustive investigative/prosecutorial techniques.*

for dishonesty and standard for misappropriation, as an unlawful usurpation of ownership rights (see Applied Law section in other cases reviewed).

IV. Re Governance: One queries why the MOHS internal audit unit appears to not have uncovered the issues concerning the GAVI grant sooner. The Accuseds' explanations here, the review and the murkiness surrounding bureaucratic procedure apparent in witness testimonies indicate that such failures to account could be attributable to a generalized practice/culture of non-reporting, where the weight of reporting is not adequately reinforced through reiteration. Requests for funds for project activities are normally submitted with the Permanent Secretary MOHS for approval and upon his approval, the relevant programme Finance Officer/Accountant (FO) prepares cheques which are signed by the requesters/project implementers;[10] FOs are advised to make it standard practice to put in writing pre-and post implementation clarifications made to programme implementers *of the requisite forms of retirement attached to specific types of funds*.

V. Knowledge Management: As with other cases reviewed, the Accused, the ACC and other involved parties were unfamiliar with the precise obligations attaching to particular roles re certain spheres of activity. Here, that unawareness concerned the nature of obligations to account for certain types of budgetary allocations; the extent of the obligation to retire funds or submit reports, the documentary source of such responsibility/ies, the obligation to observe more specific donor instructions.

MEDIA REVIEW:

Daoh was covered intensively locally, regionally and internationally, recognizing acute corruption within the health sector. The reporting trend is to contextualize ACC cases, *here*, against other ***GAVI*** cases, the acquittals in Sesay, the mere imposition of fines in FCC, with concern expressed over the more frequent imposition of fines as compared to jail terms and over how penalties are simply "buffeted" by the "political establishment." The Judiciary is implicated in the ACC's failings. Coverage tends to be opinionated at the indictment and verdict stage, more factual during trial except for CARL which throughout legally/technically evaluates procedural rectitude. Some criticism of the ACC's failure to prosecute the Finance Minister, a "relative" of President Koroma's later appointed Foreign Minister. International coverage expressed concern over the potential impact of the prosecutions of many top health care officials on the health system, noted donors' reaction and noted the GAVI episode went beyond documentation failure to actual squandering. Recent international and national coverage of Ebola related corruption hearkens back to the GAVI episode, stressing the commonplace nature of fraud in the MOHS and recognizing record keeping gaps as a major facilitator for corruption. Indictees as times miscounted.

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[10] The ***Ken Gborie*** Judgment details this process.

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