IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
APPAU, JSC
PWAMANG, JSC
MARFUL-SAU, JSC
OWUSU (MS), JSC
HONYENUGA, JSC
AMADU, JSC

REFERENCE
NO. J6/01/2021

3RD DECEMBER, 2020

ZOOMLION GHANA LIMITED ..... APPELLANT/APPELLANT

VRS

THE AUDITOR-GENERAL ..... DEFENDANT/RESPONDENT

JUDGMENT

AMADU JSC:-

INTRODUCTION

(1) By reference from the Court of Appeal dated 29th October 2020, the jurisdiction of this court was invoked in accordance with article 130(2) of the Constitution, for the determination of the question ***"whether or not in the exercise of his functions under article 187(7)(b)(i) of the Constitution the Auditor General can make a surcharge against a person other than a public officer".***

(2) It is provided for under articles 130(1)(a) and (b) and 130(2) of the 1992 Constitution as follows:-

"130(1) subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive jurisdiction in:

(a) all matters relating to the enforcement or interpretation of this constitution and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution".

Article 130(2) of the Constitution provides that:

"(2) Where an issue that relates to a matter or question referred to in Clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question, of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court".

(3) In the exercise of the interpretation jurisdiction of this court under Article 130(1) and (2) of the 1992 Constitution, it is important to examine what constitutes a genuine and real question for determination as was set out in the case of the **Republic V. Special Tribunal Ex-parteAkosah [1980] GLR 592** and **605** in which the enforcement and interpretation jurisdiction of this court was invoked under article 118(1)(a) of the 1979 Constitution which is in *parimateria* with article 130(2) of the 1992 Constitution. There, the test was set out as follows:-

"(a) Where the words of the provision are imprecise or unclear or ambiguous. Put in another way, it arises if one party invites the court to declare that the words of the article have a double

meaning or are obscure or else mean something different from or more than what they say;

(b) Where rival meanings have been placed by the litigants on the words of any provision of the Constitution;

(c) Where there is a conflict in the meaning and effect of two or more articles of the Constitution, and the question is raised as to which provision should prevail;

(d) Where on the face of the provisions, there is a conflict between the operation of particular institutions set up under the Constitution and thereby raising problems of enforcement and of interpretation."

By way of admonition, the court further stated what this court has time without number reiterated as follows: ***"On the other hand, there is no case of enforcement or interpretation where the language of the article of the constitution is clear, precise and unambiguous. In such an eventuality, an aggrieved party may appeal in the usual way to a higher court against what he may consider to be an erroneous construction of those words, and he should certainly not invoke the Supreme Court's original jurisdiction under article 118. Again, where the submission made relates to no more than a proper application of the provisions of the Constitution to the facts in issue, this is a matter for the Trial Court (in the instant case the Court of Appeal) to deal with; and no case of interpretation arises".***

(4) **THE FACTUAL BACKGROUND TO THIS REFERENCE;**

The facts of the dispute giving rise to the instant reference have been sufficiently set out in paragraphs 5 to 14 of the Appellant's statement of case. We shall refer to them briefly with the view to establishing whether or not as the Court of

Appeal has demanded, a real and genuine question of interpretation of article 187(7) b(i) has arisen.

(5) The Respondent, in the exercise of his constitutional function pursuant to article 187(7)(b) of the Constitution and Regulation 39 of the Financial Administration Regulations 2004 (L.I.1802), caused to be served on the Appellant *(a private company)* notices of specification and certification of disallowance and surcharge. This arose after the Respondent had carried out an audit of the accounts of the National Health Authority (NHIA) an organization established pursuant to the National Health Insurance Act 2003 (Act 650) and which falls within the purview of the class of public institutions or corporations provided for in article 187 (2) of the Constitution.

(6) The audit exercise carried out by the Respondent covered the period of January 2007 to April 2018. It had emerged from the audit that public officers of the NHIA had approved and authorized payments of various sums of money from public funds to the Appellant for the discharge upon performance of a contract between the parties. In the opinion of the Respondent, after carrying out an audit of the NHIA books of accounts, the payments to the Appellant were done ***"without following due process"***. Consequently, the Respondent, satisfied that a case for which he can exercise his power of disallowance and surcharge under article 187(7)(b) of the Constitution has arisen, demanded on the Appellant the refund of the total sum of (Ghc184,901,650.00) to be paid into consolidated fund. Aggrieved by the demand made on it by the Respondent, the Appellant appealed against the decision of the Respondent to the High Court pursuant to the provision of article 187(9) of the Constitution and sought an order to set aside the findings of the Respondent which resulted in the decision to disallow and surcharge of the said sum on the Appellant as contained in the Respondent's letter dated 29th October 2018.

(7) In determining the Appellant's appeal, the High Court though not having found any evidence of fraud nor any wrong doing against the Appellant in the

transaction but rather found that the various public officers who handled the processes of payment to the Appellant ***"might have beennegligent or reckless"*** in discharging their duties further held that, the Respondent having given the Appellant the opportunity to be heard before arriving at its decision to disallow and surcharge the said sum of Ghc184,901,650.00 on it, the appeal must fail and consequently dismissed same with the result that the disallowance and surcharge made on the Appellant was thereby confirmed by the High Court.

(8) **THE APPELLANT'S CASE IN THE COURT OF APPEAL**

The Appellant appealed from the decision of the High Court aforesaid first under one ground, and additional grounds as follows:-

"(a) The judgment of the Learned Trial Judge confirming the disallowance and surcharge of Ghc184,901,650.00 made by the Respondent against the Appellant cannot be supported by the evidence on record and same has occasioned a grave miscarriage of justice.

Additional ground (a) was formulated as follows:-

"(a) By confirming the Respondent's decision to disallow and surcharge the sum of Ghc184,901,615.00 on the Appellant. The Learned Trial Judge erred fundamentally in law in assuming that the Respondent's power to disallow and surcharge expenditure may be applied to private persons such as the Appellant.

PARTICULARS

"Endorsing the Respondent's power to disallow and surcharge expenditure on private entities like the Appellant.

(b) The enforcement of the Learned Trial Judge's decision to disallow expenditure incurred and or authorized by public officers and to surcharge the expended sum of Ghc184,901,650.00 on the Appellant will unjustly enrich the state and occasion a gross miscarriage of justice.

(c) The decision of the Respondent to disallow expenditure authorized and or incurred by public officers and to surcharge the said expenditure on the Appellant is unfair, unreasonable and a breach of Article 23 of the Constitution".

(9) **THE REFERENCE:**

In the reference to this court, the Learned Justices of the Court of Appeal found that a constitutional issue which requires the exercise of the jurisdiction of this court under article 130(2) of the Constitution has been provoked. The Court of Appeal stated same in the following words; ***"The matter referred to the Supreme Court requires a determination of the proper meaning and scope of Article 187 Clause (7)(b)(i) of the Constitution and in particular the question whether or not in the exercise of his functions under Article 187(7)(b)(i) of the constitution the Auditor General can make surcharge against a person other than a public officer".***

(10) **APPELLANT'S SUBMISSIONS**

The Appellant's submissions were anchored on three legs. First, that article 187(7)(b) has narrowly circumscribed the scope of the Respondent's power while in the performance of auditing the institutions set out in article 187(2) of the Constitution before the exercise of the power to disallow and surcharge expenditure can apply. It is submitted that by the provision, of Article 187(7)(b), the Respondent's power to disallow and surcharge must be on expenditure found to be contrary to law. It is further submitted that in determining that any expenditure is contrary to law, the Respondent is enjoined to establish the legal procedures which have been contravened and that the phrase contrary to law ought to be construed to include procedural and substantive breaches or both, before the Respondent could arrive at a conclusion that any expenditure is contrary to law.

(11) In confronting the question for determination directly, it is submitted on behalf of the Appellant that article 187(7)(b) contemplates liability for disallowance and surcharge on three categories of persons ***(i) those responsible for incurring or authorizing the expenditure, (ii) persons by whom sums of money ought to have been brought into account but which have not been duly brought into account and(iii) persons by whose negligence or misconduct, a loss or deficiency of public funds has been incurred.*** Referring to the provisions of Regulation 39 of the Financial Administration Regulation 2004, (LI.1802), which the Respondent alleged had been breached by the public officers who effected payments to the Appellant, the Appellant submits that the phrase ***"any person"*** cannot be construed to mean any other person not categorized under Article 187(7)(b)(i)(ii) and (iii).

(12) In support of this submission, the Appellant has referred to the legislative history of the provision as it applied in the courts of the United Kingdom for guidance. According to the Appellant, the underlying rationale for the power to disallow and surcharge expenditure is to deter public officers from engaging in illegal expenditure of public funds. Relying on the case of **Graham V. Lambie & Others [1905] SLR 42, 615, June 1905,** a decision emanating from the Local Government (Scotland) Act 1889, the Appellant argued that as held in that case, the power of recovery of any illegal expenditure was not jointly and severally recovered from the county officers and members as well as the private persons who received those payments but limited to the county officers and members only. Thus, according to the Appellant any negligence or misconduct referred to in the enabling constitutional provision which in the opinion of the Respondent has been occasioned, can only be construed to apply to the public officers involved and not any other private persons, especially where there is no evidence of negligence or misconduct on the part of the latter.

(13) The Appellant has invited this court to examine the application of the provision in the English jurisdiction and has referred to the cases of: **(i) Re Dickson, Re Local Government Act 1933 [1948]2KB95, CA, (ii) Lloyd Vs. Mcmahon [1987] AC 625 HL, (iii) Magill V. Porter [2001] UKHL 67 (13th December, 2001)** in support of its contention.

(14) The second leg of the Appellant's submission was a trace of the legislative history of the provision in question by referring the court to paragraph 594 of the proposals of the Constitutional Commission for the Constitution of Ghana 1968 under which the Second Republic came into existence. The Appellant submits that, in the report of the Constitutional Commission which drafted the proposals of the 1969 Constitution of Ghana, it contained the first legislative power conferred on the Auditor General of Ghana to disallow expenditure not made not in accordance with law and to surcharge those expenditures on those responsible for incurring or authorizing same upon the coming into force of the Financial Administration Decree 1967 (NLCD 165). According to the Appellant, these recommendations which formed the cornerstone of the provision in the 1969 Constitution under article 135(6)(b) was reproduced verbatim in the 1979 Constitution under article 151(7)(b) and has been reenacted wholly in article 187(7)(b) of the 1992 Constitution.

(15) The relevance of the historical trajectory of the provision in the defunct constitutions is to facilitate an understanding of the intention of the framers of the Constitutions relative to the necessity for giving the Auditor-General constitutional powers to disallow and surcharge expenditure of public funds which is contrary to law. In so doing, the Appellant's submitted that reading from the proposal of the Constitutional Commission which drafted the 1969 Constitution and which first created for the Auditor General those powers, the words used in the Commission's report in that, the provisions were arrived at to strengthen the hands of the Respondent ***"to deal effectively with people***

having management of public funds", is crucial in the interpretation of the provisions of article 187(7)(b) of the 1992 Constitution.

(16) The third leg of the Appellant's submission is an analysis of the judgment of this court in the cases of **Occupy Ghana V. Attorney General [2017-2018] SCLRG 527** and **Commission on Human Rights and Administrative Justice V. Attorney General & Anor. [2011]2 SCGLR 746** which the Appellant submits are distinguishable from the instant case. It is argued for the Appellant that in the decision of this court in the **Occupy Ghana** case, nowhere whether expressly or impliedly did this court hold that the mandate of the Respondent under Article 187(7)(b) of the Constitution 1992 extends to disallow and surcharge expenditure on private entities and individuals. In order to crystalize the argument on this leg the Appellant has reproduced for effect the two issues settled in the joint memorandum of issues in that case in order for the said decision to be understood and applied within the context of the issues determined by this court and no more than that:

(17) The Appellant submits that in resolving these issues this court delivered itself as follows:- ***".....From the above discussions, it is apparent that the Auditor General has an obligation to ensure that his powers of disallowance and surcharge are duly exercised by him pursuant to Article 187(7)(b) of the Constitution and that the public entity or officials directly affected by the exercise of his powers of disallowance and surcharge comply with his directives".*** *(page 567 of the report).*

(18) The Appellant submits further that there are civil remedies available in contract should any person with the requisite capacity be aggrieved with the performance of a contract entered into between the Appellant and the Ministry of Health for the benefit of the NHIA. To that extent therefore, the Appellant submits that in the context of Article 187(7)(b) of the 1992 Constitution, and in the exercise of the Respondent's functions, the Appellant cannot fall within the purview of the ***"person"*** contemplated by the provision.

(19) With respect to the position of this Court in the **Commission OnHuman Rights And Administrative Justice V. Attorney General & Baba Kamara** case(supra), where the 2nd Defendant therein took an objection to an investigation on him by the Plaintiff on the ground that he is not a public officer within the meaning of article 218(e) of the 1992 Constitution, and therefore, was not subject to the investigative power of the Commission. This Court in upholding and giving effect to the letter and spirit of the Constitution dismissed the 2nd Defendant's objection and held *inter alia* that he cannot be insulated from the Commission's investigative authority.

(20) The Appellant contends that the thinking of this court in the above case was correct and necessary in order to give effect to the Commission's power to investigate private persons whose conduct is invariably connected to that of public officials without which the power of the commission to investigate corrupt practices would have become entirely muted.

(21) In distinguishing the power of the Commission on Human Rights and Administrative Justice under article 218 and that of the Auditor-General under article 187(7) of the 1992 Constitution, it has been submitted for the Appellant that, while under article 218 the provision is in two parts the first which empowers the Commission ***"to investigate all instances of alleged or suspected corruption"*** which will in effect include the conduct of private persons, the Commission also has the power to investigate all instances of ***"misappropriation of public money by officials"*** which clearly does not include private persons and cannot by any constitutional interpretation be construed to include private persons under the purview of that provision.

(22) The Appellant further argues that from the reading of article 219 of the Constitution, it may not have been necessary to imply the words ***"private person"*** into article 218 since Article 219(1)(d) on the special powers of

investigation by the Commission provides that: ***"the powers of the Commission shall be defined by an Act of Parliament and shall include;***

(d) to require any person to disclose truthfully and frankly any information within his knowledge relevant to any investigation by the Commissioner".

Consequently, the Commission could have investigated the 2nd Defendant without the resort to the purposive interpretation of article 218 as resorted to by this court in that case.

(23) The Appellant argues further that in contrast with article 218, article 187 ought to be read as a whole within the context of Part III of Chapter 13 of the Constitution by reason of the very singular function of the Respondent which is to audit and report on the public accounts of Ghana. To that full extent therefore, the Respondent has no constitutional mandate to audit or investigate the financial affairs of any private entity or person who has received payment from public funds as consideration for the discharge of a contractual obligation. According to the Appellant, there will be no limitation to the functional efficacy of the Respondent if his powers are limited only to the functions provided by the Constitution. Therefore, the power to disallow public expenditure and to surcharge same on ***"the person responsible for incurring or authorizing the expenditure"*** flows directly from the Respondent's constitutional function to audit the accounts of public entities and authorities within the class of institutions set out under article 187(2) of the Constitution only, and not private entities or persons. Consequently a true and proper interpretation of Article 187 (7)(b)(i)(ii)(iii) must exclude implying private entities and persons in the class.

(24) **<u>THE RESPONDENT'S SUBMISSIONS</u>**

In his submissions, Learned Counsel for the Respondent conceded that the provisions of article 187(7)(b)(i) and (ii) do not from its text affect private persons, the effect of which is that the Respondent has conceded that the answer to the question under reference should be in the negative. However,

contrary to the contention of the Appellant, the Respondent submits that the power to disallow and surcharge expenditure under article 187(7)(b)(iii) includes private persons through ***"whose negligence or misconduct a loss or deficiency is incurred by the state".*** The Respondent relies substantially on the two cases decided by this court in **Occupy Ghana V. Attorney General** (Supra)and **Commission On Human Rights and Administrative Justice V. Attorney General and Baba Kamara** (supra). In analyzing and relying on the *ratio decidendi* in the said cases, the Respondent did not demonstrate any negligence or misconduct on the part of the Appellant resulting in a loss or deficiency to any funds as provided under article 187(7)(b)(iii) which the Respondent has strenuously urged is applicable to the Appellant.

(25) The Respondent summarized its submission on this issue by a self-interrogatory in the following words. ***"To argue that only public servants can be surcharged under article 187(7)(b) will lead to absurdity and cannot be the true intention of the framers of the Constitution. Indeed, in a situation where a private person through whose conduct or negligence the state losses funds or a deficiency occurs to the state is immune from the exercise of the Auditor General's power of surcharge merely because he is a private person, wherein lies the principles of probity and accountability?".***

(26) We are mindful that the Respondent's statement of case contains submissions on the constitutional duty of administrative officers to act fairly, reasonably and comply with requirements imposed on them by law as provided under article 23 of the Constitution. The issue of the conduct of the Respondent within the context of article 23 is not an issue in this reference and did not form part of the question from the Court of Appeal. We are of the view that it is a matter which appropriately belongs to the litigation in the Court of Appeal and we shall consequently refrain from making any pronouncement on same.

(27) **DETERMINATION OF THE QUESTION**

It is provided under article 187(7) of the Constitution as follows:-

"(7) In the performance of his functions under this Constitution or any other law the Auditor-General-

(a) shall not be subject to the direction or control of any other person or authority;

(b) may disallow any item of expenditure which is contrary to law and surcharge-

(i) the amount of any expenditure disallowed upon the person responsible for incurring or authorizing the expenditure; or

(ii) any sum which has not been duly brought into account, upon the person by whom the sum ought to have been brought into account; or

(iii) the amount of any loss or deficiency, upon any person by whose negligence or misconduct the loss or deficiency has been incurred".

Our task in this reference has been narrowed down by the position of the Respondent relative to the question referred for interpretation. As we have observed the Respondent in paragraphs 16 and 17 of the statement of case conceded that the provision of article 187(7)(b)(i) does not apply to private entities or persons, they not being public officers responsible for incurring and authorizing expenditure as expressly provided for in sub-clauses (b)(i) and (ii) of article 187(7). We are in agreement with the Respondent's counsel on this point and that in our view ought to have fully settled the question under reference.

(28) However, after the concession, Counsel for the Respondent has submitted that the power of the Respondent to disallow and surcharge expenditure under article 187(7)(b) is not limited to only public officers but also includes private persons and strongly relies on the provision of sub-clause (iii) of article 187(7)(b) to buttress his point. We shall examine the provision of sub-clause b(iii) with the view to determining whether or not upon the finding and conclusion of the High

Court which absolved the Appellant of the allegation of fraud and for that matter any misconduct, the said provision is applicable to the Appellant.

(29) In order to appreciate whether or not there is any merit in the contention of the Respondent's counsel on the effect of sub-clause (b)(iii) of article 187(7), it is relevant to refer to the judgment of the High Court in Suit No.MSFT/02/2019 dated 31st January 2020 from which the appeal emanated. In the said judgment, the Learned Trial Judge found and held as follows:-

"From the totality of the evidence adduced and as submitted by learned counsel for the Respondent there are many questions unanswered by the Appellant which are essential to establish their case per the appeal herein.

However, I am not satisfied that fraud has been established in this matter. The state institutions mentioned in relation to this matter may have been negligent or reckless in discharging their duties but fraud has not been established. I find that the issue of fraud has not been established beyond reasonable doubt as required by law".

(30) On the strength of this finding which the Respondent has not appealed from, the Appellant having been exonerated by a court of competent jurisdiction of fraud, and that court not having found the Appellant guilty of any wrong doing in the nature of negligence nor misconduct in the course of the transaction for which the payments were made to it by the NHIA, cannot be said to be amenable to the Respondent's constitutional power under sub cause (b)(iii) of article 187 there being no such finding by the High Court. Accordingly we hold that sub-clause b(iii) of article 187(7) of the Constitution is not applicable to the Appellant.

(31) In view of the fact that the Court of Appeal itself in the reference of the question for determination, and the parties herein have referred to the two previous cases

decided by this court, in **Occupy Ghana V. Attorney General** (supra) and **(Commission on Human Rights & Administrative Justice V. Attorney General and Another),** we shall discuss the two cases briefly in order to determine whether or not as the Respondent in particular has argued that the ratio in the two cases referred to are relevant and applicable in the determination of the question under reference before this court.

(32) In its submission, the Respondent relies heavily on the decision of this Court **Occupy Ghana V. Attorney-General (Supra)**. Given the energies expended by the parties in discussing this case, the Court will give it some attention. In that case, the plaintiff, a civil society organization actively engaged in advocacy in the areas of good governance and anti-corruption invoked the original jurisdiction of the Court for the interpretation of the constitutional provision part of which is the subject matter of this reference, particularly, the provisions of article 187 (7) (b) (i) (ii) and (iii) of the Constitution 1992. The plaintiff therefore sought the following reliefs in the said suit;

"1 That upon a true and proper interpretation of article 187 (7) (b) (i) of the

of the Constitution, the Auditor-General is bound to issue a disallowance or surcharge where there has been any item of expenditure on behalf of the Government that is contrary to law, so that the amount unlawfully expended is recovered from the person who was responsible for, or authorised, the expenditure disallowed.

2) That upon a true and proper interpretation of article 187 (7) (b) (ii) of the Constitution, the Auditor-General is bound to issue a disallowance and surcharge where any person fails to bring any sum into the Government's account, so that that amount is recovered from the person by whom the amount should have been brought into account.

3) *That upon a true and proper interpretation of article 187 (7) (b) (iii) of the Constitution, the Auditor-General is bound to issue a disallowance and surcharge where the Government suffers or incurs a loss or deficiency through the negligence or misconduct of any person, so that the value of the loss or deficiency is recovered from that person (whether or not a public servant).*

4) *That the failure, refusal or neglect by the Auditor-General to ever issue any disallowances and surcharges in respect of (i) unlawful items of expenditure, (ii) amounts not brought into account, and (iii) losses and deficiencies incurred through negligence and misconduct, as set out in successive Reports of the Auditor-General issued since the coming into force of the Constitution, are violations by the Auditor-General of his/her obligations under the Constitution and*

5) *That the Auditor-General be ordered to issue disallowances and surcharges to and in respect of all persons and entities found in successive Reports of the Auditor-General to have been responsible for or to have authorised unlawful items of expenditure, not bringing sums into account, or having caused loss or deficiency through negligence or misconduct, in accordance with article 187 (7) (b) of the Constitution."*

(33) In a joint memorandum by the parties, two issues were settled for determination:-

1. ***Whether or not the Auditor-General fully discharges his constitutional obligation simply by auditing and pointing out financial irregularities in the accounts of a public entity.***
2. ***Whether or not the Auditor-General has an obligation to ensure that his powers of disallowance and surcharge duly exercised are complied with by the public entity or official directly affected by the Auditor-General's exercise of his power of disallowance and discharge."***

(34) The court upon a thorough discussion of the facts and issues arrived at three significant conclusions which constitute the ratio derived from the issues settled for determination. They are:

"(i) upon a true and proper interpretation of article 187(b)(i) of the Constitution the Auditor General is bound to issue a disallowance and surcharge where there has been any item of expenditure on behalf of the Government which is contrary to law;

(ii) upon a true and proper interpretation of article 187(7)(b)(ii) of the Constitution the Auditor General is bound to issue a disallowance and surcharge where any person fails to bring any sum in Government's account and (iii) upon a true and proper interpretation of article 187(7)(b)(iii) of the Constitution, the Auditor-General is bound to issue a disallowance and surcharge where the Government suffers or incurs a loss or deficiency through the negligence or misconduct of any person" (page 567 of the report).

(35) Thus, the decision of this court in the **Occupy Ghana** case ought to be understood within the context of the issues settled for determination. The facts, issues and ratio of the decision in the **Occupy Ghana** case therefore is distinctly different from those of the instant reference. Therefore the ratio which emanated from the said case must be confined to the facts evaluated and issues determined by the court. We notice that in the Respondent's statement of case in the instant reference, counsel for the Respondent fully reproduced relief '3' endorsed in the Plaintiff's action in the **Occupy Ghana** case but the said relief not being a subject of direct pronouncement by the court and not part of the issues set down, the contention of counsel in our view is a misconception of the ratio in the **Occupy Ghana** case. We are of the view that there is a clear distinction on the facts and issues settled therein from the question for

determination in this reference and therefore not applicable in the determination of the question under reference herein.

(36) In the **Commission On Human Rights and Administrative Justice V. Attorney-General & Baba Kamara** case (supra) this court, speaking through Date-Bah JSC, identified the issue for determination in the said case. It is reported at page 776 of the report as follows;

"The fulcrum of this case, from the point of view of the 2nd Defendant, on which he has pivoted his central submission is article 218(e) of the Constitution, which provides that among the functions of the plaintiff is:

"to investigate all instances of alleged or suspected corruption and the misappropriation of public moneys by officials and to take appropriate steps, including reports to the Attorney-General, resulting from such investigations."

His Lordship then proceeded to hold *inter alia* that:

"The second Defendant's argument seems to us to be intended to stultify a significant part of the investigative operations of the plaintiff. It is intended to defeat one of the purposes for which the Constitution made provision for the establishment of the plaintiff. From the language and context of article 218, it is indubitable that one of its purposes is to enable the plaintiff's effective investigation of corruption by public officials. Accordingly, in our view, a purposive and holistic interpretation would require words to be implied into article 218 enabling the plaintiff to investigate private persons alongside public officials, even if private persons are not expressly specified in any particular paragraph of the article, where such investigation of a private person is necessary in order to expose

the total picture of the corruption in which the public official is alleged to have participated. Such implication is needed to give efficacy to the intention and purpose of the framers".

(37) Thus the issue in the Baba Kamara case is limited to an entirely different article of the Constitution for the determination of the issue whether or not the Commission can extend its investigative powers to the 2nd Defendant who was not a public officer within the meaning of article 218 of the 1992 Constitution at the time the matters which the Commission intended to investigate occurred. The powers of the Commission as provided under article 218 and 219 of the Constitution are purely investigative whereas the powers of the Auditor-General under article 187 are not just investigative but penal in nature and limited for the class of institutions, statutory bodies and their officers as set out under article 187(2) of the Constitution. The issue provoked in the **Commission onHuman Rights and Administrative Justice V. Attorney General & Baba Kamara** case and the question referred for determination by this court are therefore strikingly dissimilar not only with respect to the constitutional provisions under review but on the scope of the powers conferred on the **Commission on Human Rights and Administrative Justice and the Auditor-General** under the Constitution. If juxtaposed together, there is a sharp contrast between the two cases and the instant matter under reference. The ratios therein are therefore not applicable in the determination of the instant question. We therefore find the proposition by the Respondent's counsel that the said decisions are relevant and applicable in the determination of the question under reference as untenable.

(38) **CONCLUSION**

In conclusion, having found that the provisions of article 187(7) b(i)(ii) are not applicable to the Appellant as conceded by the Respondent's counsel, we find that, contrary to what the Respondent's, counsel has urged on us, the findings

and conclusion of the High Court in its judgment not having found the Appellant liable or guilty of any wrong doing whatsoever, the provision of sub-clause b(iii) of article 187(7) cannot apply to the Appellant having been insulated therefrom by the findings of the High Court. The response to the question referred to this court by the Court of Appeal is that, in the context of the facts of this case, the Appellant is not amenable to the power of the Respondent under article 187(7) b(i). Neither will it be under sub-clause b(ii) and b(iii) the latter which was urged on us by counsel for the Respondent. The Court of Appeal is directed to determine the appeal accordingly.

I.O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU
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