advantage on ALIMATU TITY GEORGE by improperly awarding her passing examination grades for the module 'Dissertation' when in fact and truth ALIMATU TITY GEORGE did not submit any Dissertation for grading and Count II states that the Appellant abused his office by improperly conferring an advantage on JAMILATU ALICIA SESAY by improperly inflating her examination grades for the module 'Jurisprudence and Legal Theory'. Certainly, it cannot be disputed that if as stated above, by improperly awarding ALIMATU TITY GEORGE passing examination grades for the module 'Dissertation' when in fact and truth she did not submit any Dissertation for grading amounts to the Appellant's alleged improper use of his office, then what the Indictment states in Count I is tantamount to saying that the advantage conferred on ALIMATU TITY GEORGE for the Appellants improper use of his office is the improper use of his office. Likewise, it cannot be disputed also that if as stated above, by improperly inflating the examination grades of JAMILATU ALICIA SESAY for the module 'Jurisprudence and Legal Theory' amounts to the Appellant's alleged improper use of his office then what the Indictment states in Count II is tantamount to saying that the advantage conferred on JAMILATU ALICIA SESAY for the Appellant's alleged improper use of his office is the improper use of his office. Surely if in both Counts I and II, the advantage conferred on ALIMATU TITY GEORGE and JAMILATU ALICIA SESAY respectively for the Appellant's improper use of his office allegedly is the improper use of his office, then the particulars of offence has failed to give reasonable information as to the advantage which the Appellant conferred upon some other person by the improper use of his office. In Section 1 (1) (a) of the **ANTI-CORRUPTION ACT 2008** advantage includes:

'any gift, loan, fee, reward, discount, premium or commission, consisting of monies or of any valuable security or of other property or interest in property of any description, or other advantage other than lawful remuneration'.

Clearly, the advantage allegedly conferred on ALIMATU TITY GEORGE and JAMILATU ALICIA SESAY respectively for the Appellant's alleged improper use of his office, the same being the improper use of the Appellant's office cannot in any way be a gift or loan or fee or reward or discount or premium or commission consisting of money or of any valuable security or some other property or interest in property of any description or some other advantage other than lawful remuneration'. It cannot be disputed that in this case the particulars of offence in both Counts does not give reasonable information as to the advantage which the Appellant conferred upon himself or some other

person by the improper use of his office. This being the case, the offences of Abuse of Office contrary to Section 42(1) of the **ANTI-CORRUPTION ACT 2008** which the Appellant was charged with was not disclosed in the Indictment. Surely, if the offence of Abuse of Office aforesaid was not disclosed in the Indictment then the said Indictment would have failed to charge the Appellant with any offence whatsoever. I hold the view that the only remedy which could have cured such a defect is by amendment of the said Indictment pursuant to Section 148 (1) of the **CRIMINAL PROCEDURE ACT 1965** which provides thus:

'where, before trial upon Indictment or at any stage of such trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the Indictment as the Court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendment cannot be made without injustice'.

Obviously, it ought to have appeared to the Court where the Appellant was arraigned, that the indictment herein was defective as has been shown above, where the possibility of amending the said defect could have been made at any stage of the trial at the said Court. The trial having ended and the Appellant convicted of the offences of Abuse of Office contrary to Section 42(1) of the **ANTI-CORRUPTION ACT 2008**, it is obvious that the amendment could not now be made without injustice been done. I say so because it is apparent that the entire evidence adduced herein was one which was geared towards proving only one element of the offence, that being the allegation that the Appellant improperly made use of his office, which said allegation I found it unnecessary to determine whether it was proved or not. The evidence of the other element, that being the advantage conferred on the Appellant or some other person as a result of the Appellant's improper use of their office was entirely lacking.

By reason that the Indictment failed to disclose the offence of Abuse of Office contrary to Section 42(1) of the **ANTI-CORRUPTION ACT 2008** which the Appellant was charged with and that notwithstanding that an amendment to the Indictment was absolutely necessary, but which was not done, even when it ought to have appeared to the Court where the Appellant was arraigned, that the Indictment herein was defective but that the Respondents proceeded with the trial thereof attempting to prove only one element of the offence charged, that being the Appellant's alleged improper use of his office without adducing

any evidence on the other element of the offence charged, that being the advantage which the Appellant conferred upon himself or some other person by the improper use of his office, the Learned Trial Judge presiding over the Court where the Appellant was arraigned ought not to have convicted the Appellant and ought to have acquitted and discharged him. In this regard, there would be absolutely no need to consider all the other grounds of the appeal herein. The fact that the Respondents attempted to prove only one of the elements of the offence, that being the Appellant's improper use of his office leaving out entirely, the element of the advantage conferred on the Appellant himself or some other person, makes it unnecessary to consider whether the burden and standard of proof were satisfied. It cannot be disputed that if evidence of all the elements of the offence charged were not adduced, it would be impossible to address issues regarding the actus reus and the mens rea of the Appellant's conduct, together with proof beyond reasonable doubt. Simply put the evidence was just not there to secure a Conviction of the offence charged.

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HON. MR JUSTICE ALLAN B. HALLOWAY JSC

IN THE SUPREME COURT OF SIERRA LEONE
CRIMINAL APPEAL

Before:

THE HONOURABLE MR JUSTICE A .B HALLOWAY JSC (PRESIDING)
THE HONOURABLE MR JUSTICE A.S SESAY JSC
THE HONOURABLE MR.JUSTICE DEEN TARAWALLY JSC
THE HONOURABLE MR.JUSTICE SENGU M.KOROMA JSC
THE HONOURABLE MR.JUSTICE ANSUMANA IVAN SESAY JA

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Between:
EMANUEL EKUNDAYO CONSTANT SHEARES-MOSES APPELLANT

-and-

THE STATE RESPONDENT

.....
.....

CHARLES FRANCIS MARGAI Esq of Counsel for the Appellant

OLADIPO V. ROBBIN-MASON SR Counsel for the Respondent

.....

I direct that copies of this version as handed down may be treated as authentic.

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The Honourable Mr ANSUMANA IVAN SESAY JA: (Delivering his Judgement of the Court this 11th day of April 2022)

BETWEEN:

EMMANUEL SHEARS-MOSES - APPELLANT

AND

THE STATE - RESPONDENT

BACKGROUND FACTS

1. The Appellant Emmanuel Shears-Moses by an indictment dated 24th day of July was charged with two counts each on abuse of office contrary to section 42 (1) of the Anti-Corruption Act No. 12 of 2008. Count 1 reads-*"that the Appellant being acting Head of Department of Law Department in the Faculty of Social Sciences and Law at Fourah Bay College of the University of Sierra Leone on a date unknown between the 1st day of July, 2015 and 31st day of January, 2016 at Freetown abused his office as Acting Head of Department of Law Department to wit:--improperly conferred an advantage on Alimatu Tity George a student of law with registration No. 28852 by improperly awarding her passing examination grades for the module "Dissertation" when in fact and truth ALIMATU TITY GEORGE did not submit any dissertation for grading.*

2. The particulars of offence for Count 2 reads -that *"the Appellant on the aforementioned dates whilst acting as Head of Department for Law abused his office to wit: - improperly conferred an advantage on JAMILATU ALICIA SESAY, a student of law with registration No. 286684 by improperly inflating her examination grades for one module-jurisprudence and legal theory*. He pleaded not guilty on both counts and the trial commenced.

3. On the 27th day of February, 2019, the (Appellant) was convicted on both counts and sentenced to a fine of Le 30, 000,000.00 (thirty million Leones) fine with an alternative of three (3) years imprisonment on each count.

4. The Appellant being dissatisfied with the aforementioned judgment filed to the Court of Appeal Registry, a Notice of Appeal dated 5th March, 2019. After listening to the legal submissions and arguments supported with various legal authorities, the Court of Appeal presided over by Hon. Justice E. Taylor-Camara and with him Hon. Justice S.A. Bah JA and Hon. Justice F.B. Alhadi JA, upheld the judgment of the lower Court and dismissed the appeal.

5. However, the Appellant being dissatisfied again with the judgment of the Court of Appeal filed a Notice of Appeal to the Supreme Court dated the 4th

September, 2020. The Appellant filed four (4) grounds of appeal. Ground 1 is divided into (a) (b) (c) (d) & (e).

6. On Ground 1, the Appellant appealed on the following grounds:

    1. the learned justices misdirected themselves on the law whether the offences charged is laid down by the Anti-Corruption Act No. 12 of 2008 or an explanation by marginal note.

    2. The Commission's seal is not required to indicate that it is the deed of the Commission.

    3. There is no distinction between a bill of indictment and an indictment in Section 130 of the Criminal Procedure Act No. 32 of 1965 and therefore the various authorities on when a bill of indictment becomes an indictment do not apply.

    4. Learned Justices stated the offence charged is a specific one different from misconduct in public office and so ignored that the marginal notes in the Anti-Corruption Act No. 12 of 2008 is a short form of misconduct in office which is encapsulated abuse of office.

    5. The University of Sierra Leone and the political parties' registration commission are creatures of statutes and so the learned justices wrongly held that the doctrine of exhaustion does not apply thereby ignoring the diction of the Supreme Court in SC 2/2005 in Sam Hinga Norman vs Alhaji UNS Jah & others.

GROUNDS 2 & 3

7. The Court in treating Grounds 2 & 3 (which were argued together) referred to Section 57 of the Court's Act No. 31 of 1965 in determining whether to entertain the said grounds of Appeal, but was rather ambivalent in its treatment of the grounds (see page 29-41-100-144): thus leaving the issue for determination more confusing than that in the lower Court, hence occasioning grave injustice to the Appellant's case.

8. It is necessary to set out the particulars of the grounds as pleaded.

PARTICULARS

9. The particulars can be summarily set up as follows:

1. The Learned Justices failed to consider whether the burden and standard of proof were satisfied and so failed to address the vital issues of mens rea and proof beyond any reasonable doubt.

2. The Court erred in holding that the Appellant persuaded Dr. Kamara to award a dissertation grade when there was no evidence before the trial judge.

3. The Court erred in holding that there is no difference between causing a mark to be awarded and physically awarding a mark which by any reasoning can only be two distinct acts of offences, if at all.

4. The Court was wrong to hold that the judge could ignore the standard of proof and withdraw her own inferences.

5. The Court misunderstands the evidence on record by saying that the Appellant by himself upgraded the jurisprudence grade for two students, while ignoring that the two students protested and asked for a remark of their scripts.

6. The issue before the Court was over the grade of one student, Jamilatu Sesay which the Appellant stated was a mistake in the entry and without meeting the standard of proof ignoring the case of Samuel Benson Thorpe vs the Commissioner of Police arrived at a wrong decision.

7. The Court wrongly applied the case of Seymour Wilson vs Musa Abess CIV APP 6/79.

GROUND 4

10. The Court erred in overlooking the fact that the Appellant being represented by counsel had to follow his decision not to object to the judge and therefore it was not his free will decision not to object in open Court and failed to consider how an ordinary person will view the matter, rather it went into a treatise on the oath and training of judges while ignoring well settled authorities on the subjects of apparent bias. The Court did not do justice to the Appellant in addressing the ground of appeal and took out of context the question of waiver in such instances and therefore placed an undue burden on the Appellant in negating same.

LEGAL ARGUMENTS

11. Both counsel representing the Appellant and the respondent relied on their respective written synopsis filed and supported with vast legal and factual authorities.

EVALUATION OF BOTH LEGAL ARGUMENTS

12. I have had the opportunity to read the written synopsis of the respective parties and the case law relied upon including the oral arguments submitted by C.F Margai counsel for the Appellant. I will at this juncture examine and evaluate the legal arguments and submission advanced and contained in the respective synopsis with more particularity on Grounds 2 & 3 and if I hold otherwise there will be no need to consider the other grounds of appeal.

13. It is crystal clear that the cardinal principle in all criminal matters is that it is the duty of the prosecution to prove their case beyond reasonable doubt subject of course to the defence of insanity and other statutory defences. See the case of **Woolmington v DPP [1935] A.C 462.**

14. I have referenced this leading case to help me determine whether the lower courts in their respective judgements consider this most vital principle of law in all criminal proceedings in the light of grounds 2 and 3. **What then is**

proof beyond reasonable doubt? In the case of Miller vs Minister of Pensions Lord Denning had this to say: -

"That degree is well settled. If need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course' it is possible but not probable the case is beyond reasonable doubt; nothing short will suffice."

15. It could be deduced from this dictum that the burden in criminal law rests on the Prosecution. It is therefore the duty of the Prosecution to prove all the essential elements that constitute the offence or offences charged and in this case, Section 42 (1) of the 2008 Act.

SECTION 42 (1) OF THE ANTI-CORRUPTION ACT 2008

It reads: -
"Any public officer who uses his office to improperly confer an advantage on himself or any other person commits an offence."

16. The particulars of offence read that the Appellant on a date unknown at Freetown between the 1st of July, 2015 and 31st of January, 2016, abused his office as acting Head of Department to wit: "improperly conferred an advantage on Alimatu Tity George a student by improperly awarding her passing examination grades for the module Dissertation when in fact she did not submit any dissertation for grading. This is for Count 1.

17. The legal argument raised by C.F. Margai counsel of the Appellant is that the Court erred in holding that there is no difference between causing a mark to be awarded and physically awarding a mark which by reasoning can only be two distinctive acts or offences if at all.

18. In my judgement, the particulars of offence alleged the Appellant to have awarded passing examination grade to ALIMATU TITY GEORGE for dissertation she did not submit. This signifies a conduct crime. For the Prosecution to succeed, they must satisfy the court of the actus reus of the offence. They must adduce evidence that it was the Appellant who awarded the grade of dissertation to the student. And it was that grade that amounted to an advantage, having so improperly being conferred. From the totality of the Prosecution's evidence, it is clear that there was in existence a dissertation committee whose duty it was to confer marks with respect to dissertations on students, regardless of which mark was submitted to the committee. It was one Dr. Binneh Kamara (PW 8) as a member of the dissertation committee that awarded the grade to the student and certainly not the Appellant.

19. A case in point is R v White 2 KB 124. The court established the 'but for' test of causation, according to which the defendant could not be convicted unless it could be shown that 'but for' his actions the victim would not have died. On the facts of this case the test was not met, therefore the defendant could not be convicted of murder. **In simple terms, the prosecution cannot establish and have not been able to establish that "but for" the actions of the appellant, the marks would not have been conferred. Had the dissertation committee rejected the marks submitted to them by the appellant, those marks would not and could not have been conferred upon the student.**

20. This would have taken a different turn if the Appellant would have been charged with **"causing to award''** rather by the use of the phrase **"improperly awarding".** The meaning of the words is quite plain, clear and has no ambiguity. These two legal phrases are different and could not have been intended by parliament to be the same thing because they indicate that there are two separate and distinct criminal offences. The former connotes an indirect act done by a person in committing an alleged offence whilst the latter connotes an act personally and physically done by the

person in the commission of an alleged criminal offence. The evidence in the court below supports the former.

21. The actus reus for the latter is lacking in this case. The court below ought to have evaluated the evidence properly to ascertain the presence of the act of the awarding followed by the mens rea of ''improperly awarding'' which connotes dishonesty. To my mind in the absence of both the act and the necessary intention criminal liability cannot hold.

At page 561 paragraph 4 of the Courts records, the trial judge had this to say: -

"It is the Court's position that the award of 55% by PW 8 to Alimatu Tity George as in Court 1 of the indictment herein could only have been caused by the information the accused passed on to PW 8 and rather dishonestly. The word "award" in the particulars of offence should not be read as if the accused physically inscribed the grade 55% on Exhibit K. Certainly, he caused it to be awarded and that is how the Court understands the evidence."

22. This was affirmed by the Court of Appeal. Causing to be awarded as the Court of Appeal found is not the same as simply awarding a mark. The Court of Appeal was plainly wrong in this regard. In this regard the Court in pronouncing its judgement held that there is no difference between causing a mark to be awarded and physically awarding a mark. With respect to the lower court, these can only be two distinctive acts or offences if at all. The prosecution was at liberty to have used the words cause to have awarded in the particulars of offence in count 1 rather than the word '' award'' or in the alternative they could have amended the particulars of offence in the light of the evidence before the court.

23. The evidence before the court supports the former and certainly not the latter. The lower court in their assessment of the evidence failed to consider this. Probably what could have been most appropriate with regards the evidence before the court is section **43 of the Anti corruption Act of 2008**. It reads:

''A public officer who knowingly abuses his position in the performance or failure to perform an act, in contravention of any law, in the discharge of his functions or duties is commits an offence and shall on conviction be liable to a fine not less than thirty million Leones or to imprisonment for a term not less than 3 years or to both such fine and imprisonment''

24. It is my judgement, the evidence adduced was scanty and not sufficient to have found the Appellant guilty on Count 1. The Court of Appeal ought to have reversed and or set aside the judgement of the High court.

25. However, by way of analogy let me cite Section 18 of the offences against the person Act 1861. It reads: -

"Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent, to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony''.

26. In the above section the words "wound" and "cause" do not have the same meaning and that was why the drafters put them in the alternative. In effect the evidence led in this case do not support the particulars of offence in Count 1. The Court below fell into error in failing to take this issue into consideration. For this reason, I will allow the appeal with regards to this Count.

27. Let me now turn my attention to what constitute the offence as laid down in Section 42 (1) of the Anti-Corruption Act of 2008. As I have said earlier, in any criminal proceedings or trial, for an accused person to be found guilty of an offence the prosecution must establish the actus reus and the necessary mens rea. The actus reus in Section 42 (1) supra is that the Prosecution must prove that "an advantage" was conferred on himself or any other person. The mens rea is the word "improperly" which connotes dishonesty.

28. The question I need to ask myself is what was it that was improperly conferred to the advantage of the Appellant or to some other person? The prosecution must show not only that it was conferred but that it was improper to his advantage or another person. It is that improper conferment to his advantage or that of another person that could not be found in the records of the court below. It is so unfortunate that the lead witness in this case Alimatu Tity George did not testify to assist the Court in arriving at a decision devoid of doubt. As I can see from the totality of the evidence there was a gap which the Prosecution never filled to warrant a conviction. That gap could have been cleared if the university had been given an opportunity to do their internal investigations or the person upon whom the advantage was improperly conferred. No doubt they would have or ought to have reached out to ALIMATU TITY GEORGE as she may have unearthed certain vital information that may have been relevant and useful to the prosecution's case.

29. To my mind PW 8, from the records (Dr. Binneh Kamara) certified the grade that was awarded to ALIMATU TITY GEORGE for dissertation she did not write. The Appellant could therefore not be found wanting for an act he never did. The University procedures for good reason, provides for an extra layer of supervision, which is the dissertation committee. This committee is charged with ensuring that marks awarded are properly awarded. The fact that they certified the marks is clear evidence that they agreed with the marks submitted by the appellant and in those circumstances, there could be no improper conferment either as a matter of fact or law.

30. In other words, the concept of vicarious liability is rarely found if at all in the criminal law. The trial judge and the Court of Appeal ought to have evaluated the evidence properly before it before reaching their conclusion. To cherry pick vital and important evidence before it is a monster in the eyes of the criminal law. Their failure to do just that will leave me with no alternative but to set aside the conviction and allow the appeal as justice demands it to be.

31. To my mind the University Act 2005, the University Handbook and code of discipline and conditions of service for senior members of staff Exhibit "M" should have been utilized. Tendering these documents without utilizing the provisions contained therein did not help the prosecution's case.

COUNT 2

32. Let me now turn my attention to Count 2 where it is alleged in the particulars of offence that the Appellant improperly conferred an advantage on Jamilatu Alicia Sesay, by improperly inflating her examination grades for the module 'Jurisprudence and Legal Theory'. I still maintain my analysis as to what need to be proved by the Prosecution with regards Section 42 (1) of the Act supra.

33. Be that as it may, it is clear in the evidence adduced contained in the oral testimony of the Appellant and his statement to the Commission that he did not deny awarding the student 52/70 but gave an excuse or explanation which appeared substantially factually correct even from the prosecution's point of view. The Appellant called DW 2 who testified that similar mistakes with regards entering wrong grades for him was done by the Appellant but when he raised it, it was corrected. He relied on mistake.

At page 562 paragraph 2 of the Court records, the trial judge had this to say:

The Court agrees 'mistakes' could happen during the insertion of student's grade". See Exhibits F 1-20 and Exhibit E.

34. To my mind even the trial judge acknowledges the fact that mistakes could be done whilst entering examination grades. If the mistake succeeds, then that will vitiate the dishonesty element (i.e. mens rea). In the absence of dishonesty the burden and standard of proof has not been discharged. This is more the reason why the University should have investigated this matter to ascertain whether the Appellant flouted procedures relating to the same. This to every stretch of imagination represents an essential gap in the prosecution's case and in the absence of this, it starts to linger in the mind

of a right thinking tribunal whether the Appellant ought to have been found guilty and why did the Court of Appeal uphold the conviction.

35. Where an accused person advances a defence which might reasonably be true, a judge sitting alone as in this case may not convict merely because he disbelieves his explanation. The real point is not whether the Appellant have proved his innocence but rather the prosecution has proved their case. The trial judge ought to have made specific findings of fact as to why she disbelieved the appellant's version of events.

36. Mistakes happen in entering grades but does that mean that one has conferred advantage improperly? There must be a legal link to justify the act itself. The lower Court ought to have paid attention to that ground of appeal. It is therefore very difficult to uphold the conviction of the Appellant in this regard.

37. On this ground alone, the Appellant must succeed. As to the other grounds of appeal i.e. grounds 1 (a) (b) (c) (d) & (e) and 4, I do not feel myself called upon to consider them in consequence of my findings in the second and third ground. It follows that the appeal must be allowed and I order that the conviction be set aside and the Appellant be acquitted and discharged.

HON.JUSTICE ANSUMANA IVAN SESAY

I have read in draft, the Judgment of my learned brothers, Halloway JSC and A.I. Sesay JA and I agree that the Appellant be acquitted and discharged.

However, as regards the conclusion reached by Halloway JSC in respect of the powers of the Commissioner of the Anti-Corruption Commission to sign an indictment, though I would with hesitation agree with him, it is my view that Parliament must enact an express provision in the enabling Act clarifying the position instead of relying on purely judicial interpretation. The reason being that another panel of the Supreme Court might depart from the current interpretation which would invariably lead to inconsistency and uncertainty in the law.

Hon. Mr. JUSTICE SENGU .M. KOROMA JSC.

In his statement, the **HON. MR. JUSTICE ALUSINE S. SESAY JSC** stated that he has read in draft the Judgement of the **HON. MR. JUSTICE ALLAN B. HALLOWAY JSC** and the **HON. MR. JUSTICE ANSUMANA I SESAY JA**. He states that he **AGREES** with their conclusions contained therein and accordingly **AGREED** that the Appellant be **AQUITTED** and **DISCHARGED**.

The HON. **MR. JUSTICE MANGAY F. DEEN-TARAWALLY JSC** made similar statements to the one above made by the **HON. MR. JUSTICE ALUSINE S. SESAY JSC**.

Consequently and by reason of the above, the appeal herein is allowed, the Conviction is hereby set aside and replaced with the orders as follows:

1. That EMMANUEL EKUNDAYO CONSTANT SHEARS-MOSES, the Appellant herein is hereby **ACQUITTED** and **DISCHARGED** of the Two (2) Counts of the offence of Abuse of Office contrary to Section 42(1) of the **ANTI-CORRUPTION ACT 2008** which he was charged with.

2. That all Fines paid by the said Appellant to satisfy the Sentence of him on his Conviction of the offence aforesaid, at the High Court shall be refunded to him forthwith.

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HON. MR JUSTICE ALLAN B. HALLOWAY JSC

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HON. MR JUSTICE ALUSINE S. SESAY JSC

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HON. MR JUSTICE MANGAY F. DEEN-TARAWALLY JSC

.....

HON. MR JUSTICE M. SENGU KOROMA JSC

.....

HON. MR JUSTICE IVAN A. SESAY JA

SUPREME COURT OF SIERRA LEONE
REGISTRY