EBSU JOURNAL OF INTERNATIONAL LAW & JURIDICAL REVIEW

# EBSU JOURNAL OF INTERNATIONAL LAW & JURIDICAL REVIEW

VOLUME 2, 2013 ISSN 2141-4602

**ARTICLES**

**INTERNATIONAL LAW**



**JURISPRUDENCE & JURIDICAL ISSUES**



**A Publication of the Department of International Law and Jurisprudence, Faculty of Law, Ebonyi State University, Abakaliki**

# When the Judge is Judged: An Assessment of Proof of Judicial Bias

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## 1. Introduction

The quest for the dispensation of justice is arguably universal. Even in pristine societies, the need for adjudication was appreciated. Like every human process, the idea of administering justice, is carried out by mortals. Given human nature, there is the possibility of passion overwhelming the faculty of reasoning, thereby leading to pervasion of justice.

The notion of judges being biased upon being bribed is as old as life itself. Even England had her own share of these Judges.[1] For instance, Francis Bacon who was made Attorney General in 1614 and Lord Chancellor in 1618, was accused of corruption and investigated by the House of Common in 1620. He eventually confessed to the charge of corruption and was convicted by the court, fined and imprisoned in the Tower of London at the King's pleasure.[2]

Bacon was not only the Lord Chancellor that soiled his hands. Lord Macclesfield, who was appointed Lord Chancellor in 1718 was a very able judge, his decisions being regarded with much respect, yet he fell into the prevalent vice of 'selling officers. He did not take bribes as Bacon did, but whenever he appointed a new Master in Chancery he demanded an honorarium just as his predecessors had done. He was impeached, found guilty and fined.[3] There was also Lord Cottenham, his story teaches us a lesson – that a judge must not have the slightest interest in any case pending before him. Lord Cottenham, was a shareholder in the Grand Junction Canal Company. The company had a dispute with a Mr. Davies who claimed that the canal was his property and the company applied for an injunction against the man. It was granted by the Vice-Chancellor, and on appeal to Lord Cottenham, the Lord Chancellor affirmed the decree. Lord Cottenham did not disclose that he was a shareholder in the company. The House of Lords, after consulting the judges, held that the decree must be set aside.[4]

This paper seeks to analyse the idea of bias on the part of judges in the sacred duty of dispensation of justice in Nigeria. In so doing, it will discuss the yardstick for measuring or weighing bias. Allegation of being bias comes up in respect of matters pending before the court. Therefore, it is inevitable that this writing will examine cases in which it came up. Aside from courts, administrative and quasi-judicial bodies could also be alleged to have been biased.

## 2. How is the Law in Nigeria now?

It is not uncommon these days to hear litigants (and even the general public) accusing judicial officers of being partial in the course of discharging their judicial duty. In Nigeria, Chief Judges are besieged by letters requesting transfer of cases from a particular judge to another, on the ground of bias or the probability of bias. The need for a judge to be impartial is accepted in the jurisprudence of all civilized country. The converse of impartiality on the part of a judge is awesomely tragic – when a crooked judge sits on the judgement seat, justice develops wing and take to flight. To say that a judge is uneven-handed (or bias to use the commonest word), is a serious matter.

When it comes to the concept of judges being biased, many complaints abound. These complaints vary as they are unclassified. Thus, this brings the question 'what amount to bias? The Nigerian Supreme Court in the case of *Azuokwu v. Nwokanma*[5] gave a description of what amounts to bias:

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1 Denning, '*Landmarks In The Law*', Butterworths, London, 1984, p.31

2 *Landmarks In The Law, supra*, p.33-34.

3 *Ibid*, p. 50-51

4 *Dimes v. Grand Junction Canal* (1852) 3 HCL, 759, 793, cited by Lord Denning in '*Landmarks In The Law*', (supra), p.52

5 22 NSCQR p. 398

> Bias in relation to a court or tribunal is an inclination or preparation or predisposition to decide a cause or matter in a certain pre-arranged way without regard to any law or rules and the likelihood of bias may be drawn or surmised from many factors such as corruption, partisanship, personal hostility, friendship, group membership or association and so on, towards or involving a particular party in case.[6]

The above dictum of the Supreme Court is instructive. Therefore, an opinion or feeling in favour of one side in a dispute or argument resulting in the likelihood that the court so influenced will be unable to hold or even scale justice, amounts to being biased.[7] The description of bias by the courts of this country is *impari materia* to that given by courts from other common law jurisdictions. In the case of *Metropolitan Properties Co. Ltd. v Lannon*, the Court of Appeal, England, (Lord Denning, M.R.) said:

> ... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself...[8]

## 3. Allegation of Bias against Judges in Nigeria

The allegation of bias by litigants generally and legal practitioners in particular is a very serious attack on the person and integrity of a judge. This is because allegation of bias impugns the judge's sense of fair hearing – which is a fundamental concept in our adjudicatory system – whether criminal or civil trial. In *Wusamotu Odumosu v. Olakunle Olatokunbo,*[9] the High Court of Ijebu-Ode granted the applicants leave to apply for an order to prohibit the President and members of the Ijebu-Ode Grade 1 Customary Court from hearing a suit before them.

The gravamen of the argument of the counsel to the applicants is that since the President of the Grade 1 Customary Court, Ijebu-Ode is the Oloritun (Quarter head) of Isoku and the first respondent in this application is the Oloritun of Imepe, both belonging to the Council of Olorituns (Itun Metala), there is a great likelihood of bias that the Customary Court before which the applicants are standing trial will not be able to do justice in the matter. Hence, the order of prohibition being sought against him and that court. This is in view of the fact that the Council of Olorituns to which the President of the Customary Court belongs had the matter reported to them and thus he had fore-knowledge of the matter.

This case is a typical example of cases in which litigants seek to restrain judicial officer from sitting on the ground that they are biased. In this case, the respondent contended that, the application was premature as the Customary Court had not even sat on the matter so it cannot be said to have conducted itself in any manner raising a likelihood of bias. Hence, the application was only anticipatory.

In a well-considered ruling, the Honourable Judge, Ogunsanya, J. held that, the application lacked merit. How did the learned judge come to this? In her ruling, in considering the grant or refusal of the order of prohibition, the learned judged raised certain questions germane to the application:

- Is it settled by evidence that the President Grade 1 Customary Court is the Oloritun of Isoku and member of the Itun Metala? and
- If he indeed is a member of that Council, does it automatically preclude or disqualify him from sitting over suit No JCCI/169/08 without more?
- Has the President of the said Customary Court conducted himself in the matter in a manner which exhibit bias or the likelihood of same?

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6 See also the case of *Womiloju v. Anibire* 42 (Pt. II) NSCQR 907

7 *Kenon v. Tekam* (2001)14 NWLR (Pt. 732)pg.12 cited with approval in *Womiloju v. Anibire*, (supra), p.907

8 (1969)1 Q.B. p. 577

9 Unreported, High Court of Ijebu-Ode, Suit No. M/25/2008, ruling delivered on 22/01/2009

As we shall see shortly, the above questions formulated to determine the success or otherwise of the application, are apposite. Mere whimsical allegation of bias has no place in the law. Thus, the learned judge, after noting that the respondents are deemed to have admitted (since they did not controvert it) the fact that the first respondent is also a fellow Oloritun (Quarter head) like the President of the said Customary Court and also a member of the Council of Oloritun Itun Metala (the Council of Oloritun), reasoned thus:

> All the facts put before me so far have been speculative and pre-emptive as to what the conduct of the President of the Customary Court allegedly seized of the matter in question will be, even the allegation that the first respondent influenced the council of Olorituns from sitting over the matter is speculative.

It would be most inequitable of this Court to prohibit the Customary Court Ijebu-Ode Grade I from hearing the matter before in the light of such *vague* and *most uncertain of fact* put before me.

### 3.1 How Judicial Bias is Proved

Before examining how judicial bias is proved, let us recapitulate on what is meant by judicial bias. One of the justices that constituted the panel that heard the *Womiloju's*[10] case, I. T. Muhammed, J.S.C., said on the meaning of judicial bias:

> Bias generally, is that instinct which causes the mind to incline toward a particular object or course. When a judge appears to give more favour on consideration to one of the utterances, attention or actions, which is capable of perverting the cause of justice, or where fair hearing cannot be said to take place, all in favour of the party he supports covertly or overtly, then an allegation of bias against him can be grounded. *That of course is a judicial bias.*[11]

According to the Supreme Court, for an allegation of judicial bias against the person of a Judge to succeed,

> ... the accuser must establish his allegation on some extra judicial factors/reasons such as where such factors or reasons are absent such perceived judicial bias is insufficient to justify disqualifying a judge from participating in a case which is properly brought before him for adjudication. The allegation cannot be founded on mere conjecture or hearsay.[12]

From the judicial dictum above, given the facts in *Wusamotu v. Ogunbanwo*, it is no surprise why the Judge of the High Court, Ijebu-Ode dismissed the order of prohibition sought against the President of Customary Court Grade I, Ijebu-Ode. The applicants in the case, from evidence adduced (affidavit evidence), were unable to establish on extra judicial factors the allegation that the President of the Customary Court is likely to be biased. Therefore, in the words of the Judge, the applicants have been speculative and in the words of Muhammed J.S.C. (in His Lordship's dictum above), the applicants allegation amount to *'mere conjecture'*.

In the same vein, in a well-considered ruling, the High Court of Ijebu-Igbo judicial division, per Mabekoje, J., dismissed the application of the applicant wherein the said applicant prayed the

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[10] (Supra), p.893, Muhammed, J.S.C. delivered the lead judgement.

[11] Italics mine for emphasis.

[12] *Womiloju v. Anibire, (*supra*)*, p.893. All Italicised words are by the writer, and it is for emphasis.

court to find for him that the respondents (who are President and members of Ijebu North Grade I Customary Court, Ijebu-Igbo) were biased in their ruling. The said applicant sought to quash the ruling of the court below by an order of certiorari. The ground relied upon by the applicant in bringing this application are "bias" and "suspected" bad faith. The learned judge, having weighed the affidavit evidence of both parties, deduced:

> I have carefully considered the facts of this case. There is nothing in the applicant's affidavit to prove bias or likelihood of bias against the respondents. *It is evident that the allegation of bias was based* on mere suspicion as stated in the statement accompanying this application.[13]

What then should the applicant do to succeed in an allegation of bias against a judge? How can the intention of the judge ascertained? The Nigerian Supreme Court held that the test of determining a real likelihood of bias is that the court would look to see if there was real likelihood that the judge would or did, in fact, favour one side at the expense of the other. The likelihood of bias, nevertheless, must be real, not a surprise, caricature or a game of chance.[14] Where the conduct of a judge or tribunal is impugned, the court is not concerned with whether the judge was in fact biased.[15]

In the absence of prying into the mind of the judge, how then is this test of likelihood of bias carried out or conducted? The Supreme Court answered it:

> The question (whether there was bias or a real likelihood of bias) is always answered by inference drawn from circumstances of the case.[16]

The above received concurrence of Adekeye, J.S.C., who also heard the matter:

> the court looks at the impression which is given to other people. Even if he was as innocent as he could be, nevertheless if right-minded persons think that in the circumstances there was a real likelihood of bias on his part, and then he should not sit. And if he does sit, his decision cannot stand. The reason is plain enough. *Justice is rooted in confidence and confidence is destroyed when right-minded people go away thinking that the judge was biased.*[17]

From the dicta so far examined, it is obvious that the test is an objective one.

### 3.2 The Case of *Adio v. Attorney-General of Oyo State*[18] Considered

This case is very significant because it presented the most spectacular circumstances where an allegation of bias was raised in Nigeria. Thus, Onu, J.S.C., observed:

> the present case is *unique* and appears *distinguishable* because this is about the first time in the annals of our judicial and legal history that a High Court judge is being accused of sitting to consider an instrument in which her husband was the Governor who signed it.[19]

The facts of this case are simple and straightforward. The plaintiffs (at the High Court) aggrieved by the inclusion of Tadese family as sub-section of Adagunodo Ruling House initiated an action before Atinuke Ige, J. (as she then was) on 27/9/82. The actual hearing of the case commenced on 3/11/84,

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13 *Adesina v. Banwo* (unreported) Suit No. M/05/2008, ruling delivered 5/5/2008. Italicised words are the writer's and it is for emphasis.

14 *Womiloju v. Anibire, (*supra).

15 *Womiloju, (*supra).

16 *Womiloju, (*supra), the words in bracket is the writers, and it is for clarification.

17 *Ibid,* Adekeye, J.S.C., italics by the writer for emphasis.

18 (2000) 5, SC.

19 *Adio v. Attorney – General of Oyo State, (*supra), p. 117.

almost a year after Chief Bola Ige had ceased to be Executive Governor of Oyo State. The chieftaincy Declaration in dispute was signed into law by Chief Bola Ige, husband of the learned trial judge, Atinuke Ige. The learned trial judge dismissed the plaintiffs' case. Dissatisfied with the judgement of the trial court, the plaintiff appealed against it to the Court of Appeal, Ibadan Division. At the Court of Appeal, one of the grounds upon which the appeal was fought is:

> the learned trial judge erred in law not disqualifying herself from trying this case on grounds of interest or bias or likelihood of bias as she is the lawful wife of Chief Bola Ige the then Chief Executive of Oyo State and the substantive 1st defendant in this case as more clearly seen in Exhibit "CI"[20]

The Court of Appeal, in a split decision, allowed the appeal on this issue set out above and declared the decision of the trial High Court void. In his lead judgement with which Akpabio, J.C.A., agreed but Kolawole, J.C.A. dissented, Ogwuegbu, J.C.A., (as he then was), found:

1) It is my view that it was not wise for the learned trial judge to have sat over the case in those circumstance.
2) Even though Chief Ige signed Exhibit "CI" (the Chieftaincy declaration in respect of the Oluwo of Iwo Chieftaincy) in his official capacity yet he was the substantive 1st defendant in the case sued in his official capacity. Viewing the matter objectively, to say that Chief Ige signed Exhibit "CI" in his official capacity and was sued in his official capacity should not be stretched too far when the reviewing court is faced with "CI" which was being interpreted by the learned trial judge who happened to be the wife of the Governor."[21]

Ogwuegbu, J.C.A., further found that the appeal must be determined upon probability to be inferred from the circumstances in which the learned trial Judge sat. The learned Justice held that, there were circumstances from which a reasonable man would come to the conclusion that the learned trial Judge was biased or that there was a real likelihood of bias. He finally adjudged that the appellant's right to fair hearing as enshrined in the Constitution was breached. Consequently, he voided the decision reached by Atinuke Ige, J.

Let us pause and ask ourselves this question: Will this fact (being that the trial judge, Atinuke Ige, J., was at the relevant time wife to Chief Bola Ige, the Executive Governor of Oyo State, who signed the Chieftaincy Declaration in question into law), without more, raise a presumption of real likelihood of bias on the part of the learned trial judge? Should the Court of Appeal not have seen this matter through the judicial prism Kolawole, J.C.A. (of the minority judgement) saw it? According to the minority judgement, to disqualify the learned trial Judge of the High Court from sitting over the matter, on the premise as discussed so far, 'is a totally unacceptable' proposition.

### 3.3 *Adio v. Attorney-General, Oyo State* in the Supreme Court

Upon appeal, the apex Court beamed its searchlight on the matters and re-evaluated it. It must be observed that the Court lived up to, as it is almost always the case, expectation in this matter. The analysis of this matter by the Supreme Court (per Ogundare, J.S.C., who delivered the lead judgement) is illuminating. The court examined English judicial decisions apposite to the issue (whether there was actual or real likelihood of bias). From the cases examined, two forms of tests of gauging bias were discovered: the 'suspicion test' and the 'real likelihood of bias test'. According to the Court, even English jurisprudence never favoured the 'suspicion test'. The court cited with disapproval on the 'suspicion test' the dictum of Lord Esher, M.R. in *Eckersley v. Mersey Docks and Harbour Board*:[22]

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[20] *Adio v. A.G., Oyo State,* (supra), p.85

[21] *Adio v. A.G., Oyo State,* (supra), p.86.

[22] (1894)2 (QB.667 at 670-671. Italics by the writer for emphasis.

> When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be *suspected*[23] of being biased, although in truth he would not be biased. It is an attempt to apply the doctrine which is applied to judges, not merely of the Superior Courts, but all judges – that, not only must they be not biased, but that, even though it be demonstrated that they would not be biased, they ought not to act as judges in a matter where the circumstances are such that people – *not necessarily reasonable people, but many people – would suspect them of being biased.*[24]

The Supreme Court cited with disapproval another English authority *R.V. Sussex Justices, Ex parte McCarty.*[25] Where Lord Hewart, C.J., said that "nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice that favours the 'suspicion test'". On the authorities, the Court concluded:

> with profound respect to their Lordships who adopted the 'suspicion test', I think the stand of Lord O'Brien is to be preferred. A mere whimsical suspicion will not suffice. There must be a real likelihood of bias, as inference which must be drawn from proved circumstances.[26]

Now, what were the proved circumstances upon which the Court of Appeal drew the inference that Atinuke Ige, J. was biased or appears to be biased? In sum, the Court found for the appellant, agreeing with the dissenting voice of Kolawole, J.C.A.

But is there any case wherein it was shown and proved that the judge was biased or likely to be biased? This brings us to the case of *Deduwa v. Okorodudu.*[27]

### 3.4 Case of *Deduwa v. Okorodudu* Considered

The case of *Deduwa v. Okorodudu* is one case wherein the Supreme Court deprecated the manner in which the learned trial Judge engaged parties in a dialogue:-

> It was most unfortunate, however, that he (the learned trial judge) should have engaged in such an undignified and emotionally charge dialogue tending to engender in the minds of reasonable and right-thinking people sitting in Court during those proceedings the impression that there was indeed a real likelihood of bias on his part.

This case was a constitutional matter; hence, it was heard by the full court of the Nigerian Supreme Court and judgment delivered on 15th October, 1974. The appeal was argued by some of the best legal minds of the time. Dr. M. Odje (later to be Senior Advocate of Nigeria) was the lead counsel for the appellants, while the doyen of the Nigerian Bar, late Chief F.R.A. Williams (both Queen's counsel and Senior Advocate), with him late Chief Obafemi Awolowo (later to be Senior Advocate, 1978) and other brilliant counsel for the respondents.

The matter (that is the appeal) arose from the High Court of the Mid-western State (now comprising Edo and Delta States) of Nigeria at Warri in the Warri Judicial Division. At the High Court, on the day for hearing, learned counsel to the appellants (plaintiff at the High Court following conviction of plaintiff for contempt of court, withdrew from the case. The appellant were given one day to get a new lawyer and the case was adjourned for definite hearing on this day, the appellants declared they did not wish their case to be heard by the trial Judge because he had earlier found them

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[23] Italics by the writer for emphasis.
[24] Italics by the writer for emphasis.
[25] (1924)1 KB 256 p.259
[26] Italics by the writer. *Adio v. A.G., Oyo State,* (Supra), p.100
[27] 2, ACLC 64

guilty of contempt of court the day before. The judge immediately dismissed the appellant's case and proceeded to trial of the respondents' claim. After hearing witnesses, it entered judgment immediately for the respondents. Dissatisfied, the appellants appealed to the Supreme Court.

On appeal before the Supreme Court, it was argued for the appellants that the learned trial Judge, Atake, J. was biased; again, it was contended that the learned judge ought not have adjudicated over the matter since he had an interest in same.

On the ground that the judge had an interest in the matter, counsel submitted that the learned trial Judge was a beneficiary of the Warri (Itsekiri Communal Lands) Trust Instrument, 1959 by virtue of his parentage, his mother being Itsekiri. It is not, however, disputed that the learned Judge's father was Urhobo and therefore of the same ethnic group as the appellants. Counsel submitted that every member of the Itsekiri community has an interest in the Trust and that the learned judge has an interest in the Trust through his mother and was consequently disqualified from hearing the suits filed by the appellants and the respondents who are Urhobos and Itsekiri respectively.

It is noteworthy to state here that, in somewhat similar manner as in the *Adio's case*,[28] the appellants, through their counsel, were unable to show any scintilla of evidence of pecuniary or proprietary interest on the part of the judge. Attempts in this direction, ended up in mere speculation. The Supreme Court, in dismissing the ground of appeal, held;

> We are firmly of the opinion and we hold that the learned judge had no pecuniary or proprietary interest in the Trust and therefore no legal interest as could have disqualified him on that ground from hearing this action, notwithstanding the fact that Itsekiri communal Land Trustees were parties in the consolidated suits.[29]

The Court now turned to the ground that the judge breached the constitutional enshrined principle of fair hearing, and that he was biased. Both were taken together by the Court since the arguments in respect of these grounds appear to be inextricably interwoven and because in the court's opinion the issues of 'real likelihood of bias' and 'fair hearing' are interdependent in the circumstances of the case. After a thorough examination and analysis of the relevant authorities, the Court, adopting the test of a 'real likelihood of bias', came to the conclusion that given the dialogue that ensued between the appellants and the Judge, he, the Judge, was biased:

> it is true that we cannot capture sitting in this court, the actual "atmosphere" which pervaded the trial court at the time. However, suffice it to say that we are absolutely satisfied that there is overwhelming evidence in the passages quoted below from which the only reasonable inference to be drawn (and, indeed, we find this interference irresistible) is that there was a real likelihood of bias on the part of the trial court even before it embarked on the trial.[30]

## 4. Conclusion

Underlying all these cases on contempt, there are well-settled principles. No judge must have an interest in conflict brought before him or her. Judges in the hallowed temple of justice must observed the age-long, legendary norm of natural justice-dispensing justice to all, without fair or favour; not minding whose ox is gored.

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[28] (Supra)

[29] *Deduwa v. Okorodudu*, (supra), p. 77

[30] *Deduwa v. Okorodudu*, (supra), p.83