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Crim app: 16/2011

~~SC CIV APP NO.3/2010~~

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

THE STATE	**-**	**APPELLANT**
AND		
ALLIEU SESAY & ORTHERS	**-**	**RESPONDENT**

CORAM:

HON. JUSTICE P.O. HAMILTON	**-**	**JSC**
HON. JUSTICE E.E. ROBERTS	**-**	**JA**
HON. JUSTICE V.M. SOLOMON	**-**	**JA**

SOLICITORS

R.S. Fynn Esq. & M.M. Samba Esq. for Appellant

N.D. Tejan-Cole Esq. for the 1st & 4th Respondents

G.K. Thorley Esq. for the 2nd & 3rd Respondents

O.Jalloh Esq. for 5th Respondent

Ruling Delivered this 9th **Day of** August**, 2012**

HON. JUSTICE P.O. HAMILTON - JSC

At the hearing of this matter on the 29th May, 2012, Counsel for the Appellant R.S. Fynn Esq. was supposed to have replied to certain preliminary objections raised by N.D. Tejan-Cole Esq. of Counsel for the 1st Respondent. Rather than replying, Counsel for the Appellant proceeded

orally to raise certain different objections. I have used the word "orally" because as I proceed with this ruling the reason for using the word orally will become explicit.

Counsel then went on to say: "There is a certain matter of an impression of impartiality in the functioning of this Court. Our indication is that we will invite His Lordship Justice Eku Roberts to consider recusing himself from this matter he having participated in this matter in the Court below. Secondly, we would also consider the Hon. Justice P.O. Hamilton to consider recusing himself from this matter primarily on the grounds of his ex improviso comments in another matter namely ***Phillip Lukulev vs The State*** in which issues similar to that which are before this Court which issues touching and concerning the Commissioner to sign appellate papers and the form in which those papers ought to be".

Counsel then went on to say that those ex improviso comments being disparaging both of Counsel and the said papers leave the Appellant with a view that the Bench as currently constituted will be unable to divorce itself of those comments and the reasoning that informed them. The Bench as presently constituted will be unable to impartially deal with this present appeal.

Mr. Tejan-Cole in his reply states that he is very much surprised at this application by Counsel for the Appellant without following the etiquette at the Bar by informing all the Counsels for the Respondents who would have assisted the court if obliged to do so and hopes that such a bad precedent would not be created. Unprepared as he is, he wishes to submit that the fact

that Justice Roberts read the High Court Judgment is not an excuse for him to recuse himself from this matter. He further submitted that it is a settled commonwealth practice to ask a judge to read the judgment of another judge due to certain conditions as in the present circumstances of this present matter in which we find Justice Roberts. He submitted further that in the Court of Appeal where a single judge is empanelled to hear a case if a party wants the full Court then that single judge can be in the full panel and it is the same in the Supreme Court where three justices are paneled they can sit in the panel of five.

He submitted that as regards Justice Hamilton the case of ***Lansana and Others vs The State*** and that of ***Juxon Smith v. The State*** both on a charge of Treason has the same panel in both cases therefore the reason for the exclusion of Justice Hamilton in this case is untenable. He further submitted that the decision of ***Phillip Lukulev vs The State*** is a decision of the Court of Appeal and not that of Justice Hamilton and finally submitted that all these must be taken into consideration before the two justices excuse themselves.

Mr. Thorley of Counsel for the 2nd and 3rd Respondents questioned the propriety of Counsel's application since the etiquette at the Bar behoves Counsel for the Appellant to have taken the issue with Counsel for the Respondents with a view of approaching the Bench in camera rather than indicting the Bench in public.

Mr. Jalloh of Counsel for the 5th Respondent adopted the submission of N.D. Tejan-Cole Esq. and referred to pages 245 to 319 of the records which is the

judgment of the Late Justice S.A. Ademosu and submitted that all what Justice Roberts did was to read the Judgment of late Justice Ademosu. Counsel then refer to Section 120 (14) of the Constitution of 1991 (Act No.6 of 1991).

Mr. Fynn in his reply conceded that there has been a breach of etiquette but submitted that the application was not intended to embarrass the Bench. On the question of a single judge and a full panel he submitted that what he seeks is the avoidance of any iota of semblance that the Bench is fettered in the performance of its sacred duty. He went on that the ruling given in ***Phillip Lukuley vs the State*** has some things in common for which the iota of impartiality seems to be absent in the present matter.

Firstly, as regards Justice Roberts, Section 120(14) of the Constitution 1991 (Act No.6 of 1991) provides:

> *"Neither the Chief Justice, not any Justice of the Supreme Court or of the Court of Appeal or a Judge of the High Court may take any part in the hearing of any appeal from his own judgment or the judgment of a panel of judges of which he was a member". (Emphasis added).*

This brings a question for consideration. Is Justice Roberts presently in an appeal from his judgment or the judgment of a panel for which he was a member? The answer to this is in the negative. Counsel's objection is as to the reading of the Judgment of the Late Justice S.A. Ademosu. There is no authority in our jurisdiction on this particular issue but the constitution is quite clear in its provisions as contained in Section 120(14) and reading the judgment does not bring it within the said provision of the Constitution.

As regards Justice Hamilton the main issue raised by Counsel for the Appellant is that this matter is similar to that of ***Phillip Lukulev vs. The State*** in which a ruling was given for which the objection raised in this matter appears to be almost the same as that raised in ***Phillip Lukulev vs. The State***. However, let me state clearly that each case depends on its own facts.

In the Civil case of *Nigerian National Shipping Lines Ltd. v. Abdul Ahmed (Trading as Abdul Aziz Enterprises) Civ. App. 3/88 unreported at Page 55 and Nigerian National Shipping Lines Ltd. v. Abdul Ahmed (Trading as Abdul Aziz Enterprises) Civ. App. 8/88 Unreported at Page 70* which were appeals to the Supreme Court was firstly against a preliminary objection of the Court of Appeal and the second a refusal by the same Court of Appeal to entertain an application for leave to appeal against an interlocutory matter in that the application was made out of time. The panel on both cases were the same (Kutubu CJ, Harding JSC, Awunor-Renner JSC, Warne JSC and Thompson-Davies JA).

The reasons given by learned Counsel for the Appellant are not sound legal reasons for which a judge should recuse himself or herself since Counsel did not say expressly that there is the likelihood of bias but since the objection is based on impartiality it connotes bias. In *R v. Barnsley Livensing Justices Ex-Parte Barnsley District Licensed Victualler's Association (1960) 2 Q.B. 167* it was held that the question whether a real likelihood of bias existed was to be determined on the probabilities to be inferred from the

circumstances, not upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large.

However, in Ghana which operates a legal system which is very similar to ours has some good authorities which are of great guidance for our legal system.

In *Adzaku v. Gelenku (1974) 1 G.L.R. 198 at 200* the *Court of Appeal* said:

> *"I have dealt with the events leading to this allegation of bias and I think it is important that such an allegation when made must be substantiated particularly when the allegation of facts may be strongly challenged ..... They ought therefore to be proved to have foundation. That is to say in order to disqualify the judge the allegation must be supported by strong evidence. To hold otherwise will be to enable a party by objections to choose his own judge, a situation which will drive a wedge into the fabric of our whole judicial system. A mere and ordinary suspicion of bias is not enough. The law on disqualification on the ground of bias recognises not only actual bias but also a likelihood of bias, and that interest, other than the interest of a direct pecuniary or proprietary nature, which gives rise to a real likelihood of bias will disqualify a judge".*

In the case of *Amposah v. Minister of Defence (1960) G.L.R. 140* the appellants who were detained under the Preventive Detention Act, 1958 appealed against the dismissal of their application for a writ of *Habeas Corpus* by the Divisional Court presided over by *(Simpson J.)*. At the hearing, Counsel for the Appellants objected to the Court being constituted

with *Van Lare J.A.* on the ground that he had previously sat us a presiding member of the Court which had disposed of an appeal raising the same and very similar issues as the present one. It was held by the Court of Appeal Coram: Korsah C.J., Van Lare J.A. and Ollennu J. as follows:

> *"The fact that a judge has sat as a member of a Court which adjudicated that the court had no jurisdiction in a particular class of case, did not disqualify him from sitting as a member of a Court where the same issue of law was raised as a preliminary objection in an appeal coming within the same class". (Emphasis added).*

It would appear from the facts and decision in the above case, that quite clearly the allegation of bias could not have been brought and sustained under the ambit of any of the tests discussed *supra*. In that respect therefore, the decision is sound in law as a contrary opinion would have had the tendency of disqualifying judges who have expressed opinions and decided previous cases before them from handling fresh cases of equal and very similar nature. If such were the rule, then new judges would have to be appointed for every fresh case that the same issue of law had been decided by the Court in previous cases. This will even make nonsense of the principle of stare decisis, or judicial precedent.

In the case of *Asare and Others v. The Republic (1968) G.L.R. 50 the Court of Appeal*, dismissed an allegation that a panel member of the Court had expressed an opinion in an enquiry held by him and therefore had formed a prejudicial opinion against the appellants who were also convicted in the same criminal transaction.

Finally in the case of *R v. Camborne Justices: Ex-Parte Pearce (1955) 1 Q.B. 41 at 55* Blackburn J. said:

> *"..... The right test to disqualify a person from acting in a judicial or quasi-judicial capacity or position upon the ground of interest (other than pecuniary or proprietary) in the subject matter of a proceeding, a real likelihood of bias must be shown". (Emphasis added).*

As earlier stated learned Counsel for the Appellant did not state equivocally that his objection is on the ground of bias but rather on *ex-improviso* comments made and also that the ruling in *Phillip Lukuley* v. *The State* carries similar issues which touch and concerns this present case. I decided to deal with bias as it is the basic ground upon which disqualification can be properly and legally considered.

The objection by learned Counsel for the Appellant was made orally which procedure it must be emphasized was wrong but in the interest of justice this Court did hear the objection. The proper method ought to have been by way of a motion with supporting affidavit. In my humble opinion this objection is dismissed since to grant it would create a bad precedent which practice should be frowned upon and deprecated.

Before I drop my pen on this issue, I think I should state that this objection is of grave concern to the legal profession especially the Bench where learned Counsel in open Court launches attack on the competence and impartiality of defenceless Judges for conducting what their sacred oaths of office constitutionally mandated them to do. No one is saying that a Judge, as a

human being cannot make mistakes. If the Judge or Judges make a mistake the learned Counsel who is aggrieved knows what is the right thing to do. The right thing is not to castigate the Judge based on ex-improviso comments in open public since there are proper legal avenues available for redress rather than for Counsel to indulge in such unethical methods in open Court.

In my humble opinion a Judge has no business in whoever wins or loses a case brought before him or her as an umpire whose duty is to balance the scale of justice based on the facts presented in evidence and no more.

The objection is therefore dismissed.

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HON. JUSTICE P.O. HAMILTON – JSC

I AGREE:.....

HON. JUSTICE E.E. ROBERTS - JA

I AGREE:.....

HON. JUSTICE V.M. SOLOMON - JA

REF: POH/HJ