IN THE COURT OF APPEAL OF SIERRA LEONE

CIVIL DIVISION

E P. CIV. APP. 59/2019

BETWEEN:

KADIE KALLON(NEE DAVIES)-APPELLANT/APPLICANT

AND

JOSEPHINE H M JACKSON- 1ST RESPONDENT & 3 OTHERS

REPRESENTATION:

ADY MACAULEY ESQ. COUNSEL FOR THE APPLICANT

MUSA MEWA ESQ. COUNSEL FOR THE RESPONDENT

CORAM:

HON. MR. JUSTICE SENGU M. KOROMA - JSC (PRESIDING)
HON. MR. JUSTICE ANSUMANA IVAN SESAY- JA
HON. MRS. JUSTICE TONIA BARNETT - J

RULING DELIVERED ON THE 1ST APRIL, 2020 BY HONOURABLE MR. JUSTICE SENGU MOHAMED KOROMA JSC

1. The Appellant/Applicant (hereinafter referred to as the 'APPLICANT') applied to this Court by Notice of Motion dated 26th February, 2020 for the following Orders:-

1) That the Honourable Mr. Justice Ivan Sesay, JA recuses himself from hearing of the matter intituled:

CIV. APP.59/2019

BETWEEN:

KADIE KALLON (NEE DAVIES) AND JOSEPHINE H.M. JACKSON & 3 OTHERS

2) That the Honourable Ansumana Ivan Sesay JA disqualifies himself from being a member of the Panel of Judges that will hear this Appeal on the following grounds:
   a. That the said Justice has twice contested General elections for the parliamentary seat at a constituency now known as constituency 93 at Rutifunk in the Moyamba District in the Southern Province of the Republic of Sierra Leone on the platform of the Sierra Leone Peoples Party (SLPP) in 2007 and 2012 respectively
   b. That because of his past affiliation and connection with the SLPP, justice may not manifestly be seen to be done by him in this case if he continues to be on the Panel because of the appearance of or presumed bias he holds towards the Sierra Leone People's Party.

3) Any further Order(s) that this Honourable Court may deem fit and just

4) Costs in this application be costs in the cause.

2. The Application was supported by the affidavit of KADIE KALLON (nee Davies) sworn to on the 26th day of February, 2020 together with the exhibits attached thereto and relied on therein.
3. The application was opposed by the 1st Respondent by an affidavit filed by JOSEPH HINDOGBAE KPOSOWA sworn to in Freetown on the 2nd day of March, 2020.

PROCEDURAL HISTORY:

4) As a result of the decision of the High Court dated the 31st May, 2019 against the Applicant herein, the Applicant filed (therein referred to as the Defendant) filed a Notice and Grounds of Appeal against the said decision.
5) At the first hearing of the said Appeal, Counsel for the Appellant/Applicant herein (hereinafter referred to as the "Applicant") intimated this Court of their intention to seek the recusal of Hon. Mr. Justice Ansumana Ivan Sesay. The Court Ordered the said Counsel for the Applicant to make the Application by Notice of Motion. This Application was duly filed.

THE PRESENT APPLICATION:

6) The Application was heard on the 5th day of March, 2020 with the Applicant represented by Ady Macauley Esq., and the Respondent by Musa Mewa Esq.

AFFIDAVIT IN SUPPORT:

7) In this application, the Applicant relied on the affidavit of KADIE KALLON (nee Davies) sworn to on the 26th day of February, 2020 together with the exhibit attached thereto.
8) I shall now deal with the parts of this affidavit germaine to this application. The Deponent averred as follows:-

i) **PARAGRAPH 3**: "That I am reliably informed by my Solicitors and verily believe that the members of the Panel (in this appeal) include Hon. Mr. Justice Ansumana Ivan Sesay, JA."

ii) **PARAGRAPH 4**: "That the subject matter of my Appeal touches and concerns the 1st Respondent; Josephine Jackson who was the candidate presented by the Sierra Leone Peoples Party (hereinafter referred to as "SLPP") for the same constituency seat (Constituency 110) contested by me under the ticket of the All Peoples Congress Party (hereinafter referred to as "APC")

iii) **PARAGRAPH 5:** "That the Hon. Mr. Justice Ansumana Ivan Sesay had in 2012 contested to become a Member of Parliament for the Parliamentary Constituency now known as Constituency 86 at Rutifunk in the Moyamba District in the Southern Province of the Republic of Sierra Leone (hereinafter referred to as "the Constituency") under the political platform of the SLPP; the same political party on whose platform the 1st Respondent is contesting under. The Deponent exhibited KK1 being a list of 2012 nominated candidates published by the National Electoral Commission (hereinafter referred to as "NEC")"

iv) **PARAGRAPH 6:** "That the Judge had also by his conduct and participation in the said election under the SLPP no doubt shown publicity his emotional and ideological attachment and commitment to the SLPP and therefore not qualified to hear and determine this appeal which borders on my lawful. election as a Member of Parliament.

v) **PARAGRAPH 7**: "That a good number of Members of the public in my Constituency who have now come to the know that the Learned Judge was once a member of the SLPP have walked up to me in the Streets and expressed doubts and reservations about the fairness of the Learned Judge in adjudicating this Appeal."

vi) **In PARAGRAPHS 8 and 9**, the Deponent averred that because of the affiliation of the Judge with the "SLPP", he will not be seen to exercise his judicial function impartially and also prevent him from bringing an open mind to the hearing and resolution of her appeal.

vii) **PARAGRAPH 10**: "That it is the identification of both the Judge and the 1st Respondent herein with the "SLPP" because of their respective aspirations during the 2012 and 2018 Parliamentary elections that brought about the likelihood, perception, suspicion, impression, possibility and appearance of "bias to mind".

ORAL SUBMISSIONS OF COUNSEL FOR THE APPLICANT:

9) In his oral submission, Counsel for the Applicant, Ady Macauley Esq., reiterated the averments in the affidavit in support asserting that the Judge having been a candidate for a political party must have emotional and ideological commitment to that party.

10) Mr. Macauley clarified that the reason for their objection was not to doubt the integrity of the Judge but to help develop our jurisprudence on judicial bias by

canvassing the circumstances under which a Judge must recuse himself or be disqualified from hearing and determining a matter.

11) In his further submission, Mr. Macauley drew the Court's attention to the distinction between 'actual bias' and the 'appearance of bias'. In drawing this distinction he referred to ZUKERMAN ON CIVIL PROCEDURE 2ND EDITION (2006) paragraph 2.55. Mr. Macauley also referred to "BENNION ON STATUTORY INTERPRETATION" 6th Edition (2012) at page 1011. Counsel further referred to the case of R-V- SUSSEX JUSTICES, EX. PARTE MACARTHY.

12) On the argument regarding "Perceived bias", Mr. Macauley cited the case of R-V-BOW STIPENDIARY MAGISTRATES EX.PARTE PINOCHET' PAGE 1012 of BENNION and the case of MORRISON & ANOR. –v- AWG GROUP LTD & ANOR. (2006) EWCA.

13) Mr Macauley additionally mentioned the case of PORTER AND WEEKS- V-MAGILL (2001) UKHL 67-Per Lord Hope; METROPOLITAN PROPERTIES CO. Ltd.-V- LANNON & OTHERS- REGINA –V- LONDON RENT ASSESSMENT PANEL COMMITTEE (1969).

AFFIDAVIT IN OPPOSITION:

14) The 1st Respondent by his Counsel, Musa Mewa Esq., relied on the affidavit of Joseph Hindogbae Kposowa sworn to on the 2nd day of March, 2020.

15) As I did in the case of the affidavit in support, I shall deal only with the relevant averments herein.

16) The Affidavit herein averred the following facts in response to the allegations made in affidavit in support:

i) **PARAGRAPH 6** –' That I have perused the affidavit in support of the application and have realised that it lacks merit to warrant the recusal of a Judge duly appointed and approved by Parliament from carrying out all of his judicial functions inclusive of the hearing of this Appeal.

ii) **PARAGRAPH 7**: 'That notwithstanding Justice Ansumana Ivan Sesay's past activities seeking to be a Member of Parliament, he was appointed by former President Ernest Bai Koroma (hereinafter referred to as "Former President) to the High Court and that appointment was approved by the 4th Parliament of the second Republic of Sierra Leone Constituting members of both the APC and SLPP. He was never rejected because he sought to be elected to Parliament in 2012 on an SLPP symbol."

iii) **Paragraph 9:** "That Judges are trained to be impartial and therefore their past occupation and activities do not hold sway over the facts and law before them. That to have contested under a political party does not leave a Judge under a permanent and ideological attachment and commitment to that political party."

iv) **PARAGRAPH 10:** " That an application for the recusal of a Judge must be based on the firm foundation of his actual or apparent disposition to do injustice and not on claims of public opinion and the past affiliations and activities of the Judge before his appointment."

v) **PARAGRAPH 13:** "That a reasonable belief by the Appellant/Applicant that the Judge's affiliation with the SLPP might prevent him from bringing an open mind to the resolution of her appeal is misleading since that belief is not supported by any fact to show that the said Judge has participated in any political activity since his appointment and therefore cannot be affiliated with the SLPP".

vi) **PARAGRAPH 15**: "That the Appellant/Applicant has failed to show cause either by actual or apparent bias why Honourable Justice Ansumana Ivan Sesay should recuse himself from forming part of the Panel hearing the Parliamentary Election Appeal.

ORAL SUBMISSIONS OF COUNSEL FOR THE RESPONDENT.

17) In his oral submission, Musa Mewa Esq., Counsel for the Respondent argued that applying for the recusal of a Judge is a matter that requires substantial evidence whether it is a case of actual or apparent bias. An application of this nature should not be made on flimsy grounds because if it were so, no Judge should be qualified to preside over any matter. He submitted that the test would be whether there is a real danger of bias. In support of this submission, he cited the case of LACOBAIL (UK) Ltd –V- BAYFIELDS PROPERTY LIMITED & ANOR. (2000) ALL ER 1 particularly page 66, paragraph 4.

18) Musa Mewa Esq. further submitted that a period of seven years had elapsed since the Judge contested Parliamentary elections. In any event, recusal must not be based on political affiliations. He referred to the case of PRESIDENT OF SOUTH AFRICA & ORS –V- SOUTH AFRICAN RUGBY UNION & ANOR. (1999) S.A.144. Counsel for the Respondent contended that there were no political parties in these proceedings but private individuals. He further cited the following authorities:-

R MAHFOUZ V GMC (2004) EWCA CIV.233; SUBRAMANIAN –V- GMC (2002) UK PC 2003 ; ZN –V- SECRETARY OF JUSTICE & ORS (2015) H.K. C U 2738; FALCON PRIVATE BANK LTD V BORRY BERNARD EDOURD CHARLES Ltd. (2014) 17 HK CFAR 281; KOMAL PATEL & ORS – V- CHRIS & ORS.(2015) HKCU 2700

19)In his final submission, Mr. Mewa opined that all the authorities cited by the Applicant are more favourable to the Respondent. He cited in particular the case of P.C. MANSAKAY –V- AMADU SANKOH CIV.APP10/2011(unreported).

ISSUE FOR DETERMINATION:

20)The operative issue for determination in this Application is whether the Learned Judge having contested Parliamentary Elections on the ticket of the SLPP should recuse/disqualify himself from sitting on the Panel to hear the various Appeals herein. Alternatively, should he fail to recuse/disqualify himself, be ordered to do so by this court.

21)The Applicant is contending that because of the Judge's past membership of the SLPP, he will be presumed to be biased. The 1st Respondent on the other hand is contending that past political affiliation should not be a ground for recusal/disqualification.

22)In order to determine this issue, I shall first of all review the authorities relied on by both Counsel. I note that Counsel relied largely on the same cases.

23) REVIEW OF AUTHORITIES:

a. ZUKERMAN ON CIVIL PROCEDURE(2006)- Paragraph 2.55

At this paragraph, it was stated that "English Law insists not only on the appearance of bias, but also on the absence of bias. As Lord Hewart CJ puts it in the case of R-V- SUSSEX JUSTICES EX.P MACARTHY(1924) 1KB , it is "of fundamental importance that justice should not only be done, but must manifestly and undoubtedly be seen to be done". The absence of an appearance of impartiality is essential for public confidence in the administration of justice.

This authority seems to be re-emphasising what Counsel for the Applicant stated in his oral submission, that his client has no doubt in the integrity of

the Judge but rather by his having contested two Parliamentary elections on the ticket of the SLPP, he was presumed to the bias. To my mind, this authority lays the foundation of the Applicants contention in this case.

b. BENINION ON STATUTORY INTERPRETATION 6th Edition (2012) at Page 1011. The relevant passage here refers to the principles applicable to cases of bias. The said passage reads thus: "The principle applicable to cases of bias was reviewed by the House of Lords in R-V- GOUGH (1993) A C 646. They distinguished the case where a person acting in a judicial capacity has a direct pecuniary interest, where he or she is automatically disqualified from sitting on the case from where the test is whether, having regard to the relevant circumstances there is a real danger of bias. The term 'danger' was considered preferable to 'likelihood' as indicating that the test is one of possibility of bias rather than the probability of bias.

:) **R-V- SUSSEX JUSTICES,** ex-parte **MARCARTHY** (1924) 1 K B

This case is famous for the oft quoted dictum of Lord Hewart CJ (which I have ılready cited above)

l) **R-V- BOW STREET STIPENDIARY MAGISTRATE & OTHERS**, ex-parte 'inochet Ugarte (No.2) (1999) 1 ALL ER 577.

'his case deals with the principle of apparent bias. In the case, Lord Hoffman, /ho had formed part of a 3-2 majority in the House of Lords trial which had ecided that General Pinochet had no immunity from arrest, had failed to isclose his links to Amnesty International, which had intervened in the appeal. 'e was director and chairperson of Amnesty International Charity Ltd, which had een incorporated to carry out AI's charitable purposes. The House Lords held ıat "in the instant case, the facts were exceptional in that AI was a party to the ppeal, it had been joined in order to argue for a particular result and the Law ɔrd was a director of a charity closely allied to AI and sharing its objects. :cordingly, he was automatically disqualified from hearing the appeal".

The relevance of this case in the development of English (and by practice) erra Leonean jurisprudence on presumed bias cannot be over stretched. The :cision of the Court, the latter part of which was relied on by the Applicant ıich is thus: "The principle that a judge was automatically disqualified from :aring a matter in his own cause was not restricted to cases in which he had a :cuniary interest in the outcome, but also applied in cases where the Judge's cision would lead to the promotion of a cause in which the Judge was in ɜether with the other parties. That did not mean that Judges could not sit on

case concerning charities in whose work they were involved, and Judges would normally be concerned to recuse themselves or disclose the position to the parties only where they have an active role as trustee or director of a charity which was closely allied to and acting with a party to the action.

f) MORRISON & ANOR. V. A.W.G. GROUP (2006) EWCA.

In this case, in the judgment with which the two other Judges of the Court of Appeal agreed, the Learned Lord Justice stated the test of for apparent bias thus: "The test for apparent bias is now settled by a line of recent decisions of this Court and the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the Judge was (or would be) biased, the Court must ask whether those circumstances would lead to a fair-minded and informed observer to conclude that there is a real possibility of bias. In the Judgment of the Court, the Judge ought to have recused himself in the unfortunate circumstances, in which, through no fault of his or anyone else, he was placed.

g) The test applied in this case is that even where a situation arises that would give rise to the apprehension of bias through no fault of the objected Judge, he should still recuse/disqualify himself from hearing the matter as long as a case for doing so has been properly made out.

h) This case referred to the Judgment of the House of Lords in the case of R-V- BOW STIPENDIARY – MAGISTRATE EXPARTE PINNOCHET where Lord Nolan has this to say "In any case, where the impartiality of a Judge is in question, the appearance of the matter is just as important as the reality".

i) LOCOBAIL –V- BAYFIELD PROPERTIES (2000) ALL E R 1.

On page 83 paragraph 50 of the Court of Appeal Judgment herein, it is stated as follows:-"This is not a case in which actual bias on the part of the Deputy Judge has a sufficient pecuniary or proprietary interest in the outcome of the trial so as not to attract the automatic disqualified principle in DIMES' case (I shall in my final analysis refer to this case). If it is not, then it is a case to which the principle expressed in R-V-GOUGH must be applied.

j) At page 66 of this Judgment, the Court of Appeal held that "in considering whether there is a real danger of bias on the part of the Judge, everything depends on the facts, which may include the nature of the issue to be decided. However, a Judge's religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot form the basis of an objection. Nor ordinarily can an objection be soundly based on the Judge's social, educational, service or employment background or that of his family; his previous political associations etc".

k) P.C. MASAKAMA KANAMAKA III –V- AMADU SANKOH CIV.APP.10/2011 (unreported)

In this case, the Applicant applied by Notice of Motion seeking that certain Judges recuse themselves from hearing an Appeal, or alternatively disqualify them from being members of the panel of Justices that will hear the appeal. Solomon JA (as she then was) delivering the unanimous Judgment of the court had this to say ".....There is no evidence before this court to support the conduct of the Justices complained of apart from their cordial relationship with Counsel. There must be cogent evidence from the Applicant to support his allegation of bias. The test is no longer an objective one, that is what a reasonable man would think but the likelihood of bias must be proved". She cited the case of **ADZAKU –V- GALENKU** (19974) 1 G.L.R page 198 where it was said that "In order to disqualify the Magistrate and to invalidate his decision the allegation must be supported by evidence. To hold otherwise will be to enable a party by objections to choose to his own Judge; a situation which will drive a wedge into the fabric of our whole judicial system." In sum, a mere suspicion of bias is not enough.

l) PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & ORS V. SOUTH AFRICAN RUGBY FOOTBALL UNION - Delivered on the 10th September, 1999.

In this case, the tests applicable to determine whether a judicial official was disqualified from hearing a case by reason of a reasonable apprehension of bias were enunciated. The Constitutional Court had this to say, amongst other `The reasonableness of the apprehension must be assessed in the light of the oath of office taken by Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience.

I doubt the relevance of this dictum to both Counsel because the presumption which underpins this judicial superstructure (the sanctity of the judicial oath) is very easily displaced when it is challenged. A claim of having abided by the judicial oath with its obligation to be fair was canvassed by Lord Hoffman in the PINOCHET CASE but that was not enough to persuade his colleagues in the face concrete evidence of apparent bias.

m) MAHFOUZ, R (on application of) –v- GENERAL MEDICAL COUNCIL (2004) E. W. C. A. Civ.233 AND SUBRAMANIAN v. GMC (2002) UK PC 2003.

These cases deal with the allegation of bias by a quasi judicial body. Here the Court of Appeal stated that at the end of the day, the underlying question is the same: whether the proceedings were fair and seen to be fair.

n) ZN –V- SECRETARY FOR JUSTICE & ORS. (2015) H K C U 27 38. The Secretary of State for Justice, Director of Immigration Commissioner of Police and Commissioner for Labour made an unprecedented application for recusal of the Judge from hearing a judicial review application involving an issue of Human Trafficking because of the positive stance he had taken combating the problem when he was Director of Public Prosecutions. The application was based on apparent bias. The Judge refused the application. The court emphasised that care must be taken when addressing an application of apparent bias. Bare claims of appearance of bias or a vague or general contention of bias was not sufficient to mount a recusal application. The allegation of bias must, the court said, be assessed objectively by the fair-minded and informed observer by having regard to all the relevant circumstances pertaining to the recusal application there again, it was held that the application must be not be based on political associations.

24. In determining this application, I have taken into consideration the authorities cited by both Counsel. I have also used additional authorities in order to arrive at a fair and just conclusion.

ANALYSIS OF THE LAW:

25) In the instant case, the Applicant is alleging an appearance of or presumed bias the Judge holds towards the SLPP as a result of his past affiliation with the said SLPP.

26) Learned Counsel for the Applicant here used the phrase "appearance of" or "presumed bias". I shall here additionally refer to it as "apparent bias". All of these phrases I shall use interchangeably.

27) It is clear from the Submissions of Counsel for the Applicant based on the affidavit in support that his client is not alleging "actual bias". The major problem associated with allegations that a Judge was biased or perceived to have been prejudiced is the inability of the complainant to prove the facts of adjudicative partiality. It is often impossible to determine with any measure of precision the state of mind of a Judge who has rendered a verdict. Thus actual bias is an elusive proposition. Accordingly, the courts take the position that an appearance of impartiality is in itself an essential component of procedural fairness. Even so, the threshold of finding perceived bias is as

high as where actual bias is alleged. This could be because they both relate to the fundamental right of the citizen to a fair trial.

28) It is noteworthy that whenever an allegation of bias or reasonable apprehension of bias is made, the adjudicative integrity not only of the individual Judge but the entire administration of justice is called into question. The courts must, therefore, consider the matter very carefully before making a finding.

29) All the authorities have shown, as I have stated above, that it is difficult to prove actual bias, apparently because of the subjectivity attendant upon it. That is why it is often unnecessary to investigate whether or not there was evidence to suggest that there was actual bias. It is enough that apparent bias is shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstance.

30) This principle has received judicial recognition in the following statement: "The jurisprudence that has developed out of the principle of impartiality or rule against bias is such that the Courts do not insist on the proof of actual bias on the part of the Judge, since an appearance of bias, if proved is enough to vitiate the proceedings". Per Lord Denning in **METROPOLITAN PROPERTY CO. (FGC) –V- LANNON (1969) 1 Q B 577** at 599.Consistent with the dictum of Lord Denning is the statement of LORD DOLAN in the PINOCHET (NO.2) CASE:

"Where the impartiality of the Judge is in question the appearance of the matter is just as important as the reality" Thus, "it is no answer for the Judge to say that he is fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that he lacks independence or is impartial ....."

31) There is however an important qualification here:

"That did not mean that the Judges, could not sit on a case concerning charities in whose work they were involved, and Judges would normally be concerned to recuse themselves or disclose the position to the parties only where they had an active role as a trustee or director of a charity which was closely allied to and acting with a party to litigation". I would invite you to carefully note the phrase...." had an active role".

32) These recent cases limit the influence of cases such as R –V- SUSSEX JUSTICES, ex-parte MACARTHY (supra) where it was established that mere appearance of bias is sufficient to overturn a judicial decision. The rule is very strictly applied to any appearance of possible bias, even if there is actually none. As Lord Phillips M R. stated in the case of DIRECTOR-GENERAL OF FAIR TRADING V. THE PROPRIETORY ASSOCIATION OF GREATE BRITAIN & ANOR. (200) EWCA Civ.350

"The frequency with which allegations of bias have come before the Courts in recent years seems to indicate that Lord Hewart's reminder in the SUSSEX JUSTICES CASE that it "is of fundamental importance that Justice should not only be done, but should manifestly and undoubtedly be done" is being urged as warrant for quashing convictions or invalidating Orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle re-asserted by Lord Hewart, this court feels that its continued citation is cases to which it is not applicable made lead to the erroneous impression that it is more important that justice should appear to be done than it should in fact be done". I share His Lordship's concern.

33) Having said this, the English Court of Appeal in the case of LOCABAIL LTD –V- BAYFIELD PROPERTIES (1999) gave some guidelines in dealing with circumstances that may give rise to a real danger of bias.

34) As an initial statement of principle, I consider it prudent to repeat the dictum of Callaway JA in the CLENAE CASE (1999) VSCA, 35 (paragraph 89 (E).

> **"As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction; subject to certain limited exceptions, a judge or Magistrate should not accede to an unfounded disqualification application".**

35) In LOCABAIL, the Court of Appeal stated thus: "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to real danger of bias .... We cannot however conceive of a situation in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class means or sexual Orientation. Nor, at any rate ordinarily, could an objection be soundly based on the Judge's social or educational or service or employment background or history ....or previous political association". This principle was applied in the ZN CASE.

36) The importance of evidence to support an application for recusal or disqualification on the ground of bias was emphasised by Solomon JA (as she then was) in the case of P.C. MASAKAMA KANAMAKA III V. AMADU SANKOH (supra). In doing so, she had this

to say: "In the instant case, the objection to the Learned Justices being members on the panel in the present Appeal is one of 'bias' because of their cordial relationship with Counsel for the Respondent. There is no evidence before this Court to support the conduct of the justices complained of apart from their cordial relationship with Counsel. There must be cogent evidence from the Applicant to support his allegation of bias. The test is no longer an objective test, that is, what a reasonable man would think but the likelihood of bias must be prove... This Court is not concerned about what a reasonable man's standard of bias, but whether there is actual or a likelihood of bias".

37) Her Ladyship cited with approval the case of **R –V- BARNSLEY LICENSING JUSTICES, EX-PARTE BARNSLEY & DISTRICT LICENSED VICTUALLER'S ASSOCIATION (1960) 2 Q.** B. page 167 at Page 187 where Devlin J (as he then was) had this to say: '' We have not to inquire what impression might be left on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias – not merely satisfy ourselves that there was the sort of impression that might reasonably get abroad".

38) The case of R –V- JUSTICES OF COUNTY OF CORK (1910) 2 1 R. page 271(Cited by Solomon JA (as she then was) in PC MASAKAMA CASE) may have been an inspiration for Devlin J where the Learned Chief Justice said ".....I do not think that mere vague suspicion of whimsical, capricious and unreasonable people should be the standard to regulate our action here. It might be a different matter if the suspicion rested on reasonable grounds – was reasonably generated – but certainly mere flimsy, elusive, morbid, suspicious ground should not be permitted to form a ground of a decision.

39) I must point out that the English and Commonwealth decisions cited above are merely persuasive. If there is a decision of the Sierra Leone Court of Appeal, then it will be binding. I should of course state that by Section 128 (3) of the Constitution of Sierra Leone, Act No.6 of 1991, the Court of Appeal is bound by its own previous decisions. In the circumstance, the decision in the PC MASAKAMA CASE is binding on this Court. This a constitutional provision which should in interpreted to meet the exigencies of the time relevant to the expressions of opinion that gave rise to it. However, in my view, that there must exist exceptional circumstances in which the Court of Appeal could depart

from its previous decision. That decision may have been made based on the technology in existence at that time but with the increased technological development, the Court should be allowed to depart from its previous decision when it is just to do so. 40.However, in the instant case, the Court shall adopt the principles in the MASAKAMA CASE in helping to determine the issue in dispute.

41.After considering the authorities relied on by both Counsel for the Applicant and Respondent and based on our research, we shall expand on the rules that would guide any application for recusal and or disqualification on the ground of Apparent bias or what the Applicant herein referred to as "appearance of bias' or perceived bias".

i. The primary rule is that whenever there is an application for recusal or disqualification or both, the adjudicating panel must immediately stop proceedings in the said matter and proceed to look into that application.
ii. If is no evidence of bias against the challenged Judge, the matter shall proceed in the normal way and the court shall so order.
iii. If there is evidence of bias on the part of the Judge, he must recuse himself

In a case where hearing of the matter has not commenced, the challenged Judge shall be replaced and where judgment has been delivered, it should be set aside.

1. The following should be taken into consideration in determining which test to apply in determining "apparent bias":
    i. There must be a reasonable apprehension of bias. This requirement translates into two stages
        a. There must be a real likelihood of bias based on the reasonable apprehensions of a reasonable man. Mere suspicion of bias is not evidence. There must be clear evidence of a real likelihood of bias. Some Judges prefer the use of the term 'real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability. Whatever may be the term

preferred by a particular Judge or Panel, the underlying principle is that there must be a possibility or probability of bias.

b. The apprehension must be held by a reasonable person, someone who need not have interest in the outcome of the matter in court other than the general interest shared by the public in a fair administration of justice.

41 In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstance, the test is how the reasonable, objective, fair-minded person would perceive it. It follows that an application for recusal/disqualification will not succeed if the Applicant fails to demonstrate that the adjudicator in the circumstances might have departed or was in danger of departing from the standard even handed justice, or that there appeared the possibility that the Judge might be inclined to one side or the other in the dispute.

2. An objection could not be soundly based on religion, ethnic or national origin; gender, age; class; mean; past political affiliation or previous judicial decision. If it is to be considered, there must be conclusive evidence of such a relationship
3. Presumption of impartiality. Failure to rebut the presumption makes the Applicant's task a lot harder.

42. The four principles work in tandem with one another. Undoubtedly, these principles combine to remove the consideration of the issue of bias from subjective threshold into the move stringent objective category.

APPLICATION OF THE LAW TO THE FACTS

43. Having expatiated on the law governing the recusal/disqualification of Judges on the ground of bias, it now falls on me to apply the law as we see it to the facts of this case.

44. This is an affidavit reliant application and as such should state the facts and the reason for the belief that there existed a real likelihood or real danger of bias

and prejudice should the objected Judge sit on the panel adjudicating on the Appeal.

45. In the instant case, the Applicant gave her reasons for such apprehension of bias in Paragraphs 4, 5, 6, 7 and 8 of her affidavit sworn to on the 26th day of February, 2020. The gravamen of the objection can be found in Paragraph 5 of the said affidavit which for the sake of clarity I shall reproduce herein: `T hat the Honourable Mr. Justice Ansumana Ivan Sesay had in 2012 contested to become a member of Parliament for the Parliamentary Constituency now known as Constituency 93 at Rutifunk in the Moyamba District of the Republic of Sierra Leone under the political platform of the SLPP; the same political party on whose platform the 1st Respondent is contesting under". The Deponent continued in the other paragraphs referred to herein that because of the affiliation of the Judge with the SLPP, he will not be seen to exercise his judicial function impartially and also prevents him from bringing an open mind to the hearing and determination of her appeal-Paragraphs 8 and 9.

46.Finally in Paragraph 10 , the deponent averred that it the identification of both the Judge and the 1st Respondent because of their respective aspirations during the 2012 and 2018 elections that brought about the likelihood, perception, suspicion, impression possibility and appearance of bias to mind.

47. Before determining whether these allegations meet the tests laid down in this case, it will be equitable to consider the Response to them in the affidavit in opposition sworn to by Joseph Hindogbae Kposowa on the 2nd day of March.2020; an affidavit sworn to on the authority of the 1st Respondent. In the said affidavit, the deponent averred that notwithstanding the Judge having contested the election on the SLPP ticket, he was appointed by the former President Dr. Ernest Bai Koroma to the High Court and subsequently approved by a Parliament consisting of both SLPP and APC members. This process was repeated in 2019 when the said Judge was elevated to the Court of Appeal; this time the appointment was made by the current President, Dr. Julius Maada Bio.

The deponent further averred that a reasonable belief by the Applicant that the Judge's affiliation with the SLPP will prevent him from bringing an open mind to

the hearing and determination of her Appeal is misleading since that belief is not supported by any fact of his affiliation since his appointment as a Judge; there is no evidence to show that the said Judge has participated in any political activity since his appointment and therefore could not be said to be affiliated with the SLPP.

48. In the light of the averments in the affidavit in opposition, would it be right to hold that there exists the real likelihood or real danger of bias by the Judge?

49. In disposing of this question. I shall revert to the tests developed in this case.

Firstly, has the Applicant rebutted the presumption of impartiality? To my mind, this has not been effectively done. The affidavit in support has not established by any exhibit that the Judge is still a member of the SLPP, participating in its activities after becoming a Judge. This could have been done by exhibiting the current copy of his SLPP membership card or some other documentary evidence that he was still actively participating in the activities of that party. If the said document was not readily available, the Rules would allow her to issue a subpoena duces tecum directed at the relevant Official to prove the status of his membership. This principle was clear in the **PINOCHET CASE**. In this case, at the material time the panel of which Lord Hoffman was hearing the Application, he was the Chairman and director of Amnesty Charity Ltd which was closely allied to Amnesty International (AI) and AI had joined in the matter in order to argue for a particular result. In other words, Lord Hoffman was 'having an active role as director and chairman of a charity which was closely allied to and acting with a party to the action.

50. In the instant case, no evidence of such a relationship has been established. It is based on mere suspicion which is not enough. As Solomon JA (as she then was) puts it in the **PC MASAKAMA CASE,** 'there must be cogent evidence from the Applicant to support his allegation of bias'

51) In any event, it has been held that past political affiliation should not be a ground for recusal of a Judge. This principle has support in a number of cases

but more emphatically applied in the **LACOBAIL CASE** (relied by both parties). Everybody has a past and if that is used without further evidence of judicial partiality, it would undermine the quality of Justice as it would be difficult to empanel judges.

52. Allied to this point is the reasonableness of the allegation of presumed or apparent bias. The averment in the affidavit in support that people on the streets walked up to the Applicant and expressed doubt and reservation about the fairness of the Judge is not enough. Would that apprehension have arisen if those same members of the public were aware that the Judge after contesting the elections in 2012 and losing to the APC Candidate was later appointed as a High Court Judge by Dr. Ernest Bai Koroma? I do not believe so. In the **ZN CASE,** the Court had this to say: 'The allegation of bias must be assessed objectively by fair- minded and informed observer by having regard to all the relevant circumstances pertaining to a recusal application'.

53. As an appendage, I would say that this case adopted the dictum in the **LOCABAIL CASE (supra)** that past political affiliations should not be an effective ground for recusal.

54. To simplify this point, let me use this example: Assuming that the members of the public were told by the Applicant that yes, the Judge (then a private legal practitioner) contested Parliamentary Elections in 2012 as an SLPP candidate and lost but was subsequently appointed as a High Court by former President Koroma. In the political culture of Sierra Leone, does it not mean a vindication of any apprehension of his potential bias against the APC Party? This argument could have been easily dismissed had the Applicant adduced sufficient evidence that the Judge is still a member and operative of the SLPP. This has not been done in this case and this court should not go outside of the evidence before it when arriving at a decision.

CONCLUSION.

55. In an adversarial system, there will always be winners and losers in litigation. However, in deciding who the winner is, there must not be any reasonable doubt

that the Judge was impartial in favour of one of the parties. Judicial impartiality is one significant element of justice. Judges should decide disputes free of any personal bias or prejudice. This is deeply rooted in the principle of natural justice that no person can be a Judge in his own cause. This is encapsulated in the Latin maxim, 'NEMO JUDEX IN CAUSA SUA'. The legal effect of a breach of natural justice is normally to halt the proceedings and/or render any judgment ensuing invalid; the case can be quashed, then be appealed or remitted for rehearing.

Judges must only recuse themselves where the case against them is properly made out, and they should resist the temptation to recuse themselves simply because it is comfortable to do so. Another way of putting this point is that the rule is a rule of law and confers no discretion on the Judge. If the case crosses the line, the Judge must not hear the case. If it does not do so, the Judge cannot decline to do so.

56. I must impress upon all of you that this case is not just about the objected Judge but also about the need to maintain public trust and confidence in the integrity of the administration of justice. The principles developed here could also be of general application. It is not about politics but a judicial matter which has been determined by legal rules.

57. It is my inevitable conclusion that having failed to meet the criteria set out in the rules developed herein for making out a case for recusal or disqualification on the grounds of appearance of, presumed or apparent bias, this application fails.

IT IS HEREBY ORDERED AS FOLLOWS:

1. That the application for the Honourable Ansumana Ivan Sesay JA to recuse himself from the hearing of the Appeal intituled Civ. Appeal 59/19 BETWEEN KADIE KALLON (DAVIES) AND JOSEPHINE H. M. JACKSON & 3 OTHERS is refused.
2. That the application for the Honourable Mr. Justice Ansumana Ivan Sesay JA to disqualify himself from being a member of the panel of Justices that will hear and determine the Appeal is refused.

3. That as agreed by Counsel for the Applicant and that for the Respondent, the Ruling herein is binding on the following related cases:
   a) EP. CIV.APP 52/2019
   b) EP. CIV.APP. 53/2019
   c) EP.CIV.APP. 54/2019
   d) EP. CIV.APP 55/2019
   e) EP. CIV.APP 56/2019
   f) EP.CIV.APP.57/2019
   g) EP.CIV.APP 58/2019
   h) EP. CIV. APP.60/2019
   i) EP. CIV.APP.62/2019
4. Costs in the cause.

Hon. Justice Sengu Mohamed Koroma JSC
(PRESIDING)

.....Hon. Mr. Justice Ansumana Ivan Sesay JA

.....Hon. Mrs Justice Tonia Barnett J.