

**SUPREME COURT OF NIGERIA**18<sup>TH</sup> JULY, 1995. SC. 219/1994

**CORAM:-M.BELLO GIN, M.L. UWAI, M.E. OGUNDARE,  
Y.O. ADIO, A.I. IGUH, JJSC.**

FEDERAL REPUBLIC OF NIGERIA ..... APPELLANT  
AND  
CHIEF (ALHAJI) MOSHOOD  
KASHIMAWO OLA WALE ABIOLA ..... RESPONDENT

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**JUDGMENTS** - *Bias - Real likelihood of bias - Circumstances wherein inference thereof exist.*

**JUDGMENTS** - *Bias - Real likelihood of bias - Test thereof - Is what a reasonable man would think.*

**TORTS** - *Libel - Liability therefor - In respect of published article - lies against the author Printer & Publisher.*

**FACTS**

The proceedings leading to this appeal have had a chequered history. The respondent was one of the two candidates in the Presidential election held on 12th June, 1993, which was conducted by the National Electoral Commission (NEC) under the provisions of the Presidential Election (Basic Constitutional and Transitional Provisions) Decree No. 13, 1993. The election having been conducted, the chief Electoral Officer of the Federation began announcing the result, but before they were fully announced, was restrained by an Order of the High Court, Abuja, from further announcing them. Dissatisfied with the Court Order, N.E.C. appealed to the court of Appeal, Kaduna Division, but the appeal was abated by the Presidential Election (Invalidation of Court Order etc) Decree No. 40 1993, promulgated by the Federal Military Government. The election was also annulled through the Provisions of the Presidential Election (Basic Constitutional and Transitional Provisions) (Repeal) Decree No. 39, 1993. The respondent however, believing he was elected to the office of the President of the Federal Republic of Nigeria, announced himself the President of the Federal Republic of Nigeria. Whereupon, he was arrested and detained in prison custody.

When the matter came before the High Court, Abuja, the issue of his bail came up. His application for bail was rejected by the court. The respondent appealed to the Court of Appeal Kaduna which granted him conditional bail.

The appellant appealed to the Supreme Court against that decision of the Court of Appeal. This appeal to the Supreme Court brought another twist to the case, as the respondent brought an application that some justices of the apex Court be excluded from sitting on the appeal who have sued the CONCORD PRESS NIGERIA LTD, of which the respondent is the publisher, for libel.

**ISSUE FOR DETERMINATION**

*Whether there will be bias or real likelihood of bias against the respondent if some justices of the Supreme Court should sit on the appeal.*

**HELD** (Unanimously granting the application per lead judgment of **BELLO CJN**)

***Liability for libel***

1. The affidavit in support of the application shows that the Applicant is the “publisher” of the Concord Press Nigeria Limited which published the libel complained of by the Justices. He is also reputed to be the “owner” of the Company. In law the author, the printer and the publisher may all be liable for a libel in respect of an article published in a newspaper. Consequently, since the Applicant is the publisher of the Concord Press of Nigeria Limited, and that in law publication is the essence of libel, it follows that both the Applicant and the Concord Press of Nigeria Limited are in law answerable and may be severally and jointly liable for the alleged libel published by the Concord Press of Nigeria Limited. (p. 1542 G)

***Circumstances to infer real likelihood of bias***

2. Furthermore, the evidence shows that in the alleged libel complained of, the Weekend Concord accused the Justices of “gross irregularities” and corruption. Under the circumstances, it is reasonable to infer, as Chief Ajayi, S.A.N. did, that the Justices have grievances against the Applicant as the publisher of the alleged libel. That being the case, I do not think it would surprise anyone if a reasonable man would think it likely or probable that there would be a real likelihood of bias on the part of the Justices if they hear and determine Chief Abiola’s case and particularly if they decide adversely against him. (p. 1543 B)

***Real likelihood of bias - Test thereof***

3. I am satisfied that sufficient evidence has been established from which form the opinion that a reasonable man would think there would be real likelihood of bias and justice would not appear to him to be done if the Panel consisting of the Chief Justice of Nigeria and Uwais, J.S.C. would hear and determine the

application to discharge the order staying bail. (p. 1543 E)

### **NOTABLE POINT OF INTEREST**

#### **UWAIS JSC**

##### ***1. Fair hearing - Impartiality of a court***

It is clear from the foregoing that the “independence” and “impartiality” of a court are part of the attributes of fair hearing. The requirement of impartiality is intended to prohibit a person from deciding a matter in which he has either pecuniary or any type of interest. Such other interest may arise from his personal relationship with one of the parties to the case or may be inferred from his conduct or utterances during the hearing of the matter. (p. 1550 D)

#### **REPRESENTATION**

Chief G.O.K. Ajayi, SAN with A. Aka-Bashorun, U. Ogbedegbe and F. O. Desalu (Miss) for the Respondent/Applicant.

T. Onwugbutor, Solicitor-General of the Federation with him L. Dike (Miss), A. D. Sodangi; C. I. Okpoko, and Usman Mohammed for the Appellant/Respondent.

#### **CASES REFERRED TO**

Salomon v. Salomon & Co. Ltd. (1897) A.C. 22

Rothermere v. Tunes Newspapers Ltd. (1973) 1 All E.L.R. 1013

Rex v. Sussex Justices (1924) 1 KB 256

Obadara v. The President Ibadan West District Court (1964) 1 All N.L.R. 336

Regina v. Camborne Justices (1955) 1 Q.B. 41

Olue v. Enenwali (1976) A.N.L.R. 70 at 76

Deduwa v. Okorodudu (1976) 1 NWLR 236 at 247

R v. Queen’s County Justices (1908) 2 I.R. 285 at page 306

R v. Halifax Justices ex parte Robinson (1912) 76 J.P. 233 at pp. 234-235

#### **STATUTES & RULES REFERRED TO**

Penal Code, Federal High Court, Abuja, s. 97

Penal Code (Northern States) Federal Provisions Act, s. 412 (1)(a)(i); s. 412(1)(y)

Presidential Election (Basic Constitutional and Transitional Provisions) Decree 1993, No. 13.

Presidential Election (Basic Constitutional and Transitional Provisions) (Repeal) Decree 1993, No. 39

Presidential Election (Invalidation of Court Order, etc) Decree 1993, No. 40

Supreme Court Rules, 0. 2, r. 31(1); 0.6, r. 5; 0.6, r.9.

**BOOK REFERRED TO**

De Smith on Judicial Review of Administrative Actions, 4th Ed. p. 276

**LEADRULING BY BELLO CJN**

On 16th May, 1995, I granted the application of Chief M. K. O. Abiola hereinafter referred to as the Applicant, for an order that the Court to hear all matters in this appeal be reconstituted so as to exclude the following:

The Hon. Justice Mohammed Bello, Chief Justice of Nigeria

The Hon. Justice Muhammadu Lawal Uwais, Justice of the Supreme Court

The Hon. Justice Salihu Modibbo Alfa Belgore,

The Hon. Justice Abubakar Bashir Wali,

The Hon. Justice Idris Legbo Kutigi,

The Hon. Justice Emmanuel Obioma Ogwuegbu,

The Hon. Justice Utbman Mohammed,

The Hon. Justice Sylvester Umaru Onu,

The Court adjourned sine die all matters in the appeal until a new Panel has been reconstituted. I now give my reasons.

I think it is pertinent to state shortly the facts of the case giving rise to the application. The Applicant was one of the two candidates in the election to the office of the President of the Federal Republic of Nigeria held on 12th June, 1993 in accordance with the provisions of the Presidential Election (Basic Constitutional and Transitional Provisions) Decree 1993 No. 13. Before the results of the election were fully announced, the High Court, I Abuja, restrained the Chief Electoral Officer of the Federation from further announcing them: see Abimbola Davis v. N.E.C. and 3 ors. case No. FCTI HC/M/348/93 (unreported) delivered on 13th June, 1993 by Saleh C.J. Furthermore, in Abimbola Davis v National Electoral Commission & 3 ors. case No. FCT/HC/M/354/93 (unreported) delivered on 12th June, 1993, Saleh C.J. declared the election illegal on the ground that it had been done in violation of a Court Order. The said Court Order had been made by Ikpeme 1. of the High Court Abuja in Abimbola Davis v National Electoral Commission & 3 ors. suit No. FCT/JC/M/299/93 (unreported) delivered on 9th June, 1993 restraining the Commission from holding the election on 12th 1 June, 1993.

The Commission was not satisfied with the decisions of Saleh C.J. in the two aforementioned cases and appealed to the Court of Appeal. The Federal Military Government did not permit the Court of Appeal to hear and deter

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mine the appeals. It made the Presidential Election (Invalidation of Court Order, etc.) Decree 1993 No. 40 invalidating the decisions with effect from 22nd June, 1993. The Decree provided as follows:-

B “1 (1) *Any interim, interlocutory or final order, ruling, judgment, decision, direction or other pronouncement made or issued or to be made of* issued by any court of law in Nigeria, on or before the commencement of this Decree, whether or not in exercise of its original jurisdiction, which order, ruling, judgment, decision, direction or pronouncement relates to the conduct, the holding or the release of the result of the Presidential election held on 12th June 1993 shall be null and void and of no effect whatsoever.

C (2) *If any proceeding or appeal has been instituted on or before or is instituted after the commencement of this Decree in any court, in relation to the conduct, the holding or the release of the result of the Presidential election held on 12th June 1993, the proceeding or appeal shall, by virtue of this Decree, be made null and void and of no effect whatsoever.*

D 2(1) *Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for or on account of any act, matter or thing done or purported to be done in respect of this Decree.*

E (2) *Accordingly, if any proceeding has been instituted on or before or is instituted after the commencement of this Decree, such proceeding shall abate, be discharged and made void. “*

F The Federal Military Government did not stop there. On the same day, 22nd June, 1993, it enacted the Presidential Election (Basic Constitutional and Transitional Provisions) (Repeal) Decree 1993 No. 39 which annulled the election. The Decree reads:-

“1 (1) *The Presidential Election (Basic Constitutional and Transitional Provisions) Decree 1993 is hereby repealed.*

G (2) *Notwithstanding the provisions of section 6 of the Interpretation Act or any other enactment to the contrary, any act, matter or thing done or purported to have been done under or pursuant to the Decree repealed by subsection (1) of this section shall, by virtue of this Decree, be made null and void and of no effect whatsoever.*

H 2(1) *Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for or on account of any act, matter or thing done or purported to be done in respect*

*(2) Accordingly, if any proceeding has been instituted on or before or is instituted after the commencement of this Decree, such proceeding shall abate, be discharged and made void."*

It is clear and unambiguous that since the election was held under the provisions of the above repealed Decree, it was an "act, matter or thing done" within the ambit of subsection 1 (2) of the repealing Decree and the election was accordingly annulled by the latter Decree.

Now, believing that he had won the election in accordance with the provisions of the repealed Decree, the Applicant declared himself the President of the Federal Republic of Nigeria on 12th June, 1994. In consequence thereof, he was arrested, detained and charged with the offences of treasonable crimes contrary to sections 412(l)(a)(i) and 412(l)(y) of the Penal Code (Northern States) Federal Provisions Act and section 97 of the Penal Code in the Federal High Court, Abuja. On 14th July, 1994, the Federal High Court refused to grant bail to the applicant. The Court of Appeal allowed his appeal against the refusal of bail and granted him bail on 4th November, 1994 in these terms:-

*"(1) The appellant is granted bail in his own self recognizance.*

*(2) The appellant should not indulge in any activity that will jeopardize the peace of this country. "*

The prosecutions were not satisfied with the decision of the Court of Appeal granting bail, so they appealed to this Court. They also obtained the order of the Court of Appeal staying the bail pending the determination of the appeal.

By 24th March, 1995, the prosecutions were in default of filing their brief F within the time prescribed by Order 6 rule 5 of the Supreme Court Rules. In consequence of the default, Chief Ajayi S.A.N. on behalf of the Applicant applied by Motion on Notice for an order striking out the appeal for want of prosecution by virtue of Order 6 rule 9. Thereafter, the prosecutions applied by Motion on Notice dated 6th April, 1995 under Order 2 rule 31(1) for enlargement of time to file the brief and to deem the brief filed with the application as filed within time.

Before the two motions were heard, Chief Ajayi S.A.N. filed another Motion on Notice dated 18th April, 1995 for an order discharging the Order of stay of Execution pending appeal made by the Court of Appeal on 5th December, 1994. His grounds of the application are-

*"(i) The appellant has failed to prosecute its appeal with due diligence whilst taking advantage of the order for stay granted pending appeal.*

*(ii) The appellant during the period of default continued to detain the respondent in custody in inhuman and dehumanizing conditions and in*

*open defiance of specific and repeated orders of court. “*

The three Motions came before the Court for hearing on 20th April, 1995.

After having heard learned counsel on two Motions, the Court granted the prosecutions’ application for enlargement of time and struck out Chief B Ajayi’s application to strike out the appeal for want of prosecution. At the request of Chief Ajayi S.A.N., the application to discharge the Order for Stay of Execution was adjourned to 16th May, 1995. When the adjourned application came up for hearing on the said date, Chief Ajayi S.A.N. made the present application to disqualify myself and the justices listed at the beginning of C these Reasons for Ruling from determining the adjourned application and all matters relating to the substantive appeal against the decision of the Court of Appeal granting bail to the Applicant. The Panel for the hearing of the adjourned application consists, among others, of myself and Justice Uwais, sought to be disqualified.

D The ground upon which the objection to the Justices is based may now be stated. The affidavit in support of the application disclosed that in suits No. ID124/94 Hon. Justice Mohammed Bello v Concord Press Nigeria Limited, ID/30/94 Hon. Justice Uthman Mohammed v Concord Press Nigeria Limited, ID/31/94 Hon. Justice Sylvester Onu v Concord Press Nigeria Limited, E ID/33/94 Hon. Justice Abubakar B. Wali v Concord Press Nigeria Limited, ID/34/94 Hon. Justice Idris Legbo Kutigi v Concord Press Nigeria Limited, ID/35/94 Hon. Justice MuhaIlmladu L. Uwais v Concord Press Nigeria Limited, and ID/37/94 Hon. Justice Salihu M. Alfa Belgore v Concord Press Nigeria Limited, F the plaintiffs have severally sued the defendants on 5th January, 1994 claiming N50 million each as general damages for defamatory publications alleging gross improprieties and corruption against them in the Weekend Concord of 11th December, 1993 published by the Concord Press Nigeria Limited. The suits are still pending for determination by the High Court, Lagos.

It was further deposed that the Applicant is the Chairman, Chief G Executive and Publisher of the Concord Press Nigeria Limited and controls 90 of its shares. His wife, Alhaja Doyin Abiola, is the Managing Director of the Weekend Concord. The Applicant is reputed to be the owner of the Concord Press Nigeria Limited and the suit instituted by the Clnef Justice. in which considerable evidence which received worldwide publicity had already been H given, was regarded by average Nigerian as a claim against Chief M. K. O. Abiola, the Applicant. Finally, paragraph 9 of the affidavit deposes:-

*“9. It will be in the best interests of the administration of justice ill Nigeria if the Justices of the supreme Court who have sued the Respondent*

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*(the Applicant) to court for substantial damages which, if awarded will erode the Respondent's financial viability, are not placed in a position to decide issues relating to his personal liberty.* “Bracket mine.

In his submission on the need to reconstitute the Panel in order to ensure that justice is not only done but it also appears to have been done, Chief Ajayi S.A.N. contended that the Applicant was the virtual owner of the Concord E Press of Nigeria Limited and that although lawyers appreciated that in law a Company was a separate legal personality from its “owner” in accordance with the rule in Salomon v Salomon & Co. Ltd. (1897) A.C. 22, the ordinary Nigerian was incapable of understanding such a nicety and would see the suits against the Concord Press Nigeria Limited as being against Chief Abiola.

The learned senior counsel referred to Rothehlere and Ors. v Times Newspapers Ltd. & ors (1973) 1 All E.L.R. 1013 at pages 1017 and 1020 wherein Lord Denning, M.R. considered the circumstance for which a judge may disqualify himself from trying a case on ground of prejudice and also to De Smith On Judicial Review Of Administrative Actions, 4th Ed. p. 276 r which deals with the doctrine of necessity and submitted that the doctrine was inapplicable in the Nigerian situation.

Chief Ajayi, S.A.N. emphasized that he did not raise any issue of bias by the Justices. Nevertheless, he contended that the Justices have grievances against the Applicant and personal prejudice against the Concord Press I Nigeria Limited which Nigerians might reflect on Chief Abiola. He submitted that in the interest of justice, the Justices should not sit in judgment against the Applicant who is their adversary in matters relating to his personal liberty.

The learned Solicitor-General of the Federation opposed the application. He pointed out that the suits were against the Concord Press Nigeria Limited which was entirely a separate legal personality from Chief Abiola. Referring to Umenwa v Umenwa (1987) 4 NWLR (Part 65) 407 at p. 415, he submitted that the Justices should only be disqualified if there was bias or real likelihood of bias but no such issued was raised. He stated that the affidavit in support of the application did not disclose sufficient facts showing that the common man viewed the suits as against Chief Abiola. He urged the Court to dismiss the application.

Now, although Chief Ajayi, S.A.N. stated in his submission that he did not base the application on bias as that might tantamount to contempt of court, it seems to me that having regard to the deposition in support of the application and the submission of learned counsel, the application is solely predicated on the principles of appearance of justice and real likelihood of bias. In Rex v Sussex Justices (1924) I KB 256, Lord Hewart C.J. stated the



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principle of appearance of justice at page 259 of the report as follows

..... “a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. “

The law disqualifying a judge from adjudication has been stated in several B decisions of this Court. I shall only mention a few. In Obadara v The President, Ibadan West District Court (1964) 1 All N.L.R. 336, delivering the judgment of the court, Brett, Ag. stated at page 344 as follows-

“The principle that a judge must be impartial is accepted ill the jurisprudence of any civilized country and there are no grounds for holding that in this respect the law of Nigeria differs from the law of England or for hesitating to follow the English decisions. The English decisions were reviewed by the Divisional Court in Regina v. Camborne Justices (1955)1 Q.B. 41, and we would adopt the following passage from page 51 of the judgement as setting out the law to be applied in Nigeria -

In the judgment of this court the right test is that presented by Blackburn J., namely, that to disqualify a person from acting in a judicial or quasi judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown. This court is further of opinion that a real likelihood of bias must be made to appear not only from the materials infact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries ‘. “

The decision in Regina v Camborne Justices (supra) together with other authorities were reviewed by Lord Denning, M .R., in Metropolitan Properties Co. Ltd. v Lannon (1969) a.B. 577 at page 598 in these words»

“A man may be disqualified from sitting in a judicial capacity on one or two grounds. First, a ‘direct pecuniary interest’ in the subject matter. Second, ‘bias’ in favour of one side or against the other ....

So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the often repeated saying of Lord Hewart c.J. In Rex v. Sussex Justices. Ex parte McCarthy (1924) 1 K.B. 256 at 259): “It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

In Reg. v. Barnsler Licensing Justices, Ex parte Barnsler and District Licensed Victuallers’ Association (1960) 2 a.B. 167 at 187) Devlin J. appears to have limited that principle considerably, but I would stand by it.

It brings home this point: in considering whether there was a real

likelihood of bias, the court does not look at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right minded persons would think that, in the circumstances, there was a real likelihood of bias, on his part, then he should not sit. And if he does sit, his decision cannot stand: see Reg. v. Huggins U895) 1 a.B. 563) and Rex v. Sunderland Justices U901) 2 K.B. 357 at 373 C.A.) per Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see Reg. v. Camborne Justices. Ex parte Pearce (1955) 1 Q.B. 41 and Reg. v. Nailsworth Licensing Justices Ex parte Bird U953) 2 ALL E.R. 652 P.c.) There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence -is destroyed when right-minded people go away thinking: 'The judge was biased'. "The foregoing statements of the law were adopted by this Court in Ikehi Olue v. Obi Enenwali (1976) A.N.L.R. 70 at 76 as stating the correct principle and approach of the Nigerian law. Again, in Deduwa v. Okorodudu (1976) 1 NWLR 236 at p. 247 this Court quoted with approval the pronouncement of Lord Denning, M.R., in the said Metropolitan Properties case the following passage.-

"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then, he should not sit and if he does sit, his decision cannot stand" Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough..... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense," of the other. The .court will not inquire whether he did, infact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain

enough. Justice must be rooted in confidence; and confidence is destroyed when rightminded people go away thinking: 'The judge was biased'. “

The case of Rothermere v. Times Ltd. (supra) cited by Chief Ajayi, S.A.N. is very relevant to his application. Mr. Levin, who had often in the past criticized the judiciary, was sued for libel jointly with the Times Ltd for his article published by the Times. He applied to be tried by a jury because of his previous criticism of the judiciary. The Master refused the application and ordered trial by a judge alone. Lord Denning, M.R. at page 1017, on appeal against the Master's order, said-

“Likewise Mr. Bernard Levin. He says that he has often in the past criticized the judiciary, and that is one of the reasons why he would wish to be tried by a jury. If he means by this that he thinks the judges, or anyone of them, would be prejudiced against him, he would be entirely wrong. Every single one of them would be most scrupulous to be fair to him. No judge whom he had criticized would dream of sitting on the case. But I would not let him have any disquiet on this score. One of the advantages of trial by jury - as proclaimed by Blackstone - is in case the judges should cease to be impartial. So Mr. Levin too asks for a jury here.” (underline mine)

In the same case at page 1020, Cairns L.J. had this to say-

“There remains here the special factor that Mr. Levin has been critical of the judiciary in the past in a way which might cause a judge to feel some resentment against him. I do not think there is any substance in this suggestion. In any case where a well-known writer or other public figure is involved a judge may have private feelings, favourable or unfavourable, towards him. If the judge had been the subject of some individual criticism or had had some private disagreement with the litigant he obviously would not hear the case, although even in those circumstances I think the risk or prejudice would be more apparent than real. Every judge by his training is used to putting out of his mind any knowledge or feelings that he has had about a party before he came into court. If a judge could not do that, not only would he not be fit to try the case alone, he would not be fit to direct the jury.” (Underline mine)

The foregoing principles of law may now be applied to the facts of the present application. The affidavit in support of the application shows that the Applicant is the “publisher” of the Concord Press Nigeria Limited which published the libel complained of by the Justices. He is also reputed to be the “owner” of the Company. In law the author, the printer and the publisher may all be liable for a libel in respect of an article published in a newspaper. Consequently, since the Applicant is the publisher of the Concord Press Nigeria

Limited, and that in law publication is the essence of libel, it follows that both the Applicant and the Concord Press of Nigeria Limited are ill law answerable and may be severally and jointly liable for the alleged libel published by the Concord Press of Nigeria Limited. The fact that the Justices did not join the Applicant in the suits as a defendant does not alter his legal liability and responsibility for its publication. Nor does it change the reality of the situation that he published libel against the Justices. B

Furthermore, the evidence shows that in the alleged libel complained of, the Weekend Concord accused the Justices of “gross irregularities” and corruption. Under the circumstances, it is reasonable to infer, as Chief Ajayi. S.A. N. did, that the Justices have grievances against the Applicant as the publisher of the alleged libel. That being the case, I do not think it would surprise anyone if a reasonable man would think it likely or probable that there would be a real likelihood of bias on the part of the Justices if they hear and determine Chief Abiola’s case and particularly if they decide adversely against him. In that event, right-minded persons would go with the impression: “What did you expect? He accused them of corruption!” In other words, reasonable people would have the impression that the Justices were biased and would lose confidence in the administration of justice. Indeed, justice is rooted in confidence and the courts should abstain from doing anything that may erode the root of justice. The courts should enhance confidence in the administration of justice. C D E

Finally, I am satisfied that sufficient evidence has been established from which to form the opinion that a reasonable man would think there would be real likelihood of bias and justice would not appear to him to be done if the Panel consisting of the Chief Justice of Nigeria and Uwais, J. S. C. would hear and determine the application to discharge the order staying bail. These are the Reasons for the Ruling I delivered on 16th May, 1995. F

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#### UWAISJSC

In the ruling which I delivered on the 16th day of May, 1995, granting the application by the Respondent/Applicant, I indicated that I will give my reasons today for allowing the application. I now proceed to do so. G

The Respondent/Applicant was arraigned on the 14th day of July, 1994 before the Federal High Court sitting at Abuja, charged with the following offences: - H

#### “COUNT 1

*That you Chief (Alhaji) Moshood Kashimawo Olawale Abiola (M) of 51 7 Moshood Abiola Crescent, Ikeja, Lagos, on or about 11th day of June, 1994 at Eleganza Sports Complex in Epetedo area of Lagos Island,*

*Lagos, within the jurisdiction of the Federal High Court did form an intention to remove or overawe otherwise than by Constitutional means the Head of State and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, General Sani Abacha, as Head of State and manifested such intentionally overt acts, to wit:-*

**B** (i) Solicited, incited, addressed and endeavoured to persuade and to procure persons to take part unconstitutionally in the removal or overawe of the Head of State and Commander-in-Chief of the Federal Republic of Nigeria.

**C** (ii) Distributed, circulated and advertised a document or prepared speech titled “THE WAY FORWARD” or “ADDRESS TO THE PEOPLE OF NIGERIA” to some persons so that they could cause dissatisfaction amongst the Civil and Military populace in Nigeria in furtherance of the intention referred to in overt act (i) above.

**D** (iii) Addressing a rally at Epetedo area of Lagos wherein you proclaimed yourself President and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria with a view to removing the Head of State and Commander-in-Chief of the Federal Republic of Nigeria, General Sani Abacha; and you thereby committed an offence contrary to Section 412 (i) (a)

**E** (i) of the Penal Code (Northern States) Federal Provisions Act, Chapter 345 Laws of the Federation of Nigeria, 1990 (applicable in the Federal Capital Territory) Abuja, punishable under self same section and triable by this Court.

**COUNT 2**

**F** That you Chief (Alhaji) Moshood Kashimawo Olawale Abiola (M) of Moshood Abiola Crescent, Ikeja, Lagos on or about the 11th day of June, 1994 at Eleganza Sports Complex in Epetedo area of Lagos Island, Lagos, within the jurisdiction of the Federal High Court, did form an intention to levy war against Nigeria or part of the Federation of Nigeria in order by **G** force or constraint to compel the Head of State and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria to change his measures Of counsels and manifested such intention by overt acts, to wit:

**H** (i) Propounded, promised and endeavoured to secure or procure unconstitutionally the restoration of political structures earlier dismantled of disbanded by the Federal Military Government.

(ii) Calling on Nigerians to destroy or demolish vital national institutions, and you thereby committed an offence contrary to Section 412 (1) (b) of the Penal Code (Northern States) Federal Provisions Act, Chapter 345 Laws of the Federation 1990 (Applicable in the Federal Capital Terri-

COUNT 3

*That you cu« (Alhaji) Moshood Kashimawo Olawale Abiola (M) of Moshood Abiola Crescent, Ikeja, Lagos and other persons now at large, on or about the 11th day of June, 1994 at Eleganza Sports Complex in Epetedo area of Lagos Island, Lagos, agreed to do an illegal act, to wit: proclaiming yourself President and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria and to overthrow the Head of State and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, General Sani Abacha and you thereby committed an offence punishable under section 97 of the Penal Code and triable by this Court. “*

The charge was read and explained to the Respondent/Applicant and he pleaded not guilty to each of the three counts. Counsel for the Prosecution then applied for adjournment of the trial for 40 days to enable the prosecution complete its investigation and to procure, interview and present witnesses to the trial Court. Counsel for the Respondent/Applicant made an oral application to the trial court for bail under section 341 subsection (3) of the Criminal Procedure Act, Cap. 80 of the Laws of the Federation of Nigeria, 1990. The application was opposed by the prosecution. The learned trial judge (Mustapha J.), in a considered ruling delivered on the 14th day of July, 1994 refused to grant bail to the Respondent/Applicant and dismissed the application.

Dissatisfied with the ruling, the Respondent/Applicant appealed against it to the Court of Appeal, sitting at Kaduna. The appeal succeeded and it was allowed. The refusal by the trial Court to grant bail was set aside. The Court of Appeal (Abdullahi, Mahmud Mohammed and Opene, JJ.C.A) granted the application in the following terms:-

“The application for bail is therefore granted as follows:-

- (1) The applicant is granted bail in his own self recognizance.
- (2) The appellant should not indulge in any activity that will jeopardize the peace of this country. “

The prosecution, now in turn, appealed to this court against the decision of the Court of Appeal granting bail to the Respondent/Applicant. At the same time, the prosecution applied to the Court below for an order staying the bail pending the determination of the appeal to this court. The application was granted and the bail was stayed.

After 3 months had elapsed without the Appellant/Respondent filing its brief of argument in this Court, as enjoined by our Rules, the Respondent/Applicant brought an application for the appeal to be struck out for want of prosecution. Before the hearing of the application, the Appellant/Respondent had filed the brief of argument and a motion on notice praying for enlarge-

ment of time within which to file its brief and for the Court to deem the brief, it filed with the motion, as properly filed and served. On the 18th day of April, 1995, the Respondent/Applicant filed another motion on notice asking “for an order discharging the order of Stay of Execution pending appeal made by the Court of Appeal on the 5th December, 1994.” On the following day, that is the  
 B 19th day of April, 1995, the appellant/Respondent also filed a motion on notice “praying the Court for an order striking out the Motion on Notice dated the 18th day of April, 1995.”

All these motions were together before this Court (Bello, CJN, Uwais, Ogundare, Ogwuegbu and Adio, J.J.S.C.) on the 20th day of April, 1995; for  
 C hearing. The Court decided to take first the application by the Appellant/Respondent for the enlargement of time to file its brief and for the brief already filed to be deemed properly filed and served. Addresses by counsel were heard and the application was granted as prayed. Consequently, counsel for the Respondent/Applicant applied orally for leave to withdraw the  
 D application for an order to strike out the Appellant/Respondent’s appeal for want of prosecution. The application was granted and the motion was struck out. The Court then indicated to counsel for the parties that the remaining motions would be taken together. Chief Ajayi, learned Senior Advocate then began to move the motion by the Respondent/Applicant. He said inter alia  
 E that the application was for the discharge of the order for stay of execution made by the lower court and that the Respondent/Applicant had filed all appeal to this court against the order. The Court interjected that the motion should have been brought in the appeal against the order of stay of execution (ie. Suit No. SC. 246/1994) and not in the present appeal (Suit No. SC.214/ 1994)  
 F which concerns bail. Learned Senior Advocate, in reply to the Court’s observation, said that he was served with the motion filed by the Appellant/ Respondent on the 19th day of April, 1995, that is a day before the hearing, and that he needed time to study it. Mr. Onwugbufor, learned Solicitor General of the Federation, did not object to the motions being adjourned. We therefore,  
 G adjourned the motions to the 18th day of May, 1995. The date was, later brought forward to the 16th day of May, 1995. The hearing of the substantive appeal against the granting of bail by the lower court was also fixed for the 1st day of June, 1995.

When the Court came to hear the adjourned motions on the ad-  
 H journed date, Chief Ajayi drew our attention to yet another motion on notice which he filed a day earlier, that is on the 15th day of May, 1995. Learned Senior Advocate indicated that the matter raised in the new motion was funda-

mental and that it ought to be resolved before the other motions pending

before the Court were proceeded with. His request was granted. The motion reads in part as follows:-

“TAKE NOTICE that this Honourable Court will be moved on the ..... day of May, 1995 or so soon thereafter as Counsel can be heard on behalf of the RESPONDENT for an order that the Court sitting to hear all matters in this suit be reconstituted so as to exclude herefrom the following Justices of the supreme Court viz:

The Honourable Justice Mohammed Bello, Chief Justice of Nigeria.

The Honourable Justice Uthman Mohammed, Justice of the supreme Court

The Honourable Justice Abubakar Bashir Wali, Justice of the Supreme Court

The Honourable Justice Idris Legbo Kutigi, Justice of the Supreme Court.

The Honourable Justice Emmanuel Obioma Ogwuegbu, Justice of the Supreme Court.

The Honourable Justice Muhammadu Lawal Uwais, Justice of the supreme Court

The Honourable Justice Salihu Modibbo Alfa Belgore, Justice of the Supreme Court

AND FURTHER TAKE NOTICE that the grounds of this application are as follows:-

(i) This appeal arises out of the grant of bail to the Respondent by the Court of Appeal sitting at Kaduna.

(ii) The Respondent is the Chairman and Publisher and Controls majority shareholding interest in Concord Press Nigeria Newspaper known as Weekend Concord.

(iii) One of the Respondent’s Wives Alhaja Doyin Abiola is the Managing Director of Concord Press Limited.

(iv) Each of the Chief Justice and the Justices of the Supreme Court referred to herein is currently maintaining an action for libel claiming N50 G million against Weekend Concord for publication of an article alleging gross improprieties against them and for which the Defence on the Record is inter alia Justification.”

The motion is supported by an affidavit sworn to by one Alhaji Muraino Ojeyemi Akinteye, who is Personal Secretary to the Respondent/Applicant. Paragraphs 4 to 9 inclusive of the affidavit read:-

“4. On the 5th of January 1994 the Honourable Mr. Justice Mohammed Bello Chief Justice of Nigeria commenced an action against the Concord Press Nigeria Ltd in the Ikeja High Court in Suit No. JD/24/94 entitled the Honourable Mr. Justice Mohammed Bello Versus Concord Press Nigeria



*Ltd. A certified True Copy of each of the Writ of Summons and the Statement of Claim therein is now produced and shown to me marked Exhibits "MOA 1 & MOA 2".*

5. The Respondent owns and/or controls over 90 of the shares in Concord Press Nigeria Ltd and he is generally reputed both in Nigeria and B overseas to be the owner of Concord Press Nigeria Ltd.

6. Trial in suit No. ID/24/94 has already commenced and a considerable amount of evidence which has been given world-wide publicity has already been given in the case on matters which affect the claims of all the Justices of the Supreme Court (sic) listed in the application before the Court.

C 7. The trial of suit No. ID/24/94 is seen by the average Nigerian as a claim by the Chief Justice of Nigeria against the Respondent.

8. I know as a fact that there are pending before the same Court trying ID/ 24/94 seven other virtually identical cases in which, but for one single item all the claims and the statements of claim are identical with that instituted by D the Honourable Justice Mohammed Bello and the particulars of the said suits are as follows:-

ID/30/94 Hon. Justice Uthman Mohammed v. Concord Press Nig. Ltd.

ID/31/94 Hon. Justice Sylvester Onu v. Concord Press Nig. Ltd

ID/33/94 Hon. Justice Abubakar B. Wali v. Concord Press Nig. Ltd

E ID/34/94 Hon. Justice Idris Legbo Kutigi v. Concord Press Nig. Ltd

ID/35/94 Hon. Justice Emmanuel O. Ogwuegbu v. Concord Press Nig. Ltd

ID/36/94 Hon. Justice Mohammed L. Uwais v. Concord Press Nig. Ltd

ID/37/94 Hon. Justice Salihu M. Alfa Belgore v. Concord Press Nig. Ltd

F It will be in the best interests of the administration of Justice in Nigeria if the Justices of the Supreme Court who have sued the Respondent to court for substantial damages which, if awarded will erode the Respondent financial viability, are not placed in a position to decide issues relating to his personal liberty. “

G In moving the application, Chief Ajayi pointed out that the name of Honourable Justice Sylvester Umaru Onu, Justice of the supreme Court had mistakenly been omitted from the list on the motion paper. He submitted on the authority of Rothermere & Ors. v. Times Newspapers & Ors. (1973) 1 ALLE.R. 1013 at pp. 1017Fand 1020B, which he had cited, that the Justice H listed in the application ought not to sit in judgment over the application of the Respondent/Applicant before this Court. He stated further that to lawyers, by the decision in Salomon v. Salomon&Co. Ltd. (1897) A.C.22, the Week-end Concord, being a company, is different from the Respondent Applicant.

However, no person in Nigeria looks to such situation as devoid of personal interest. He submitted further that the Respondent/Applicant is the publisher, chairman and chief executive of the Weekend Concord and that it is common knowledge that the Respondent/Applicant had made personal appearances in Court at the hearing of the case brought by the Chief Justice of Nigeria against the Weekend Concord. Learned Senior Advocate said that the arrangement being sought by the Respondent/Applicant is administrative in nature, such that the Court to hear his application would be constituted to exclude the Justices of the Court suing the Weekend Concord. He pointed out that as counsel practising in this court, he was aware that if the Justices concerned are withdrawn from sitting in the case, there would not, for the time being, be sufficient Justices to constitute the Court as provided by the Constitution. He described the situation as temporary, since the number of Justices prescribed for the Court by the Constitution had not been made up in appointments. Learned Senior Advocate referred to page 276 of Judicial Review of Administrative Action, 4th Edition, by De Smith and finally submitted that the libel by the Weekend Concord against the Justices of the Supreme Court concerned is a serious libel.

In his address, the learned Solicitor-General, submitted that the Concord Press Nigeria Ltd is, in law, a separate entity from the Respondent/Applicant and that any judgment given against the Company would not in any way affect the Respondent/Applicant. Therefore, the interests of the latter and the company are not coterminous. He argued that the only occasion when the Justices should not sit on a case is when there is a likelihood of bias. Learned Solicitor-General submitted that the minds of the Justices concerned in the case would not be affected merely because of the libel actions they brought against the company. He cited in support the decision of the Court of Appeal in Umenwa v. Umenwa, (1987) 4 N.W.L.R. (Part 65) 407 at pp. 415-416. He argued further that the likelihood of bias would only arise if there was an appeal in any of the libel cases to this Court, if the Justices concerned happened to be members of the panel that constituted the court to hear the appeal. But then, he said, the Respondent/Applicant is not a party in the libel cases against the company since the company is different from him. He contended that what matters in the administration of law is what the law provides and not what the ordinary people think. He finally submitted that the affidavit in support of the motion by the Respondent/Applicant is not sufficient for the Court to determine what the ordinary man in Nigeria thinks about the libel actions.

In reply, Chief Ajayi said that he did not allege bias by the Justices against the Respondent/Applicant but grievance against him because he is an adversary to them. Learned Senior Advocate was at pains to stress that hl

did not accuse the Justices concerned of bias against the Respondent/ Applicant.

Now, it was Bracton who wrote that a Judge was not to hear a case if he was suspected of partiality because of consanguinity, affinity, friendship or enmity with a party, or because of his subordinate status towards a party or  
B because he was or had been a party's advocate - See De Legibus, f. 412. Also natural justice demands, not only that those whose interest may be directly affected by an act or decision should be given prior notice and adequate opportunity to be heard, but also that the tribunal should be disinterested and impartial. It is these principles, I believe, that inspired the enactment of Sec-  
C tion 33 subsection (1) of the 1979 Constitution of the Federal Republic of Nigeria, which provides -

“33 - (1) *In the determination of his civil rights and obligations, including any question for determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable*  
D *time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.* “

It is clear from the foregoing that the “independence” and “impartial-  
ity of a court are part of the attributes of fair hearing. The requirement of  
impartiality is intended to prohibit a person from deciding a matter in which he  
E has either pecuniary or any type of interest. Such other interest may arise from his personal relationship with one of the parties to the case or may be inferred from his conduct or utterances during the hearing of the matter. Hence the remark per Lord Hewart, CJ in The King v. Sussex Justice's Ex parte Mc Carthy,  
(1924) I K.B. 256 at page 259 that it is “not merely of some importance but is of  
F fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to have been done.”

Although Chief Ajayi has refrained, out of reverence, from saying that the Justices concerned are likely to be biased against the Respondent/  
G Appellant the import of the motion, in particular the affidavit in support thereof as well as his oral address, is unmistakably that the likelihood of bias exists if the Justices that have taken out writs against the Concord Press (Nig.) Ltd. should sit over the present case. I think learned Solicitor-General was right when he stated in his reply that the issue involved in the motion rests on  
H likelihood of bias.

The courts have laid down many times, where the conduct of a judge or tribunal is impugned, that they are not concerned with the question whether an adjudicator was infact biased-See Allison v. G.M.C. (1894) IQ B 750 at page

Fed. Rep. of Nigeria v. Abiola (1995) 7 KLR Uwais JSC 1551 758; Rv. Queen's County Justices, (1908) 2 I.R. 285 at page 306; Rv. Halifax Justices, ex parte Robinson, (1912) 76 J.P. 233 at pp. 234-235; R v. Caernarvon Licensing Justices, ex parte Benson, (1948) 113 J.P. 23 at page 24 and Rv. Barnsley Licensing Justices, (1960) 2 Q.B. 167 at page 187. The reason for this attitude of the courts is that it would be unseemly for the court to purport to pry into the state of mind of any judicial officer - see 47 Law Quarterly Review at pp. 407. Where even the evidence adduced has pointed strongly to the inference that an adjudicator was in fact biased, the courts have confined themselves to determining whether a likelihood of bias has been established. The question is always answered by inference drawn from the circumstances.

The test of a real likelihood of bias which the courts have applied is based on the reasonable man who is fully apprised of the facts involved. Thus in the case of Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon & Ors. (1968) 3 All E. R. 304, Lord Denning, M.R. remarked as follows on page 310 thereof:-

*".....in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it may be, who sits in judicial capacity. It does not look to see if there was real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: See Rv. Huggins(1895-99) All E.R. Rep. 914, (1895) 1 Q.B. 563; R v. Sunderland Justices.(1901) 2 K.B. 357 (It page 373 per Vaughan Williams, L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: See R v. Camborne Justices ex parte Pearce. (1954) 2 All E.R. 850; (1955) 1 Q.B. 41 at pp. 48-51; R v. Nailsworth Justices ex parte Bird. (1953) 2 All E. R. 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, infact, favour one side unfairly. Suffice that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence, and confidence is destroyed when right-minded people go away thinking: "The judge is biased." (underlining mine).*

From all the foregoing, it is clear to me that it is safer and more appropriate for me not to continue to participate in the hearing of this case since the Respondent/Applicant has raised the objection. Suppose I hold the contrary view, and decide to continue to sit on the case; I would still be caught

by the dictum of this court per Patayi-Williams, J.S.C. (as he then was) in Kujore & 3 Ors. v. Mrs. Otubanjo, (1974) 10 S.C. 173 at page 181, where he said-

*“Adverting once again to the present case, there is no doubt in our mind that, in the absence of an immediate retort from the learned President at the time the allegation, which he must know to be true, as made, any reasonable person making such a factual complaint would conclude that the learned President for some inexplicable reason, was bent on hearing the case in Spill of the allegation. Such a person would undoubtedly also conclude that the President would not be impartial and would likely be biased against him. We do not think that any further proof of likelihood of bias is necessary.”*

It is for these and the reasons ably given by my learned brother the Chief Justice of Nigeria, the draft of which I had the privilege of reading in advance, that I too agreed on the 16th day of May, 1995 that the application should be granted and that the Chief Justice of Nigeria and my humble self should be disqualified from sitting further on this case. And also that all matters in the case should be adjourned sine die until a competent panel is constituted to hear the case.

I have deliberately refrained from making any reference to or order in this ruling on the competence of my other brothers mentioned in the application for disqualification. This is because they are not members of this panel nor are they put on notice of this application by the Respondent/Applicant. The doctrine of audi alteram partem applies. They cannot be condemned without being given the opportunity to be heard or being heard.

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### OGUNDARE.JSC

On 16th May 1995, I granted the application of Chief M.K.O. Abiola the respondent in this appeal for an order that the Court to hear all matters in this appeal be reconstituted so as to exclude some named Justices of this Court. I indicated at the time that I would give my Reasons later.

I have had the advantage of a preview of the Reasons for Ruling of my learned brother Bello CJN just delivered. I agree entirely with his reasoning which I hereby adopt as mine. I have nothing more to add.

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### ADIO JSC

When this application came before this court on the 16th May, 1995, I granted the order that the court sitting to hear all matters connected with this appeal be reconstituted so as to exclude the Honourable Justices of this court

named therein. I then indicated that I would give my reasons today, the 18th of July, 1995.

I have had the opportunity of reading, in draft, the ruling just read by my learned brother, Bello, C.J.N., and I agree entirely with his reasoning and conclusions.

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**IGUHJSC**

On the 16th May, 1995, I granted the respondent's application for an order that the court sitting to hear all matters connected with this appeal be reconstituted so as to exclude the Honourable Justices of the supreme Court therein named. I then indicated that I would give my reasons for so doing today. C

I have since had the privilege of reading in draft, the lead reasons for ruling just delivered by my learned brother, the Hon. the Chief Justice of Nigeria.

I agree entirely with the reasoning and conclusions therein and adopt them as mine. D

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