INTRODUCTION

The importance of any adjudicatory process in a democracy, such as The Gambia cannot be over emphasized. It is in response to this importance that principles of fairness, impartiality, unbiased decision making process coupled with expeditious trials are all now incorporated into written constitutions such as we have in The Gambia, Ghana, Nigeria just to mention a few.

In this presentation, I will commence with the philosophical underpinnings of the concept of bias or partiality in the decision making process, and the tests that are used to determine bias by the Courts. For example what constitutes disqualification of an adjudicator, the hostility and personal attributes exhibited by the Judge, family or professional or proprietary interest that the Judge is alleged to have in the matter before him. I will also consider circumstances where the allegation of bias will not operate, i.e. waiver or the principle of necessity and finally the conclusion.

Section 24 (1) of the Constitution of the Republic of The Gambia 1997 (1) provides as follows:-

“Any court or other adjudicating authority established by law for the determination of any criminal trial or matter, or for the determination of the existence or extent of any civil right or obligation, shall be independent and impartial, and”.

Section 24 (1) (b) of the same Constitution provides also as follows:-

“Where proceedings are commenced for the determination or the existence of any civil right or obligation, the case shall be afforded a fair hearing within a reasonable time” (2)

There are corresponding and similar provisions in the Constitution of the Republic of Ghana, 1992 as follows:-

Article 19 (1) provides as follows:-

“A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court”. 

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Article 19 (13) also provides thus

“An adjudicating authority for the determination of the existence or extent of a civil right or obligation shall, subject to the provisions of this Constitution, be established by law and shall be independent and impartial, and where proceedings for determination are instituted by a person before such an adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

Furthermore, articles 125 (1) and 127 (1) of the Constitution 1992 of the Republic of Ghana guarantee the absolute independence of the judiciary, which is subject only to the Constitution 1992.

From the above constitutional provisions, it is clear and apparent that the philosophical underpinnings of the Constitutions of the Republic of The Gambia and Ghana in so far as they relate to the adjudicatory authority of the Courts established under the respective Constitutions or other laws are founded on the following principles:-

i. Independence of the decision making process
ii. Impartiality of the judicial system,
iii. Fairness of the system and
iv. Early and or expeditious trial

What shall be noted is that, it is now the norm that determination of all disputes, both civil and criminal between individuals within a state, or between the state as against individuals or between citizens of a state are dealt with by recognised judicial institutions created under the various constitutional and legal establishments for that purpose.

In the Republic of The Gambia, (3) judicial power is vested in the courts created under the Constitution and the said power shall be exercised by the courts according to the jurisdictions conferred on them by law.

It is noteworthy that, section 120 (3) (4) specifically provides as follows:

“In the exercise of their judicial functions, the courts, the judges and other holders of judicial office shall be independent and shall be subject only to this Constitution and the law, save as provided in this
The above constitutional provisions also reiterate the absolute independence of the courts and the holders of any adjudicatory functions created by or under the Constitution of the Republic of The Gambia.

Section 120 (1) \(^{(5)}\) lists the following as the courts duly established by and under the Constitution. These are:

i. The Superior Courts comprising of the following:
   a. The Supreme Court
   b. The Court of Appeal
   c. The High Court and the Special Criminal Court

ii. Lower Courts
   a. Magistrate Courts
   b. The Cadi Courts
   c. District Tribunals
   d. Such other lower courts and tribunals as may be established by an Act of the National Assembly \(^{(6)}\)

The above then are the courts that have been constitutionally established in The Gambia and others established by and under laws passed by the National Assembly.

It is very crucial that for any adjudicatory system to have the semblance of respectability and authority that courts are bound to have, the public must have absolute faith, trust and confidence in the individuals who manage the institutions of state to adjudicate disputes, i.e. the courts as mentioned and listed supra. There should therefore be no element or trace of bias or partiality whatsoever inherent either directly or indirectly in the conduct, statement, action, innuendos of the Judges, Magistrates or holders of any judicial and or adjudicatory function in the performance of their duties. The sanctity and legitimacy of the entire judicial system depends upon how this delicate issue of “Bias or Partiality” is handled whenever such allegations are made, treated and resolved.
This is because, there is the need for the citizenry or the general public to consider the judicial system as really transparent in order to evince confidence in the public to access the courts on a daily basis to settle their disputes whenever these arise and to also accept the decisions of the courts.

Bias in the context in which it has been stated in the topic has been defined in the case of *R. V. Queens County JJ* (7) *per* Lord O’Brien C.J as follows:)

“an operative prejudice, whether conscious or unconscious”

What then is prejudice - Prejudice has been described as an opinion or judgment formed before hand without due examination based on considerations other than on merit. It is thus to be seen that, the rule against bias is not only to prevent the distorting influence of actual bias but also and more importantly to preserve and protect the integrity of the decision making process. This can only be achieved if the decision maker is insulated against the occurrence of circumstances that suggest the existence or appearance of bias, i.e. the operation of prejudice. It is perhaps pertinent at this stage to refer to the locus classicus dictum of Lord Hewart CJ, in the case of *R. V. Sussex JJ, ex-parte Mc Carthy* (8) wherein he stated that

“Justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

The Gambian Court of Appeal in the consolidated cases of *HALIFA SALLAH & 2 OTHERS vrs THE STATE – CORAM: A.K. Savage JCA* presiding, as he then was, *E.A. Agim JCA* as he then was, and *N.A. Izuako Ag. JCA*, dated 21st December, 2005 soon to be reported in Gambia Law Reports (2002 – 2008) Vol.II 504 at 530 where Savage JCA as he then was, quoting ESO JSC in the Nigerian case of *AKINFE v. THE STATE (1988) 3 NWLR (part 85) 729* also described bias as the showing of an act of partiality, continuing, the Court held, as follows:-

“The ordinary grammatical meaning of bias is slant, personal inclination or preference, a one sided inclination. In charges of bias, the integrity, honesty, or fidelity of purpose and the Judges traditional role of holding the balance in the matter are questioned. He is branded or seen as one who leaves his exalted, respected and traditional arena of impartiality to descend unfairly against one of the parties outside all known canons of judicial discretion. The Judge is said to have a particular interest, a proprietary interest
which cannot be justified on the scale of justice as he parades that interest recklessly and parochially in the adjudication process to the detriment of the party he hates and to the obvious advantage of the party he likes.”

The above then sums up the reason why decision makers should strive to ensure that their conduct in all its totality does not give rise to the suspicion or real suspicion of likelihood of bias or partiality in any form in the decision making process.

In this write up, I will adopt a three fold approach in determining what consideration goes into the ascertainment of whether there has been bias or not in the judicial decision making.

1. The Test of Bias

These will range from that of “reasonable suspicion” to “probability” of bias, or “real dangers” as was recently held in the case of R. V. Gough (9).

2. Situations which will normally disqualify a decision maker for bias.

3. Situations which will not normally disqualify a decision maker for bias.

For examinations of the above criteria, I have combed the Law Reports of The Gambia, and come across decision of Agnes Dordzie J, in the case of the “O” Corporation Limited vrs Kabo Air Ltd and Anr (10) and the Gambia Court of Appeal decisions in HALIFA SALLAH & 2 OTHERS vrs THE STATE, already referred to supra and hereafter referred to simply as the HALIFA SALLAH cases.

I will therefore draw extensively from the English and Ghanaian authorities, and where appropriate, other common law jurisdictions.

1. The Test of Bias

It has been stated long ago in the celebrated English case of R vrs Rand, (11) that nobody may be a Judge in his own cause per Blackburn J,

“Any pecuniary interest, however small, in the subject matter of the inquiry, does disqualify a person from acting as a Judge in the matter”.

The same point was made by Lord Campbell in the case of Dimes vrs Proprietors of Grand Junction Canal (12).
There is the real danger that whenever the decision maker has a pecuniary or proprietary interest in the outcome of the proceedings, public confidence in the decision making process will be shaken, and such a decision should not be made to stand.

Various tests have been applied, such as:

a. **Reasonable Suspicion of Bias**

Reasonable suspicion of bias such as was expounded in the case of *R vrs Sussex JJ ex-parte McCarthy* already referred to supra \(^{(13)}\) where it was stated as follows:-

> “nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice”.

On this issue see also the case of *Metropolitan Properties Co. FGC Ltd vrs Lannon* \(^{(14)}\) where Lord Denning stated as follows:

> “The court 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”.

b. **Real Likelihood of Bias**

This can refer to either the possibility or probability of bias on the part of the decision maker. See the case of *R vrs Barnsley Licensing JJ ex-parte Barnsley and District Licensed Victuallers Association* \(^{(15)}\).

This case establishes the principle of whether the reasonable man conceives of the allegation to be bias or not, and also what the attitude of the courts is of the allegation, this will normally be based on the impression the courts have formed of the circumstances surrounding the allegations of bias. Quite often, this will be based on case by case analysis.

However, it should be borne in mind that, it is quite desirable for all judicial or quasi judicial decisions to be above suspicion, just as Caesars wife was supposed to be.

This is because any slightest derogation from this is likely to erode the confidence that the public need to have in the judiciary or the decision making process for that matter.
The learned authors *De Smith, Woolf and Jowell* (16) (in their invaluable book) could not have summarised this scenario any better when they wrote thus:-

“*The various tests of bias thus range along a spectrum. At the one end, a court will require that, before a decision is invalidated, bias must be shown to have been present. At the other end of the spectrum, the court will strike at the decision where a reasonable person would have infected the decision. In between these extremes is the “probability of bias” (this being closer to the “actual bias” test) and the “possibility of bias” (this test being closer to that of reasonable suspicion).*

The application of these tests were seen at play in the case of *R vrs Gough* (17) already referred to supra. In the said case, the House of Lords considered the test in relation to an allegation of bias on the part of a juror in a criminal trial. This was a case where the appellant was indicted on a single count of conspiring with his brother to commit robbery. The brother had been discharged, but after conviction it was discovered that the brothers neighbour had served on the jury.

The House of Lords, considered all the authorities and held that a direct pecuniary or proprietary interest always disqualified the decision maker. Outside of that category, it was held that the correct view is “*whether in the circumstances of the case the court considers that there appeared to be a “real danger of bias”*. The House of Lords concluded that in such a case, the decision should not be allowed to stand. The House of Lords applied the “real likelihood” of bias test and soundly rejected the “reasonable suspicion test”.

The House of Lords further held that:

1. The same test should be applied in all cases of apparent bias whether concerning justices, members of inferior tribunals, arbitrators, justices, clerks or jurors.

2. That the real danger test should be applied from the point of view of the court and not from the point of view of the reasonable man.

At page 667-668 of the report, (18) (see page 527 of De-Smith etc) Lord Goff stated thus:-

“*Since however the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man, and in the results it is difficult to see*
what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court here personifying the reasonable man.”

The Gough decision has to be understood on the basis that it is incapable of being applied generally to all situations. As was stated by me earlier on, every case must be considered on a case by case basis but not mechanically as if one was acting as a robot.

The Ghana Supreme Court, in the case of Republic vrs High Court, Denu, ex-parte Agbesi Awusu II, Applicant (No. I) Nyonyo Agboada (SRI III) (Interested Party) referred to as the ex-parte Agbesi Awusi Case (19) held inter alia that

“Whether there existed a real likelihood of bias or apparent bias was an issue of fact determinable on a case to case basis”.

The same point was also re-emphasised by Georgina Wood JSC (as she then was) in the case of Republic vrs High Court, Kumasi, Ex-parte Mobil Oil (Ghana) Limited – Applicant, (Hagan Interested Party) (20) where she stated thus:-

“In an application for an order of prohibition on grounds of real likelihood of bias on the part of the trial judge, each case must be determined on its own peculiar merits. Therefore, in typical common law fashion, it would be dangerous, if not impossible, to attempt a closed list of all the factors which will give rise to a real likelihood or possibility or danger of bias.”

It is therefore very important for all class of adjudicators to recuse themselves if there is in existence a relationship between them and the party or counsel capable of being construed as a real likelihood of bias.

c. Disqualification For Bias

In view of the debilitating and harmful nature/effect of a proven allegation of bias in the decision making process by an adjudicator, the test discussed supra has to be properly evaluated and assessed in order for a dispassionate decision to be arrived at.
This is because, the worst thing that should happen to a litigant whose case has been decided by an adjudicator is for him to learn later on that the said decision was given by the adjudicator because of:

a. A pecuniary interest or advantage that he stands to benefit from the case.

b. Has proprietary interest in the subject matter of the dispute.

c. Is related by blood, marriage, professionally or by business to one of the parties and has refused to make full disclosures of the said interests.

The rule appears to have been strongly stated in the *R vrs Gough* case that no person is qualified to adjudicate in any judicial proceedings if he stands to derive a pecuniary benefit from the said decision. The rule applies irrespective of the exalted position of the judicial officer, in this jurisdiction, it may be the Honourable Lord Chief Justice, Justices of the Supreme, Appeal and High Courts up to the lower levels of the Gambian Judiciary.

In Australian cases, it was held that, the pecuniary interest of a judge’s spouse in an issue does not disqualify the judge from adjudicating, though it will be a different matter if the circumstances give rise to a real likelihood of bias. (See case of *R. vrs Industrial Court* citing the unreported passage in *Bank of New South Wales vrs Commonwealth*). For example, in the case of *R vrs Mulvihill* it was held that

“a Judge who had a shareholding in a bank robbed by the appellant was not disqualified from trying this case.”

The Ghana Supreme Court in the *Republic vrs High Court, Denu, Ex-parte Agbesi Awusu II (No. I) Nyonyo Agboada (SRI III) (Interested Party)* was called upon to make a determination as to how a charge of bias or real likelihood of bias had to be established.

**Facts**

In view of the profound, exemplary and illustrative nature of the facts of this case and its relation to the topic being handled, I am minded to state in extenso the facts of the case in order to enable the principles of law decided by the Supreme Court to be understood in proper context.

On the 5th of March, 2003 the Interested party therein brought an action against the Applicant therein claiming a declaration that, he the Interested
Party and not the Applicant was the Acting President of the Anlo Traditional Council, a gathering of Traditional Rulers in a local Ghanaian Community. Whilst that action was pending before the very forum, the Applicant therein convened a meeting of the Anlo Traditional Council at which the very issue for determination of who was the competent person to be appointed as the Acting President of the said Traditional Council was discussed.

After the said meeting, the Applicant caused a publication in a wide circulation daily Newspaper, Daily Graphic to report on the outcome of the meeting.

Alleging that the publication at the instance of the Applicant therein amounted to an interference with the due administration of Justice and that such conduct amounted to a showing of contumacious disrespect of the Judicial Committee of the Anlo Traditional Council, (the body set up under law to adjudicate such disputes in Ghana), the Interested Party applied to the High Court, Denu presided over by Justice Woanyah, for contempt against the Applicant therein, and another person one C. K. Galley.

While the contempt case was pending before him, the High court Judge before whom the case was pending accepted an invitation to attend a meeting of the Anlo Traditional Council at the instance of the Interested Party at which the very issues to be discussed were the issues pending before him.

Even though, the Judge was reputed to have left the meeting before the discussions took place at the Anlo Traditional Council, the Applicant therein brought proceedings before the Supreme Court for the orders of Prohibition and Certiorari directed at the High Court, Denu presided over by Woanyah J, on grounds of real likelihood of bias. One of the allegations of bias made against the trial High Court Judge was that, after the meeting of the Traditional Council to which the Judge was invited, the Judge met with and discussed the contempt application pending before him with the District Chief Executive, the political administrator for that administrative area. The Judge was alleged to have expressed adverse views about the Applicant’s chances of winning the case pending before him to the District Chief Executive, who also sent a report on their discussions to the Regional Minister, (the Political Head of the larger administrative area).

It was also alleged in support of the allegation of real likelihood of bias against the trial Judge that the Judge had heaped abusive language on applicant’s counsel both in open court and in his ruling in respect of a motion by the Interested Party for the transfer of the contempt application pending before
the Judge. The Judge in open court berated counsel for the Applicant for allegedly telling lies about him the Judge in a petition submitted to the Chief Justice. The Judge admitted his meeting with the District Chief Executive and that he had indeed made negative comments on the Applicant’s status as the Acting President of the Anlo Traditional Council.

The Supreme Court, coram, Bamford Addo JSC, presiding, Atuguba JSC, Wood JSC (as she then was), Brobbey and Dr. Date-Bah JJSC held unanimously granting the application for the order of prohibition but refusing the application for certiorari as follows:-

“a charge of bias or real likelihood of bias must be satisfactorily proved on balance of probabilities by the person alleging same. Whether there existed a real likelihood of bias or apparent bias was an issue of fact determinable on a case by case basis. Furthermore, where a trial Judge had fore knowledge of the very issues of fact to be determined, that would disqualify him from sitting. In the instant case, the applicant had, on the evidence, satisfactorily proved that there was a real likelihood of bias on the part of the trial Judge who should thus be prevented from adjudicating the contempt application pending before him.” (25) (Page 866, holding I)

The facts of this case and the decision as well as the opinions delivered by the learned Justices are significant for many reasons:

1. It established very clearly the principle that allegations of bias or real likelihood of bias have to be considered on a case by case basis. This lends support to the earlier statement by me that the principles decided in the R vs Gough case (26) are incapable of being applied mechanically to all manner of cases.

2. The test applied in the case was the real likelihood of bias, and not the reasonable suspicion of bias.

3. Judge’s, Judicial Officers, adjudicators of any description like Caesar’s wife should strive to live above reproach. They should not do anything which has the tendency to bring their high and exalted office into disrepute.

4. An adjudicator, Judge and indeed anybody concerned with making a determination affecting the rights or interests of parties must
endeavour to use polite, temperate, civil and courteous language. This is to prevent the parties before the court or adjudicator from losing confidence in the dispassionate resolution of the dispute before them. Indeed, Bamford Addo JSC, in the case under discussion stated in her opinion as follows:— (27)

“Respecting the allegations of insults heaped on counsel and the applicant, I also find such evidence in the Judge’s rulings and agree with the applicant that the suit before the Judge cannot be judged dispassionately in view of the apparent displeasure revealed in his ruling against the applicant and his counsel”.

Commenting on the exchanges between counsel and the Judge Dr. Date-Bah JSC (28) (on pages 884 – 906) also stated as follows among others:-

“Independently of a finding of bias or a real likelihood of bias on the facts of this case, it would be possible to hold, on the authority of (Budu vrs Caesar [1961] GLR 176 at 177) that in the light of the acrimonious exchanges between counsel and the learned Judge in this case, a fair trial involving both of them is unlikely.”

As a matter of fact, Dr. Date-Bah JSC could not have hit the nail better when he stated again thus: (29) (See pages 884-906)

“Rather, this case falls within the second formulation in the Pinochet case, (R. V. Bowstreet Metropolitan Stipendiary Magistrate, Ex-parte Pinochet Urgate (No. 2) 2000 I. A. C. 119 H.L) namely “where a Judge is not a party to the suit and does not have a financial interest in the outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial.”

It can thus be seen that the duty cast on Judges or adjudicators generally is a very onerous responsibility that has to be discharged dispassionately. The law has thus been firmly settled in Ghana long ago in the locus classicus decision of the Ghana Court of Appeal sitting as the Supreme Court in the case of Attorney-General vrs Sallah (30) (1970 CC. 54, and 1970 G & G 487) where Amissah JA, delivering the judgment of the court stated as follows:-

“What then is the law on disqualification on the ground of bias? We think that bias in a judge disqualifies him from adjudicating upon a case. And in this regard the law recognises not only actual bias as
a disqualifying factor but a real likelihood of bias as well. The objection on this motion is not based on actual bias and indeed the learned Attorney-General was at pains to point out that nobody has said that the Judges involved were in fact biased. His case is that from the facts before the court, it ought to hold that, there is a likelihood of bias.” In determining the question of bias the courts have held that pecuniary or proprietary interest, however small, in the subject matter of the dispute disqualifies a judge. The law assumes bias in such a case”.

Let me now go back to the Gambian case already referred to supra.

In the Gambian case of The O Corporation Ltd. vrs Kabo Air Ltd. and Anr (31) (already referred to supra, Dordzie J, held at page 354 as follows:)-

“It is a legal principle well established that under the common Law that objection to panel or a judge presiding over a case is taken before hearing commences and not after judgment had been delivered. If it becomes necessary to take such objection post facto then it is required of the applicant to demonstrate the area of the decision that is beclouded by bias”.

The facts in the above case are as follows:- The applicants were defendants in the judgment delivered in favour of the plaintiff. Dissatisfied they appealed against same and applied to the court for a stay of execution of the judgment. The 1st defendant judgment debtor applicant filed a further application before the court praying that the court recuses itself from hearing the application for stay on the grounds of bias, in that, the presiding judge had sat on a panel that investigated alleged malpractices in the Sheriff department of the court. Based on the above facts, it will be seen that the decision of Dordzie J was correct and is based on the test of “real likelihood of bias”.

The decision is also significant in the sense that, there was no proof of any pecuniary or proprietary benefit that the judge was alleged to have gotten or will get from the decision to be given in the case.

Thirdly, it has to be noted that, the decision will prevent frivolous and mischievous applications from being made against judicial officers which have the tendency of permitting litigants to choose their own convenient forum.
Such a practice should be frowned upon and deprecated. From a perusal of the judgment of Dordzie J, it would appear that she relied on some Ghanaian decisions notably:

i. Agyekum vrs Asakum Engineering Construction Ltd (32)

ii. Asare and others vrs The Republic (33)

iii. Amponsah vrs Minster of Defence (34)

In the Amponsah vrs Minster of Defence (35) case, already referred to, the appellants, who had been detained under the Preventive Detention Act, 1958 appealed against the dismissal of their application for a writ of habeas corpus by the Divisional Court presided over by (Simpson J). At the hearing, counsel for the appellants objected to the court being constituted with Van Lare JA on the ground that he had previously sat as a presiding member of the court which had disposed of an appeal raising the same issues as the present one. It was held by the Court of Appeal coram Korsah C.J, Van Lare JA and Ollennu J, as follows:-

“The fact that a judge had sat as a member of a court which adjudicated that the court had no jurisdiction in a particular class of case, did not disqualify him from sitting as a member of a court where the same issue of law was raised as a preliminary objection in an appeal coming within the same class.”

It would appear from the facts and decision in the above case that quite clearly the allegation of bias could not have been brought and sustained under the ambit of any of the tests discussed supra.

In that respect therefore, the decision is sound in law as a contrary opinion would have had the tendency of disqualifying judges who have expressed opinions and decided previous cases before them from handling fresh cases of similar nature. If such were the rule, then judges would have to be appointed for every fresh case that the same issue of law had been decided by the court in previous cases. This will even make nonsense of the principle of stare decisis, or judicial precedent. In the case of Asare and others vrs The Republic (36) the Court of Appeal, dismissed an allegation that a panel member of the Court had expressed an opinion in an enquiry held by him and therefore had formed a prejudicial opinion against the appellants who were also convicted in the same criminal transaction.
In over ruling the objection the court held, “that no ordinary man with average intelligence could possibly think that a statement that the second appellant was convicted of a gigantic fraud was tantamount to an opinion that he was rightly convicted of a gigantic fraud”.

In the Agyekum vrs Asakum Engineering case, already referred to supra, the Ghana Supreme Court, held on this issue of judicial bias based on acquaintance as follows:

“Where the issue of a judge’s previous acquaintance with a matter did not impinge seriously on the matter in controversy, the courts, as a matter of courtesy, relied on the parties to object to the participation of the judge in the matter. And where the concession was made, the judge declined jurisdiction only in furtherance of the principle of justice being seen to be done. Consequently, where no objection was made, there was an assumption and clear understanding that the judge’s previous acquaintance with the matter on the bench could not impair his judicial balance.” per Francois JSC at 650.

What then are the facts in the HALIFA SALLAH Cases? The facts as appearing in the head note of the case are as follows:-

The State, prepared, settled and filed information, charging the accused persons with various offences therein contained. On the day that they were arraigned before the High Court presided over by M.A. Paul J, as he then was, the accused persons refused to plead to the charges on the grounds that they were not informed of the charges against them (and more importantly for this purpose) that they would want the matter to be transferred to another Judge whose impartiality is not in issue. This is because, according to the accused persons, especially the 1st, Halifa Sallah and the 3rd, Hamat Bah, they had in the recent past made some incriminating remarks about the learned trial Judge, Paul J as he then was. Following their refusal to plead to the charges after it was read to them, the learned trial Judge entered a plea of not guilty and ordered them to be remanded into prison custody. Dissatisfied with the entire proceedings the accused persons appealed to the Gambia Court of Appeal, which on the 21st December, 2005 by a majority decision Savage and Agim JJCA as they were then, in the majority, with Izuako Ag. JCA in the minority, their appeals were dismissed.
In reaching their decisions, both the majority and minority made very useful pronouncements on the allegations of bias leveled against the learned trial Judge which I deem critical at this stage to refer to.

Per Savage JCA as he then was at page 531 –

"Allegation of bias on the part of a trial Judge, other than on the basis of pecuniary interest, must be supported by clear, direct positive, unequivocal and solid evidence from which real likelihood of bias could reasonably be inferred and not mere suspicion. Even the question and answers between the learned judge and the third appellant leaves some doubt in the minds of people."

Agim JCA as he then was, was more specific and clear in his decision when he stated that it will be dangerous and irrational for the Judiciary, if fanciful and baseless allegations of bias or partiality against judges will be used to prevent judges from sitting on cases, it will amount to allowing parties to choose their convenient judges or courts. This is how Agim JCA as he then was puts it when he was analyzing one of the principles used in determining bias, and that is "the real suspicion or reasonable apprehension of bias" which is postulated on the basis that a judge should give the benefit of doubt to his accusers and recuse himself from the case unless it is clear from the surrounding facts that the accused is only trying to delay the case.

Per Agim JCA –

"The danger inherent in this approach is obvious. It means that every judge will be disqualified from trying a case on mere vague suspicions of whimsical, capricious and unreasonable people or irrational accusers. Such an unregulated situation will render the judge vulnerable and erode his independence of adjudication, a sine qua non for a fair trial system. The Ghanaian Court in Adzanku v Galenku (1974)1 GLR 198 held that such an approach will enable a party by objections, to choose his own judge, a situation which will drive a wedge into the fabric of our whole judicial system."

These are very strong words indeed but very critical and go to the very foundations of the concept of fairness and also ensuring the observance of the principles of natural justice, that no one should be a judge in his own cause. By parity of reasoning, it should be noted that, the principle should also not be used to abuse the judicial system by allowing parties to raise all sorts of
fanciful allegations against judges, hoping thereby to get them to recuse themselves so that they can choose the court they want.

In a small jurisdiction like the Gambia, this can be dangerous and I have earlier on said that such a practice should be frowned upon.

N.A. IZuako, Ag. JCA as she then was, in his minority opinion in the same Halifa Sallah cases, stated the following as the role of an impartial adjudicator at page 538.

“A judge in my view is the moderator of judicial proceedings, an umpire, and a referee. His role consists in seeing that the rules of engagement in court proceedings are adhered to. He is the wise listener who intervenes as little as possible as he guides the proceedings in observance of procedural and substantive matters of law to arrive at the justice of the case. At the conclusion of the case and after due considerations of facts and law, he gives a judgment which must be unbiased. But sometimes it happens that a judge would find himself descending from that high pedestal into the arena.”

For my part, I think it is advisable for trial courts to strive to abide by what the minority opinion states as the role expected of judges. This is because, any erosion of confidence in the judicial making process is a sure recipe for confusion, anarchy and breakdown of the rule of law. If people no longer have confidence in the fair and unbiased decision making process, they are likely to adopt self help methods and this will not augur well for the entire society and the promotion of rule of law.

The combined effect of the above decisions appear to give the impression that for an allegation of bias against a judge to succeed, it must be based on strong and convincing grounds. These grounds must be such that it should not take any effort to discern that from the nature of the allegations, the judge has either a pecuniary or proprietary interest or benefit in the matter. However, if the allegation of bias, fails to meet the real likelihood of bias test or the reasonable suspicion of bias, the allegation must be dismissed. All these are aimed at protecting the integrity, dignity, transparency, sanctity and image of the court and the officers of the court.

There have been some instances where bias has been held to apply. These are:

   i. Because of personal hostility exhibited by the judge.
ii. Personal friendship

iii. Family relationship

iv. Professional and or vocational relationship and interest in the issue before the court

i. Personal Hostility Exhibited By The Judge

The learned authors of De Smith, Woolf and Jowell (40) state that:

“It has been said that mere personal prejudice, even resulting from a previous dispute or altercation is not comprehended within the term “a challenge to the favour” of a tribunal and is therefore not a ground for setting aside its decision” (41) (See case of Maclean vrs Workers Union.

They state however that, the above dictum in the Maclean case, cannot be supported as a general principle of law, but it is appropriate in the context in which it was used, an action arising out of the expulsion of a member from a Trade Union.

However, as a Judge, with over 22 years of practice before being elevated to the Bench in 2002, I am aware of judicial hostility which sometimes is exhibited by the Bench to parties appearing before them or often times to their Lawyers.

It is therefore possible to state that, a strong personal animosity exhibited by a Judge in the ordinary courts to a party must disqualify a judge from adjudicating if the animosity gives rise to a real danger of bias. The evidence in support of the animosity or hostility must be very strong and compelling, because, the courts are generally reluctant to conclude that a judicial officer’s judgment is likely to be warped by personal feelings. There have been instances where an adjudicator manifested open hostility to either a party or his Counsel at the hearing of the case before him. In such a situation, the only reasonable conclusion may be that a fair hearing is either not possible or was not granted the party who has been so affected.

As a young practitioner, I observed a High Court Judge, who threatened to beat up a Lawyer in court because according to the Judge, that Lawyer had dared to write a petition against him to the Chief Justice complaining about his
biased attitude. The conduct of the Judge on that occasion actually proved the allegation of bias that had been made on the basis of open hostility.

It must be noted that the evidence in support of the allegation of bias on the basis of animosity or hostility must be clearly established. If the evidence is not strong, the court is likely to dismiss the allegations as unfounded. In the Ghanaian case of *Amadu vrs Mohamed* (42) the Supreme Court was invited by the applicant for an order of prohibition against a High Court Judge to prohibit him from hearing a contempt application on the following grounds:-

1. Friendship or unholy friendship with the principal of the respondent and his Lawyer.
2. Animosity or hostility towards the applicant.
3. Bias because of the attitude towards the applicant.

The Supreme Court, speaking with one voice through Dr. Date-Bah JSC held as follows:-

“The affidavit evidence adduced by the applicant in proof of real likelihood of bias – a ground for granting an order of prohibition – woefully failed to prove the fact relied on to establish the allegations of hostility against the applicant, and personal friendship between the trial High court Judge who is to hear the application for committal of the applicant for contempt and counsel for the respondent. The circumstantial evidence relied upon by the applicant was not of sufficient weight to establish proof on the balance of probabilities that the trial judge was a friend of the respondent’s counsel and that he was hostile towards the applicant.”

The case is further proof that, for one to succeed on this ground of bias, the evidence must be very strong, convincing and really incriminating to disqualify the adjudicator from hearing the case, or setting aside the decision if one had already been given.

**ii. Personal Friendship**

I find the following statement of the law as was stated by Lord Browne-Wilkinson, in the case of *R. V. Bowstreet Metropolitan Stipendiary Magistrate, Ex-parte Pinochet Ugarte* referred to as the Pinochet case (No. 2) (43) very apt and succinctly describing what the courts mean by personal friendship.
"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally, if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause.

In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be a Judge in his own cause, since the Judge will not normally be himself benefitting, but providing a benefit for another by failing to be impartial."

Normally, close personal friendship between an adjudicator, and a party appearing before him or counsel should give cause for the real possibility of bias.

In the Western world and North America, this issue cannot be a problem. This is because of their social settings which does not endanger personal friendships as being able to affect the decision of a judicial officer.

But in Africa, where because of our social and cultural antecedents, there are a lot of bondings outside close family set ups, it will be dangerous to assume that personal friendships cannot constitute bias.

There are litany of personal friendships that we develop in schools, universities, professions, and in society. People whom you have socialised with on the way to the top may expect to be treated with some favour when they appear before you.

The normal thing is for a Judge to make full disclosure of his or her close personal relationships with the parties or counsel before proceeding with the case.

I had to make a full disclosure when a former driver of mine had been dragged to a Family Tribunal presided over by me. In that context, even though I made the disclosure, the Applicant stated openly that she had confidence in me and
by that waiver I proceeded with the case to conclusion to the admiration and acceptance of all.

I also know of situations where a Judge had to recuse himself because one of the Lawyers in the case was his personal Counsel in a private case being litigated by the Judge.

It is my opinion that if only Judicial Officers will make a full disclosure of whatever interests and personal relationship that exists between them, and parties and or Counsel who appear before them, most of the allegations of bias on this ground will be prevented.

iii. Family Relationship

Family relationship has always been considered as a valid ground capable of being used to challenge any judicial decision actuated by such a relationship. In the African context, and I believe here in The Gambia, just as in Ghana, family relationship if not disclosed can cause the parties to lose confidence in the judicial decision making process.

What is not clear is whether family relationship between Counsel and a Judge will disqualify a Judge from presiding over that case. It has however been held that a decision of a court was set aside in Canada because the Chairman of the Tribunal was the husband of an executive officer of a body which was a party to the proceedings before the tribunal. See case of *Ladies of the Sacred Heart of Jesus vrs Armstrong’s Point Association* (44).

What is really important in all these is the fact that whenever an adjudicator is faced with a situation where his family relations appear before him either directly or indirectly, it is a desirable practice for the Judge to recuse himself or make a full disclosure of that fact. When faced with a similar situation where my younger brother worked in a Bank whose case was on appeal before me, I had to make full disclosure of the relationship that exists between me and my brother and the fact that on occasions I might be faced with a situation where I visit him at the Bank. After the disclosure, all the parties insisted that I need not recuse myself and I proceeded with the case to completion.

I will therefore appeal to all Judges or Judicial officers to be circumspect when matters of family relationships arise in matters pending before them for adjudication.
iv. Professional And Or Vocational Relationship/Interest In The Issue Before The Court

Dr. Date-Bah JSC in his opinion in the case of *Ex-parte Agbesi Awusu II, case already referred to supra (No 1)* (45) delivered himself thus,

“There was further clarification of the law on judicial bias by the English Court of Appeal in *Locabail (UK) Ltd vrs Bayfield Properties Ltd [2000] QB 451.* This case highlights the distinction between cases of non-automatic disqualification and automatic disqualification. In the latter case a judge has a direct personal interest, which is other than de minimis, in the outcome of proceedings. In such cases, bias is presumed to exist and the judge is automatically disqualified. The other category of judicial bias is that of apparent bias, which was what was in issue in the Sallah case.

In the Locabail case, Lord Bingham of Cornhill CJ (as he then was), Lord Woolf MR (as he then was) and Sir Richard Scott V-C, delivering the judgment of the Court of Appeal, said this of the automatic disqualification category (at p473):

“Until recently the automatic disqualification rule had been widely (if wrongly) thought to apply only in cases where the judge had a pecuniary or proprietary interest in the outcome of the litigation... In *Reg vrs Bowstreet Metropolitan Stipendiary Magistrate, Ex-parte Pinochet Ugarte (No 2) [2000] 1 AC 119,* the House of Lords made it plain that the rule extended to a limited class of non-financial interest. Lord Browne-Wilkinson said at p 135:

“My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge’s
decision will lead to the promotion of a cause in which the judge is involved together with one of the parties”.

Similarly, Lord Hutton said in the Pinochet case (at p 145) that:

“there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.”

This case is based on an allegation of actual bias. But even if there is a failure to prove this actual bias, there is the opportunity to prove apparent bias or real likelihood of bias. As the Court of Appeal said in the Locabail case (at p 475):

“In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias”.

From the above, it is clear that there could be a reasonable apprehension of bias arising as a result of professional or business relationship of the adjudicator with a party before him.

In the U.S. for example, there has been much discussion of the qualification of judges to hear cases argued by members of their law firms to which they formerly belonged. For my part, I am of the opinion that only if the judge had disclosed this fact and also never handled the brief when he was in that law firm as a barrister, there is no reason to disqualify the judge.
The real test is what a reasonable man, confronted with the facts of the case will conceive of the justice delivery system. The real crux of the matter is that, each case will be considered on case by case basis.

Situations Where Bias Will Not Apply

1. Waiver

It is possible, as happened in the examples I have referred to, that after a full disclosure has been made, by the judge the party to be affected by the bias will waive his objections to the decision maker, thereby enabling him to continue with the case.

Objection is also deemed to have been waived if the party or his legal representative who knew of the disqualification failed to object at the earliest practicable opportunity, and rather acquiesced in the proceedings.

2. Necessity

It is stated by the learned authors of *De Smith, Woolf and Jowell* (46) as follows:-

“A person who is subject to disqualification at common law may be required to decide the matter if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice. So if proceedings were brought against all the superior judges they would have to sit as judges in their own cause”

In The Gambia, Section 121(1) of the Constitution provides that the Chief justice shall be the head of the Judiciary and in that respect shall be responsible for administration and supervision of the Courts.

Section 143(1) of the Gambian Constitution whilst confirming the administrative powers of the Chief Justice over the Courts, further stipulates that the Chief Justice may in the exercise of such administrative powers issue orders and directions for the proper and efficient operation of the Courts.

The combined effect of these constitutional provisions and the Rules of procedure of the various Courts in the Gambia actually vests the power to empanel Judges to sit on cases in the appellate courts as well as assignment of Judges, Magistrates and indeed all Judicial Officers the divisions of courts and cases they are to handle. It is to be noted that, in the exercise of these administrative responsibilities the Chief Justice cannot be faulted on grounds
of bias even if he is the subject matter of the suit that he is called upon to empanel a court to determine.

The Constitution 1992 of the Republic of Ghana has similar provisions in articles 125(3) and (4) respectively.

The Chief Justice of the Gambia and of Ghana under the respective Constitutions referred to supra will therefore call in aid the doctrine of necessity and still perform their constitutional functions even if allegations of bias are made or exist.

A similar doctrine of necessity arose in the Ghana case of Tsatsu Tsikata vrs Chief Justice\(^{(47)}\).

“An allegation of bias should not make the Chief Justice in the circumstances of the instant case, unable to perform his functions under the 1992 Constitution. No legal bias has been shown against the Chief Justice so as to disqualify him from exercising his prerogative of empanelling Justices of the Supreme Court. And to accede to the request of the plaintiff-applicant on the bare fact that the Chief Justice is a party to the action and therefore should not empanel the Supreme Court would be unjust”.

In this request, the Ghana Supreme Court followed a line of respected decisions such as Akuffo-Addo vrs Quashie-Idum and Kuenyehia vrs Archer\(^{(48)}\).

The position can therefore be safely stated that in cases of genuine issues of necessity, the issue of bias will be relegated into the backdoor to enable the institutions created under the Constitution and statute law perform their mandate.

**Conclusion**

In the *ex-parte Mobil Oil, (Ghana) Ltd*\(^{(49)}\) the Ghana Supreme Court stated as follows:-

“At Common law, a judge, Magistrate or an independent arbitrator would be disqualified from adjudicating whenever circumstances pointed to a real likelihood of bias, by which was meant, “an operative prejudice, whether conscious or unconscious in relation to a party or an issue before
him. That would apply, in particular, where circumstances pointed to a situation where a decision might be affected by pre-conceived views.”

It is therefore a cardinal rule of practice, that the issue of allegations of bias or impartiality against adjudicators is a very serious matter that ought to be handled dispassionately.

As stated supra, each case has to be considered and decided on its merits. This is to ensure that the judicial system is not sacrificed on the altar of personal benefits. If the allegation of bias is not conceded to by the judge concerned, then a proper investigation must be conducted to determine whether there is a real likelihood of bias, or real suspicion of bias. In any case, my advice to all adjudicators is for them to recuse themselves from the determination of any case in which they stand to derive some benefit. This could be direct or indirect.

There is therefore the need for all adjudicators to be very mindful of what they say in private and in public whenever a matter is pending before them. This is to ensure that allegations of prejudice are not made against them.

In a recent judgment of the High Court, Accra, Human Rights Division, in an unreported ruling of suit No HRM 46/10, dated 11th June, 2010 Dery J, held as follows:

“In the circumstances of the case before me, the respondent has demonstrated, by the interview it granted while the case has just begun before it, that it is incapable of carrying out a fair, impartial and unprejudicial investigation into the M& J hearing. I would therefore, grant the applicants’ prayer for judicial review. I accordingly order that the respondent, that is the Commission on Human Rights and Administrative Justice (CHRAJ), be restrained, and it is, hereby, restrained from investigating and or/ hearing the investigations into the Mabey and Johnson hearing now being heard by CHRAJ. (50)

The above was the decision of the High Court in an action brought to restrain the Commissioner of Human Rights in Ghana from investigating bribery allegations made against some public officials in what is now known as the Mabey and Johnson bribery scandal. The Commissioner of CHRAJ was reported to have made some prejudicial comments on a television station, hence the application to restrain him succeeded.
There is therefore the utmost need for all judicial and quasi judicial officers to be circumspect and cautious in what they say, comment and or write about cases pending before them.

**CLOSING STATEMENT**

What then is the closing statement? Bearing in mind the decision of the majority of the Gambian Court of Appeal in the *Halifa Sallah* Cases already referred to supra, it is safe to conclude that, for now the Gambia has settled for “the real likelihood or real danger test which is that, to disqualify a person from acting in an adjudicatory role, a real likelihood of bias must be shown to exist.”

Agim JCA as he then was on page 547 puts it in very strong language indicating his preference for the said approach in the following words –

“The preponderance of judicial decisions of national courts favour this test”.

He then referred to the following Ghanaian and Nigerian decisions to buttress his preference –

1. Sallah V. Attorney-General (19700 CC 54
3. Republic Vs Constitutional Committee Chairman, Ex-parte Barimah II 1968 GLR, 1051 at 1053.
4. Odunsi Vs Odlunsi (1979) NSCC 57 at 59
6. Ohe V Enenwali (1976) 2 SC 23
7. Deduwa Vs Okerodudu (1976) 9-10 SC 329 and
8. Egri Vs Uferi (1973) 11 SC 299

And with the above references, Agim JCA as he then was in his closing statements declared as follows:-
“The allegation of bias must be supported by facts. A mere or reasonable suspicion of bias without more is not enough. There must exist facts showing the circumstances which gave rise to a real likelihood of bias.”

Since this is the decision of the highest court of the Gambia for now, it is expected that all courts except the Supreme Court are bound to follow this decision.

Thank you.

Jones Victor Mawulom Dotse
Justice of the Supreme Court of the Gambia
Banjul, 29 – 6 - 2010

REFERENCES

2. Ibid
3. Section 120 (2) of the Constitution of The Gambia, 1997
5. Ibid
7. [1908] I L.R. 285 at 294
8. [1924] 1 K.B. 256 at 259
11. [1866] L.R. 1 QB 230 at 232
12. [1852] 3 H.L. Cas 759 at 793
13. [1924] 1 KB 256
15. [1960] 2 Q.B. 167 at 187
17. [1993] A C 646
20. [2005-2006] SCGLR 312
25. Ibid page 866, holding 1
26. [1993] AC 646
27. [2003 – 2004] SCGLR 864
29. Ibid
31. [2002-2008] GLR vol. 1 353, High Court, Judgment of The Gambia
32. [1992] 2 GLR 635 at 651
33. [1968] GLR 50
34. [1960] GLR 140
35. Ibid
36. [1968] GLR 50
37. Ibid
38. [1992] 2 GLR 635 at 651
39. Ibid at 650
41. [1929] 1 Ch. 602 at 625
42. [2007 – 2008] SCGLR 58 at 59
43. [2000] 1 A. C. 119 at 132 – 133
44. [1961] 29 D.L.R. 2d. 373
47. [2001 – 2002] SCGLR 437 holding 1 & 2
49. [2005 – 2006] SCGLR 312
51. (1) Halifa Sallah
    (2) Omar Jallow
    (3) Hamat Bah
    Vrs
The State


CORAM:

A.K. Savage JCA as he then was presiding

E.A. Agim JCA as he then was and

N.A. Izuako Ag. JCA.