COMMUNITY COURT OF JUSTICE, ECOWAS

(2017)

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

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CHIEF REGISTRAR

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[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON TUESDAY, THE 24TH DAY OF JANUARY, 2017

SUIT N^{O}: ECW/CCJ/APP/05/15
JUDGMENT N^{O}: ECW/CCJ/JUD/01/17

BETWEEN
GNANDAKPA WIYAO & 5 OTHERS - *PLAINTIFFS*

VS.
THE STATE OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **ZEUS ATA MESSAN AJAVON (ESQ.)** - *FOR THE PLAINTIFFS*
2. **THE MINISTER OF JUSTICE AND RELATIONS WITH STATE INSTITUTIONS** - *FOR THE DEFENDANT*

- Admissibility - Expedited procedure - Res judicata

SUMMARY OF FACTS

he Applicants averred that in the year 2003, they were suspected of plotting against the internal and external security of the State of Togo, thus, they were arrested and detained for several months, they were subjected to acts of torture and other cruel, inhuman or degrading treatment or punishment before their release, without trial on 12th July 2005. That since their release, they have been suffering after-effects and that some of them died during their detention and others a few moments after their release. They had brought an action before the ECOWAS Court alleging the violation of their fundamental rights and judgment was given by the ECOWAS Court. Thereafter, the Applicant's filed another action before the Court again.

In response, the Defendant State filed an Exceptional Memorial in Defence in limine litis, arguing that the matter brought before the Court is a non-suit claim, based on the principle of res judicata. That the new Application is seeking a fresh examination of the already ended case. They further argued that through the present Application, Plaintiffs/Applicants are seeking to turn the decision around, that the decisions of the Court are not subject to appeal; that the authors of the present Application are the same as the Applicants in the proceedings which led to the previous Judgment. Also, that the previous proceedings had the same subject-matters and was the same and that on the strength of the principle of res judicata, the same claims between the same parties, acting in the same qualities, relating to the same subject-matter and supported by the same pleas cannot be brought again before a court. That the Court cannot examine, afresh, a case it has already adjudicated upon between the same parties.

The Applicants filed for expedited procedure, pursuant to Article 59 of the Rules of Procedure of the Court, alleging that the

precariousness of their situation explains the urgency to have their case heard expeditiously.

ISSUES FOR DETERMINATION

- *Whether the Application is admissible.*
- *Whether the application for expedited procedure is admissible.*
- *Whether the case is res judicata.*

DECISION OF THE COURT

The Court, declared as admissible the Application for expedited procedure filed by Plaintiffs/Applicants;

- ***Declared** that the said Application for expedited procedure has become devoid of any useful purposes;*
- ***Grants** the plea on non-suit made by the State of Togo, based on the principle of the res judicata, in regard to Judgment n ° ECW/CCJ/JUD/18/15 dated 7th October 2015;*
- ***Declared** the non-suit plea well-founded;*
- ***Held** that the initiating Application filed by Captain GNANDAKPA Wiyao and the five (05) others is inadmissible;*

As to merit

- ***Rejects** as lacking grounds the counter-claim made by the State of Togo;*
- ***Orders** each party to bear its own costs;*

JUDGMENT OF THE COURT

THE COURT OF JUSTICE OF THE ECOWAS COMMUNITY

Delivered the following Judgment in the case of Captain GNANDAKPA Wiyao and five (05) others all domiciled in Lomé (Togo) against the State of Togo, in a case of human rights violation.

1- PARTIES

1.1- **APPLICANTS: Captain GNANDAKPA Wiyao**, Warrant Officer BONFOH Bassabi Y. Nikabou, Chief Sergeant KOUI Matoukou, Chief Sergeant GNALO Akossi, First Class Soldier OUNADAN Nassame, First Class Soldier KAO Batolousim all domiciled in Lomé - Togo, represented by their Counsel Maître Zeus Ata Messan AJAVON, lawyer at the Togo bar, 1169 Avenue de Calais, BP: 1202 Lomé-Togo, Tel: 00228 90 33 07 63/00228 2320 57 79;

1.2- **DEFENDANT State of Togo**, acting the person of its legal representative, the Minister of Justice and Relations with State Institutions, residing and domiciled at the seat of the said Ministry, 03 Rue de I'OCAM- BP. 121 in Lomé-Togo.

II- FACTS AND PROCEDURE

II.1- During the year 2003, some individuals had the idea of attacking the internal and external security of the State of Togo;

It was in these circumstances that some soldiers, including Captain GNANDAKPA Wiyao, Warrant Officer BONFOH Bassabi Y. Nikabou, Sergeant-Chief KOUI Matoukou, Sergen - Chef GNALO Akossi, Private First Class OUNADAN N, and Private First Class KAO Batolousim were arrested and detained;

The above-mentioned individuals complain about their arrest and detention, as well as acts of torture and other cruel, inhuman or degrading treatment to which they have been subjected.

II.2- By Application dated 12th February 2016, which was received at the Registry on the 18th of the same month, Captain GNANDAKPA Wiyao, Warrant Officer BONFOH Bassabi Y. Nikabou, Staff Sergeant KOUI Matoukou, Sergeant Chief GNALO Akossi, Private First Class OUNADAN Nassame and Private First Class KAO Batolousim have sued the State of Togo for violation of their fundamental human rights.

II.3- In a separate document dated the same day, Plaintiffs/Applicants sought the leave of the Court to submit the main Application to expedited procedure, pursuant to Article 59.1 of the Rules of Procedure of the Court;

II.4- The two Applications were notified on the State of Togo on 02/23/2016;

II.5- The Defendant State replied by an Exceptional Memorial in Defence in *limine litis* and a defence writ on the merits of the case, all dated 23rd March 2016, which were recorded at the Court Registry on 5th April 2016;

II.6- The cause was retained and debated at the hearing on 11th October 2016. All parties were represented by their Counsels;

II.7- The case was slated for deliberation, and for the decision to be rendered on 6th December 2016 On this date, the deliberation was extended to 24th January 2017.

III- PLEAS-IN-LAW AND CLAIMS

III.1- In their pleadings, the Applicants claim that they hold grievances against the State of Togo for violating their fundamental human rights as enshrined under the following instruments:

- Articles 15, 16 and 21 (1) and (2) of the Togolese Constitution of 14th October 1992;

- Article 52 of the Togolese Code of Criminal Procedure of 2nd March 1980;

- Articles 3, 4, 5 and 6 of the African Charter on Human and Peoples' Rights of 27 June 1981;

- Article 5 of the Universal Declaration of Human and Peoples' Rights of 10 December 1948;

- Articles 7, 9/1, 9/5, 10/1 of the International Covenant on Civil and Political Rights of 16 December 1966;

- The UN Convention against Torture and Other Cruel, Inhuman punishments or Degrading Treatments of 10 December 1984;

- Principles 1 and 6 of the set of principles for the protection of all persons subjected to any form of detention or imprisonment of 19 December 1988;

- Point 1 of the Fundamental Principles relating to the treatment of Detainees of 14 December 1990.

III.2- In pleading the admissibility of their Application, they cite Articles 9.4 of the Protocol on the ECOWAS Community Court of Justice and 10 of the Supplementary Protocol, Principles 33/1 and 33/4 of all the Principles for the Protection of all Persons subjected to any form of Detention or Imprisonment of 19 December 1988;

III.3- They noted that the said provisions provide respectively as follows:

"The *Court has jurisdiction to determine cases of violation of human rights that occur in any Member State*."

"*Access to the Court is open to individuals on application for relief for violation of their human rights;*"

"*Any detained person or his counsel, has the right to make a request or complaint about the manner in which he is treated, in particular in cases of torture and other cruel, inhuman or degrading treatment ... if necessary, to the competent control or appeal authorities*"

"*Any request or complaint must be examined without delay and a response must be given without undue delay. In the event of rejection of the request or the complaint or in the event of excessive delay, the Applicant is authorized to seize a judicial or other authority ...*"

III.4- They close their arguments on admissibility by stating that since human rights are inherent in the human person, "inalienable, imprescriptible and sacred" and not subject to any limitation whatsoever, the Court must declare their Application as admissible, as to form.

III.5- Arguing on the merit of their case, the Applicants aver that during the year 2003, they were suspected of wanting to plot against the internal and external security of the State of Togo; thus, they were arrested and detained for several months, in various places, notably in the premises of the **Gendarmerie of Kara**, **the RCP cantonment in Kara**, **the Gendarmerie in Lomé and the Central Intelligence Department**; that they were subjected to acts of torture and other cruel, inhuman or degrading treatment or punishment in these places, before their outright release, without trial on 12th July 2005; that since their release, they have been suffering after-effects, including chronic low back pain, eye problems which are the consequences of their condition of detention and which require specialized treatment; moreover, some of their brothers-in-arms, in particular Corporal OURO Bang'na, Private

First Class OKOROKA, Lieutenant KPANDANG Kondoh, Lieutenant KALAYA Banafeikou, Corporal DENA Wandoua, Corporal MENSAN Yao, LIMEYA Komi all died during their detention and others a few moments after their release.

III.6- The Applicants claim that through the actions of its agents, who beat and spilled blood out of their bodies, tortured, illegally arrested, and arbitrarily detained them in military garrisons without trial, the State of Togo violated the Code of Criminal Procedure of Togo, Article 52, the provisions of the Togolese Constitution of 14th October 1992, Article 15 of the African Charter on Human and Peoples' Rights, Article 6, the provisions of Article 9/1, 10/1 of the International Covenant on Civil and Political Rights, the provisions of the Declaration on Basic Principles of Justice relating to Victims of Crime and victims of abuse of power, the Universal Declaration of Human Rights of 10th December 1948, the UN Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, the provisions of all the Principles for the Protection of all Persons subjected to any form of Detention or Imprisonment of 19 December 1988 and the Fundamental Principles relating to Victims of Crime.

III.7- In support of their allegations, they produced the following exhibits:

- Travel Authorisation No. 0483/3 e RIA / T of 9th May 2003 issued in the name of Captain GNANDAKPA Wiyao;

- Copies of Decisions of the Minister of Defence and Veterans Affairs on Sacking from the Army, and Trial of Captain GNADAKPA Wiyao, Chief Sergeant GNALO Akossi, of First Class Soldier OUNADAN Nassame and KOUI Matoukou

- Copies of the summons of GNADAKPA Wiyao, GNALO Akossi, OUNADAN Nassame and KOUI Matoukou all issued on Wednesday 16th December 2015 by Maître Bertin

K. AMEGAH -ATSYON, Bailiff at the Court of Appeal and the Tribunal of First Instance of Lomé, upon Application filed by *Collectif des Associations contre l'Impunite au Togo (CACIT)* represented by its Executive Director Mr. André Kangui AFANOU;

- "certificates of release" issued by the Prosecutor's Office in Lome, in favour of GNANDAKPA Wiyao, GNALO Akossi, KAO Batolousim, OUNADAN Nassame and KOUI Matoukou;

- Copies of Medical Reports dated 1st and 8th February 2016 by Doctor DOSSEH Ekoué David, Surgeon Sylvanus OLYMPIO Teaching Hospital of Lomé, in favour of GNADAKPA Wiyao, GNALO Akossi, BONFOH Bassabi, Kao Batolousim and KOUI Matoukou;

- an Official Report drawn-up on Wednesday 16th December 2015 by Maître Bertin K. AMEGAH-ATSYON, Bailiff at the Court of Appeal and the Tribunal of First Instance of Lomé, upon Application filed by *Collectif des Associations contre l'Impunite au Togo (CACIT)* represented by its Executive Director Mr. André Kangui AFANOU in connection Mr. BAKAI Bawubadi Robert's arrest in regard to the "certificates of release";

III.8- Finally, Plaintiffs/Applicants sought from the Court, as follows:-

As to form

- A **declaration** that the Court has jurisdiction over the instant case;

As to merit

- The Court should **declare** and **adjudge** that the actions of the officers of the Parachutes' Commando Regiment (RCP) of Kara, the 3rd Inter - Arms Regiment (RIA) of Témédja,

the Central Information Processing Center (CTR), the Togolese Inter-Arms-Regiment (RIT) and the Cantonment of the National Gendarmerie of Lomé, upon the instructions of their hierarchical superiors, constitute acts of torture and other cruel, inhuman or degrading treatments, in violation of Articles 16 and 21 (1) and (2) of the Togolese Constitution of 14th October 1992, Articles 4 and 5 of the African Charter on Human and Peoples' Rights of 27th June 1981, Articles 5 and 10/1 of the Universal Declaration of Human Rights of 10th December 1948, Article 7 of the International Covenant on Civil and Political Rights of 16 December 1966, of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, taken in spirit and in form, of 10 December 1984, paragraph 1 of the Fundamental Principles relating to the Treatment of Detainees of 14th December 1990 and Principles 1 and 6 of the Set of Principles for the Protection of All Persons Subject to Any Form of Detention or Imprisonment of 19th December 1990;

- The Court should **declare** and **adjudge** that their arrest and detention, for more than two (2) years in the different garrisons of Kara, Témédia and Lomé, (27 months), is a flagrant violation of Articles 15 and 19 of the Togolese Constitution of 14th October 1992, the provisions of Articles 3 and 6 of the African Charter on Human and Peoples' Rights of 27th June 1981, Articles 9/1 and 10/1 of the International Covenant on Civil and Political Rights and of Article 4 of the Declaration on the Basic Principles of Justice for Victims of Crime and Victims of Abuse of Power;

- The Court should **declare** and **adjudge** that Plaintiffs/ Applicants are entitled to reparation for the wrongs caused them, pursuant to the provisions of Article 9 paragraph 5 of the International Covenant on Civil and Political Rights;

Consequently,

- The Court should **order** the State of Togo, to carry out investigations, in order to establish the reality of the facts of the case, pursuant to the provisions of Article 12 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10th December 1984, taken in its spirit and in form;

- The Court should **order** the State of Togo to take all the necessary and urgent and necessary measures, with a view to rehabilitating and, possibly, reintegrating the victims into their various corps, and to draw the financial consequences which result from it;

- The Court should **order** the State of Togo to pay each of Plaintiffs/Applicants, on the one hand, the sum of twenty million (20,000,000) CFA francs, for arbitrary arrest and detention, for more than two years, and, on the other hand, the sum of thirty million (30,000,000) CFA francs for acts of torture and other cruel and inhuman treatment inflicted on them;

- The Court should **order** the State of Togo to bear all the costs.

III.9- In its Exceptional Memorial in Defence in limine litis, the defendant argued a non-suit claim, based on the res judicata that covers the attacked judgment no ECW/CCJ/JUD/18/15 of 7th October 2015;

III.10- The Defendant claimed that on 19th September 2014, the named **GNADAKPA Wiyao and 5 others**, through a joint motion, came before the ECOWAS Court of Justice, arguing the same facts as contained in the present Application; that by Judgment No. ECW/CCJ/JUD/18/15 of 7th October 2015 the Court gave its decision, whose operative part reads thus:

"The Court,

Sitting in a public hearing in a human rights violation matter, as first and last resort, after hearing both parties,

As to form

- *Declares as admissible the Application filed by Plaintiffs/ Applicants.*

As to merit

- *Holds that the evidence adduced by the Plaintiffs/ Applicants is insufficient.*

***Consequently**,*

- *Dismisses all claims made by Plaintiffs/Applicants*
- *Orders Plaintiffs/Applicants to bear all costs*"

III.11- The Defendant argues that through the present Application, Plaintiffs/ Applicants seek to turn the decision around; that under Article 19.2 of Protocol (A/P.1/7/91) on the ECOWAS Court of Justice, the decisions of the Court are not subject to appeal; that the authors of the present Application are the same as the Applicants in the proceedings which led to Judgment no ECW/CCJ/JUD/18/15 of 7th October 2015; that the previous proceedings related to the same subject-matters and was the same cause as the present proceedings that the Applicants have just initiated; none of the Applicants' claims is new to the Court; that the claims are identical to those already examined in 2015, which was brought to an end through Judgment no ECW/CCJ/JUD/18/15 of 07 October 2015; that on the strength of the principle of *res judicata*, the same claims between the same parties, acting in the same qualities, relating to the same subject-matter and supported by the same pleas cannot be brought again before a court; that according to the time-held jurisprudence of the ECOWAS Court of Justice, the Court cannot

examine, afresh, a case it has already adjudicated upon, in adversarial procedure between the same parties; that the Court reaffirmed this position in judgment n ° ECW/CCJ/JUD/08/15 24th April 2015 (case of GNASSINGBE Kpatcha and 9 others against the State of Togo).

III.12- In regard to the foregoing, the Defendant seeks from the Court as follows:-

- To **declare** and **adjudge** that the present Application filed by Plaintiffs/Applicants is identical with the earlier Application filed by them, which the Court had already examined in 2015, and which led to the Court delivering Judgment ECW/CCJ/JUD/18/15 of 7th October 2015, and now covered with the *res judicata.*

Consequently,

- To **declare** and **adjudge** that the action brought by the named GNANDAKPA Wiyao, BONFOH Bassabi Y. Nikabou, KOUI Matoukou, GNALO Akossi, OUNADAN Nassame, KAO Batolousim is manifestly inadmissible under the principle of *res judicata*, which covers Judgment No. ECW/ CCJ/JUD/18/15 of 7th October 2015.

- To **order** Plaintiffs/Applicants to bear all costs.

III.13- In its Memorial in Defence as to merit, the State of Togo avers that the Applicants have produced some new documents in an attempt to make up for, or hope to remedy the serious shortcomings contained in their previous Application, and documents which the Defendant requested Plaintiffs/Applicants to produce at the time, without any reaction from them; that for the same facts, Plaintiffs/ Applicants had already seized the Court of Justice of the ECOWAS Community, which delivered a non - suit decision No. ECW/CCJ/ JUD/18/15 dated 7th October 2015; that the new Application seek

a fresh examination of the already ended procedure of the Application dated 19th September 2014; that the only additions concern the statement of the facts, the production of summons to arrest, and medical reports; that anything that is new in the new Application is proof of catch-up that Plaintiffs/Applicants have tried to live up to the relevant arguments raised by the Defendant in its Memorial produced in the first proceedings; that the authority of *res judicata* is an unsurmountable obstacle to the action of Plaintiffs/ Applicants, even on the merit of the case.

III.14- The Defendant recalls that the new Application seeks a fresh revisiting of the already decided Application of 19th September 2014; that Plaintiffs/Applicants made some additions at the level of the statement of facts, while writing a part thereof concerning each Applicant; that they concocted arrest summons concerning they themselves, in order to get declarations that they had written by themselves; that in lieu and place of Medical Certificates that they had produced in the earlier procedure, they now produced Medical Reports dated 1st February 2016, for three of them, and 8th February 2016 for the others.

III.15- The Defendant reiterates that, not only it did not find any evidence of the Applicants' allegations relating to their arrest, police custody, summons, release and atrocities meted on them, but also, that the authority of the *res judicata* covers Judgment NO. ECW judgment /CCJ/JUD/18/15 of 7th October 2015.

III.16- Finally, the State of Togo seeks from the Court as follows:-

- To declare and adjudge that the present Application is essentially confusing, it is neither serious nor justified, therefore should be dismissed, and all claims by the Applicants should be rejected, for all intent and purposes.

As a counter claim,

- To declare the action of the Applicants as abusive and harmful, and,

- To award a nominal cost against Plaintiffs/Applicants, in reparation for the prejudice caused the Defendant, and equally ordering Plaintiffs/Applicants to bear all costs.

IV - LEGAL ANALYSIS

On the Application seeking the submission of the main case to expedited procedure

IV.1- By separate Application dated 12th February 2016, the Applicants requested the Court to find the urgency and to adjudge that their case be submitted to expedited procedure, pursuant to Article 59 of the Rules of Procedure of the Court.

IV.2- In support of this request, they alleged that they were beaten, tortured in various ways and detained in inhuman conditions until they developed certain illnesses;

They felt that the precariousness of their situation explains the urgency of having their case examined in an expedited procedure;

IV.3- The State of Togo did not react to this request from the Applicants

IV.4- Article 59.1 of the Rules of the ECOWAS Community Court of Justice provides that: "*On application by the Applicant or the Defendant, the President may exceptionally decide, on the basis of the facts before him and after hearing the other party, that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules, where the particular urgency of the case requires the Court shall give its ruling with the minimum of delay.* "

Paragraph 2 of this Article requires that the request to submit a case to an accelerated procedure be presented by separate document, when the initiating Application or the defence is filed.

IV.5- The Applicants' Application for expedited procedure was lodged at the Court Registry on 18th February 2016, at the same time as the Application initiating the proceedings. It was done by separate document.

It therefore appears that this Application was made in the form and time required by the Rules.

The Application seeking to submit the main case to expedited procedure is therefore to be declared as admissible;

IV.6- An Application for expedited procedure tends to have the case examined within relatively short time limits. However, in the present case, as the case, was enrolled directly on the merits, it was debated and later was slated for deliberation;

It then follows that the Application for an expedited procedure has become devoid of any useful purpose;

On the non-suit decision applied for by the Defendant

IV.7- In its "Exceptional Memory in Defence *in limine litis*", dated 23rd March 2016, the State of Togo argued a non-suit decision in regard to the initiating Application, in the instant case, owing to the principle of the res judicata that has affected Judgment No. ECW/CCJ/JUD /18/15 of 7th October 2015;

IV.8- The Defendant State clarified that the Applicants had earlier referred an Application dated 19th September 2015 this to the Court, arguing the same facts as contained in the present Application; thus, following this referral, the Court delivered Judgment No. ECW/

CCJ/JUD/18/15 dated 7th October 2015, whose operative part reads thus:

"*The Court,*

Sitting in a public hearing in a human rights violation matter, as first and last resort, after hearing both parties,

As to form

- *Declares as admissible the Application filed by Plaintiffs/ Applicants;*

As to merit

- *Holds that the evidence adduced by the Plaintiffs/ Applicants is insufficient;*

Consequently,

- *Dismisses all claims made by Plaintiffs/Applicants;*
- *Orders Plaintiffs/Applicants to bear all costs*"

IV.9- The Defendant further avers that through the present Application, the Applicants wish, by a means other than those provided for in the Rules, to call into question the decision thus rendered by asking the Court to reconsider the same facts and to adjudicate afresh on them, at all costs, in defiance of the texts governing the Court; that under Article 19.2 of the 1991 Protocol, the decisions of the Court are not appealable;

IV.10- The Defendant states that the authors of the present initiating Application are the same as the Applicants in the proceedings which led to Judgment no. ECW/CCJ/JUD/18/15 of 7th October 2015; also that the parties are therefore the same and the proceedings focused on the same Subject-matter revolving around the same cause;

IV.11- Equally, the Defendant argues that the Applicants' claims in the present proceedings are not new to the Court; that they are identical to those which the Court has already examined in pronouncing Judgment no. ECW/CCJ/JUD/18/15 of 7th October 2015; that according to the time - held jurisprudence of the Court, the Court cannot examine afresh a case which it has already adjudicated upon, in an adversarial procedure, between the same parties;

IV.12- The Applicants did not react to the Defendant's plea concerning the dismissal sought;

IV.13- The analysis of the documents produced in the case file by the parties shows that, during the year 2014, a judicial procedure was in fact initiated by some Applicants, among whom are those in the instant case, against the State of Togo, before this Court, seeking examination of the alleged violation of their fundamental rights;

The examination of the said procedure was ended by the delivery of **Judgment N°: ECW/CCJ/ JUD/18/15** dated 7th October 2015; the operative part of the said Judgment is worded as follows:-

"*The Court,*

Sitting in a public hearing in a human rights violation matter, as first and last resort, after hearing both parties,

As to form

- *Declares as admissible the Application filed by Plaintiffs/ Applicants;*

As to merit

- *Holds that the evidence adduced by the Plaintiffs/ Applicants is insufficient;*

Consequently,

- *Dismisses all claims made by Plaintiffs/Applicants;*
- *Orders Plaintiffs/Applicants to bear all costs*'';

IV. 14- The Court can find that the Applicants in the present proceedings are among those who initiated the proceedings which were brought to an end by Judgment no. ECW / CCJ / JUD / 18/15 of 7th October 2015.

Indeed, the examination of the dispatch of the Judgment makes it possible to identify Messrs. GNANDAKPA, BONFOH Bassabi Y, KOUI Matoukou, GNALO Akossi, OUNADAN Nassame, KAO Batolousim among the Applicants in the said proceedings, The heads of claim formulated by the Applicants in the two proceedings remain the same, namely:

- To order the State of Togo to open and carry out investigations in order to establish the reality of the facts of the case;
- To enjoin the State of Togo to take all the necessary and urgent measures with a view to effecting their rehabilitation and, possibly, the re-integration of the victims into their various corps, and to draw the financial consequences resulting from such re-integration;
- To order the State of Togo to pay each of Plaintiffs/ Applicants, on the one hand, the sum of twenty million (20,000,000) CFA francs, for acts of arbitrary arrest and detention, for more than two years and, on the other hand, the sum of thirty million (30,000,000) CFA francs for the acts of torture and other cruel and inhuman treatment inflicted on them;

These orders are based on the arrest, detention, acts of torture and other cruel, inhuman or degrading treatment to which they have been subjected following a suspicion of an attack, during 2003, on the internal and external security of the Togolese State;

IV.15- Thus, the Court can find that the parties, the subject - matter and the cause are the same in the present proceedings as that which led to Judgment N°. ECW/CCJ/JUD/18/15 dated 7th October 2015;

However, according to the general principle of law known as "res judicata" the same claims between the same parties acting in the same capacity, relating to the same subject-matter, and supported by the same claims cannot be brought afresh before a court;

IV.16- Often times**,** the Court itself has wondered about the possibility for it to re-examine a case that it has already decided between the same parties
The Court has invariably replied that, with the exception of exercising the right to remedy, it can no longer hear such a case;

IV. 17- Indeed, in regard to the principle of "res judicata" the Court has a well-established case Law Indeed, in its Judgments nos. ECW/CCJ/JUD/05/15 of 23rd April 2015 and ECW/CCJ/JUD/08/15 of 24th April 2015 respectively delivered in the cases of **"Georges Constant AMOUSSOU against the State of Benin** and **GNASSINGBE Kpatacha and others against the State of Togo**, the Court ruled on the effects weight of the principle of the *res judicata;*

The Court recalls that in both cases it concluded that the principle of *res judicata* prohibits the parties from renewing before it the dispute which has already been submitted to it and which it has finally settled;

IV.18- In Decision No. ECW/CCJ/JUD/05/15 of 23rd April 2015 (Case of **Georges Constant AMOUSSOU against the State of Benin**), the Court conducted its findings and held as follows:

"IV.21- *Therefore, it is legitimate to ask the following question: Can the Court hear a case which it has already settled? The general rules of law require that the answer to this poser can only be negative, with the exception of the ECOWAS Community Court of Justice, where possibilities offered to parties, to formulate opposition to judgment, third party opposition and revision, respectively under Articles 90, 91 and 92 of the Rules of Court;*

However, the Applicant's action does not fall within any of these remedies"

IV.22- Undoubtedly, in this case, the principle of res judicata applies; however, this principle prohibits the parties from filing afresh, before the judge, the dispute which has already been settled, finally"

IV.19- In the second case (Judgment N°: ECW/CCJ/JUD/08/15 of 24th April 2015, delivered in the case of **GNASSINGBE Kpatcha and others against the State of Togo**) the Court answered the question in these terms.

"*IV.20- In the instant case ..., the action of Applicants does not fall within the perspective of the exercise of the right to remedies authorized by the Rules of the ECOWAS Community Court of Justice, namely: either party's opposition, third-party opposition and revision;*

The Court must, therefore, answer the issue raised in the negative;

It therefore follows that the Applicants in the proceedings that resulted in Judgment no. EWC/CCJ/JUD/06/13 dated 3rd July 2013 which can no longer validly sue the State of Togo before the Court, in the same cause and having the same claims"

IV.20- In the present case, all the criteria required for a court decision to enable it to fall under the principle of *res judicata* appear to have been met.

IV.21- Therefore, the Court retains that, in law, the fact that a court has heard and decided a case constitutes an impediment to the admissibility of any action based on the same case, involving the same parties and on the same facts and subject-matter, unless it is only for the exercise of the right to such remedies as provided for by the extant texts governing the Court;

IV.22- The Court points out that as far as its decisions are concerned, they can only be subject to opposition by either of the parties at cause, opposition by a third party that may have an interest at stake, and Application for revision by either of the two parties, as respectively provided for in Articles 90, 91 and 92 of its Rules;
The Court notes that the Applicants do not intend to exercise the right to any of these remedies for the simple reason that they never argued that their action falls within this framework

IV.23- It then falls to declare the State of Togo's objection as to admissibility as well-founded and granting it, by declaring the initiating Application of Captain GNANDAKPA Wiyao and the five (05) others as inadmissible;

On the counter-claim made by the State of Togo

IV.24- The State of Togo filed a counter-claim and requested that the Court should award a nominal cost against the Applicants at cause, for the reparation of the prejudice suffered by the State;

Togo contends that the Applicants' action was abusive, vexatious and caused it harm;

IV.25- The Applicants did not react to this counter-claim filed by the State of Togo;

IV.26- The Court points out that since the coming into force of Article 9.4 of the Supplementary Protocol (A/SP.1/01/05) amending Protocol (A/P.1/7/91) on the Community Court of Justice of the Community, the Court has been granted remit to examine all cases on human rights violations that occur in any ECOWAS Member States;
The Protocol has equally granted access to the Court to all victims applying, with cases, for the examination of their human rights violation, provided such Applications are neither anonymous nor already brought before an equally competent international court, for adjudication;

IV.27- The examination of the initiating Application reveals that the Applicants believe that they should go to the Court because they consider themselves victims of violations of their fundamental rights;

IV.28- Under Article 10 of the Universal Declaration of Human Rights of 10th December 1948 it is provided that:

> "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*"

IV.29- Can the normal exercise of the right, by a citizen, to uphold a right guaranteed by the provisions of a legal instrument be analyzed, with regard to his own State, an abusive and vexatious behavior? Can such move by the citizen be considered as an abuse, a source of prejudice for his State?

The Court considers that a procedure initiated by a citizen in order to safeguard his fundamental rights cannot be analyzed as an abuse of court process;

IV.30- Furthermore, it can easily be seen that the State of Togo only contents itself with maintaining that the Applicants' action is abusive, vexatious and causes it harm without necessarily indicating or justifying what constitutes such abuse;

Indeed, the abusive and vexatious nature of the proceedings initiated by the Applicants is not demonstrated,

IV.31- Thus, it appears that the Applicants' action is neither vexatious nor abusive.

In these circumstances, it is right to reject the Application for a nominal costs applied for, by the Defendant State, against the Applicants;

V - ON THE COSTS

V.1- Each of the parties has expressly requested that the other be ordered to bear all costs;

V. 2- It is important to remember, at this stage, that costs are governed by the provisions of articles 66 and following of the Regulations of the Court of Justice of the ECOWAS Community;

V.3- It should also be noted that under Article 66.4 of the Rules of Court, there is the possibility for the Court to apportion the costs, or to decide that each party will bear its own costs, if the parties respectively succumb to one or more heads of claims, or for exceptional reasons

V. 4- In the instant case, it appears that each of the parties has succumbed to one head of claim;

In these circumstances, Court to declare that each will bear its own costs.

FOR THESE REASONS

The Court,

Sitting in a public hearing, in a human rights violation matter, in first and last resort, and after hearing both parties;

As to form

- **Declares** as admissible the Application for expedited procedure filed by Plaintiffs/Applicants;

- **Declares** that the said Application for expedited procedure has become devoid of any useful purposes;

- **Grants** the plea on non-suit made by the State of Togo, based on the principle of the *res judicata*, in regard to Judgment N°: ECW/CCJ/JUD/18/15 dated 7th October 2015;

- **Declares** the non-suit plea well-founded;

- **Holds** that the initiating Application filed by Captain GNANDAKPA Wiyao and the five (05) others is inadmissible;

As to merit

- **Rejects** as lacking grounds the counter-claim made by the State of Togo;

- **Orders** each party to bear its own costs;

THUS DONE, ADJUDGED AND PRONOUNCED IN PUBLIC HEARING AT THE SEAT OF THE COURT IN ABUJA, (FEDERAL REPUBLIC OF NIGERIA), ON THIS 24TH DAY OF JANUARY 2017;

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

1. **Hon. Justice Jérôme TRAORE** - *Presiding.*
2. **Hon. Justice Yaya Boiro** - *Member.*
3. **Hon. Justice Hamèye Founé MAHALMADANE -** *Member.*

Assisted by
Athanase ATANNON (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 24TH DAY OF JANUARY, 2017

SUIT N^{O}: ECW/CCJ/APP/10/16
JUDGMENT N^{O}: ECW/CCJ/JUD/02/17

BETWEEN
LA SOCIETE ANONYME
(MASEDA INDUSTRIES) - *PLAINTIFF*

VS.
REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JEROME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **CHEICK OUMAR KONATÉ (ESQ.)** - *FOR THE PLAINTIFF*
2. **M. SEYDOU SANOGO** - *FOR THE DEFENDANT*

-Admissibility - Fair Hearing - Compensation

SUMMARY OF THE FACTS

Maseda Industrie SA, represented by its Chief Executive Officer, filed before the Court for the violation of human rights by the Republic of Mali and sought reparation. It invokes the provisions of Articles 8 of the Universal Declaration of Human Rights and 7 of the African Charter on Human and Peoples' Rights, complaining in particular of the exceptionally long duration of an action brought by the company before the Administrative Chamber of the Supreme Court of Mali which, after several adjournments, rendered a decision on 30 June 2016, five years after its referral, establishing, according to the Applicant, a violation of its right to be heard within a reasonable time.

The dispute arose from the performance of the terms of a performance contract entered into on 15 September 2011 between the Applicant and the State of Mali. However, the grievance concerns rather the judicial treatment reserved to the Applicant by the Malian courts.

The Republic of Mali opposes the application for plea of inadmissibility based in particular on discontinuance of proceedings before the domestic courts and on the non-exhaustion of local remedies.

ISSUES FOR DETERMINATION:

- *Is the application of "Societe Maseda Industrie SA" admissible?*
- *Was the right to an effective remedy and the right to be heard within a reasonable time violated?*
- *Is the Applicant entitled to the compensation sought?*

DECISION OF THE COURT

The Court declared the application of Maseda Industrie SA admissible.

Held that this Court is not an arbiter of contracts.

The Court held that the Applicant's right to have its case heard within a reasonable time was violated and that the respondent State is responsible for it.

It therefore ordered the State to pay the Applicant the sum of 10 million FCFA as compensation for the losses suffered by it.

JUDGMENT OF THE COURT

Delivered the following judgment:

Between

I- The Parties

The limited company "Maseda Industrie SA" with its head office on Avenue de l'OUA, immeuble Maseda, Faladié, BP 2768, Bamako, represented by its Chief Executive Officer and represented by Maître Cheick Oumar Konaté, lawyer at the Court, Rue 822, porte 611, Bamako, Republic of Mali, whose office is elected for the present,

- Applicant,

Against

The Republic of Mali represented by the Directorate General of State Litigation with its headquarters in Bamako, Republic of Mali, in the person of M. Seydou Sanogo, magistrate,

- Defendant;

The Court,

Mindful of the Treaty establishing the Economic Community of West African States (ECOWAS) of 24 July 1993;

Having regard to the Protocol of 06 July 1991 and the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice;

Having regard to the Rules of the Community Court of Justice, ECOWAS of 3 June 2002;

The Universal Declaration of Human Rights of 10 December 1948;

Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;

Having regard to the application dated 07 March 2016 registered at the Registry of the Court of Justice on 06 April 2016, submitted by the limited company Maseda Industrie SA;

Having regard to the statement of defence of the Republic of Mali dated 05 May 2016 registered at the Registry of the Court on 10 May 2016;

Having regard to the rejoinder of the Applicant dated 06 June 2016 registered at the registry of this very Court on 14 June 2016;

II - Facts and Procedure

1- On 15 September 2011, the Republic of Mali, represented by the Ministry of Industry, Investment and Trade, signed a seven-year performance contract with Maseda Industrie SA covering the period from 2011 to 2017.

2- By this agreement, the Republic of Mali undertook to fulfil the following obligations:

- To grant to the Applicant a decreasing discount on the price of the cotton-fibre sold by the state enterprise CMDT;
- Assure the Applicant of a regular supply of raw material (cotton-fibre) from CMDT;
- Strengthen the fight against fraudulent products that would compete with those produced by the Applicant.

3- Approximately fourteen months after the signing of the said contract, the Applicant addressed an informal appeal to the defendant, requesting payment of the sums of 5,063,972,000 FCFA representing the loss of income and 500,000,000 FCFA as damages.

4- On 16 October 2012, the Applicant brought an action before the Administrative Division of the Supreme Court of Mali seeking an order against the respondent to pay the above amounts.

5- By letter dated 20 November 2012, the Applicant withdrew and the President of the Administrative Division of the said Supreme Court gave notice thereof by order No. 009-2012/CS-PSA dated 18 December 2012.

6- On 11 April 2013, the Applicant again filed an application with the Supreme Court for compensation for the above-mentioned damages. In this respect, it claimed the sum of 5,063,972,000 FCFA in principal and 500,000,000 FCFA in damages for the entire damage, as well as an order that the defendant bear the entire costs.

7- On 13 June 2013, the case was listed for a hearing on 23 January 2014. On that date, the case was put under advisement for decision to be delivered on 06 February 2014.

8- On 06 February 2014 the case was adjourned to 08 October 2015. On 8 October 2015, the Court again decided to adjourn the case sine die according to the extract from the docket of its registry dated 1 February 2016 attached to the file.

9- On 6 April 2016, the company Maseda Industrie applied to the ECOWAS Court of Justice with an application dated 7 March 2016 for compensation against the Republic of Mali.

10- The Supreme Court of Mali handed down judgment No. 358 dated 30 June 2016, in which it dismissed the company Maseda Industrie from all its claims as ill-founded. This decision was served to the latter by writ dated 16 November 2016 signed by Maître Moussa Berthe, bailiff, before being produced by the defendant at the hearing of 06 December 2016 of this Court.

III-Arguments and submissions of the parties

11- The Applicant considers that the application is admissible as it meets all the formal requirements of the law. Thus, the letter of withdrawal No. 76-12BT dated 20 November 2012 sent by it to the Supreme Court of Mali merely put an end to the proceedings (not to the action)

and the aforementioned order issued to that effect by the President of the said court did not, in anywhere, mention a withdrawal of the action as claimed by the defendant.

12- On the merits, the Applicant invokes two legal grounds, namely:

- Article 8 of the Universal Declaration of Human Rights of 10 December 1948, which provides that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him or her";

- Article 7 of the African Charter on Human and Peoples' Rights of 27 June 1981, which states that "Everyone has the right to have his cause heard. This right includes the right to be tried within a reasonable time..."

13- In the light of these texts, the Applicant considers that the Republic of Mali failed to comply with its international obligations and its own Constitution through the exceptionally long duration of the procedure it submitted to the administrative division of the Supreme Court of Mali. For the Applicant, this inertia of the Supreme Court is a denial of its right to justice.

14- With regard to compensation, the Applicant relies on the report evaluating the loss of earnings of the company Interafricaine d'Audit et d'Expertise to request, as a principal claim in the amount of 5,063. 972 000 FCFA and 500. 000,000 FCFA in damages.

15- In its submissions, the Applicant recalls that in the judgment in the case of **Norbert ZONGO against the Republic of Burkina Faso**, the African Court of Human and Peoples' Rights recalled and upheld the consistent jurisprudence of the International Court of Justice, according to which "*It is a general principle of international law that the violation of a commitment entails the obligation to make reparation in an appropriate manner. Reparation is therefore the essential complement to a breach of a convention, without the need for it to be written into the convention itself".*

16- In the same case, the African Court of Human and Peoples' Rights recalled, according to the Applicant, that "*The liable State is under an obligation to make full reparation for the damage occasioned by the internationally wrongful act...such reparation shall take the form of restitution, compensation and satisfaction.*

17- Finally, the Applicant points out that it is a matter of principle that liability entails an obligation to compensate for the damage suffered if the causal link between the wrongful act and the damage is established in concreto.

18- The State of Mali states for its part, that the application is inadmissible with regard to the form since it was introduced after the withdrawal of the Applicant which was formally noted by Order n 009-2012/ CS-PSA dated 18/12/2012.

19- According to the Respondent, the Applicant, in addition to not having exhausted local legal remedies, withdrew its action and cannot bring the same case before another court, even a sub-regional one. Thus, the invocation of the violation of human rights and the denial of justice by the Supreme Court of Mali are only pretexts to circumvent the dismissal of the second application filed by MASEDA.

20- On the merits, contrary to the allegations of the Applicant, the Republic of Mali maintains that it did not commit any breach of its Constitution or of its international obligations. That since the introduction of the proceedings before the Supreme Court, the rights of the parties to the defence and the exchange of pleadings and exhibits between the parties were properly conducted.

21- As for the adjournment of the case of 8 October 2015, it is explained by the retirement of some counsel of the Supreme Court and the new appointments within the said court.

22- That moreover, this procedure has come to an end given that the Supreme Court of Mali finally decided the case between the parties

following the judgment N 358 of 30 June 2016 served to the Applicant on 16 November 2016 attached to the proceedings file.

23- That in any case, according to the respondent, it is not for the Community Court of Justice, ECOWAS to assess the conduct of the proceedings at the national level. The respondent invokes, for this purpose, a constant jurisprudence of the aforementioned court, according to which "the ECOWAS Court of Justice is not a court of appeal of national decisions".

24- With regard to the compensation requested by the Applicant, the respondent considers that it did not commit any wrongful act justifying compensation and that the Applicant did not establish any proof of the non-performance of its contractual obligations by the Republic of Mali.

25- On the contrary, the government of Mali believes that the various meetings it organized between the companies and the technical services, the proposals made to take into account the economic realities of CMDT, as well as the review of the needs of the companies, which were reduced from 10,000 tons to 4,925 tons, of which 500 tons were for the Applicant, are proof of the efforts made by the government to fulfil its contractual obligations.

26- In view of the foregoing, the Republic of Mali concludes that the application is inadmissible and, in the alternative, that all of the claim made by the Applicant is rejected as ill-founded. The Respondent further seeks an order that the Applicant should be ordered to pay all costs.

IV- Analysis by the Court

27- The Court must first rule on the request for reversal of the deliberation (1) and then on the objection of inadmissibility of the request raised by the defendant (2), before assessing, possibly, the merits of said application (3).

In the form

1- On the request for reduction of the deliberation

28- Considering that by letter dated 05 January 2017 registered at the Registry of the Court of Cassation on 18 January 2017, the Republic of Mali sought the adjournment of the case on the grounds that the appeal for review brought before the Supreme Court of Mali by the Applicant against Judgment No. 358 of 30 June 2016 will have to be examined in Bamako in the course of January 2017; that on this occasion new elements likely to influence the decision of this Court have emerged, hence the interest of adjourning the said proceedings.

29- Considering, however, that the Court considers that this review procedure initiated before the Supreme Court of Mali cannot have any impact on the decision likely to be rendered by it;

30- That it follows that the claim made by the Republic of Mali must be rejected.

2) On the admissibility of the application

31- Whereas the Court notes, first of all, that the application submitted to it alleges violations of human rights, in particular the right of any person aggrieved to an effective remedy before a judge and the right to a trial within a reasonable time. The Court also notes that this application invokes at least two international instruments that are binding on the respondent, namely the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.

32- In accordance with its jurisprudence, therefore, it considers that these elements alone are sufficient to justify its *ratione materiae* jurisdiction.

33- That in addition, the argument of the defendant according to which, the Applicant having withdrawn her action, cannot bring the same

case before another court, even sub-regional, cannot prosper since in the case of the present suit, with regard to the documents of the procedure, in particular the aforementioned letter of withdrawal of the Applicant and the presidential order which followed, it is a simple withdrawal of the proceedings and not of the action.

34- With regard to the non-exhaustion of local legal remedies invoked by the defendant, this Court remains faithful to its traditional jurisprudence, in which it has always recalled that it is open to any party who is a victim of human rights violations to bring a case before it without the need to exhaust local remedies.

35- That it follows that the application presented is admissible in the formal presentation.

AS TO THE MERIT

1- On the violation of human rights

36- Whereas, in order to obtain the dismissal of the Applicant, the Respondent relies on the jurisprudence of the Court of Cassation, according to which the latter is not a judge of the formal regularity of national legal acts, nor is it a judge of reversal or cessation of national judicial decisions.

37- On this point, the Court, always guided by the principles that govern its jurisprudence, has recalled in a number of its decisions, including the one rendered on 6 October 2015 in the case of **General Amadou Haya Sanogo et al. v. the Republic of Mali**, that

> **"*While it is a principle that it does not assess the reasons for a judicial decision handed down by a court of a Member State, inasmuch as it is neither a judge of legality in the broadest sense of the term nor a judge of appeal or cassation, it is nevertheless entitled to draw all the consequences of a national decision, in the field of human rights*."**

38- In the present case, the question is not so much to assess the merits, if not the legality, of the aforementioned decision of the Supreme Court of Mali rendered between the parties, as to examine whether, in principle and in general, the right of the Applicant to access to a judge and to have his cause heard within a reasonable period of time, were respected.

39- With regard to the right of access to a judge, the Court considers that the plea presented by the Applicant lacks relevance since it appears from the arguments and documents in the file that the Applicant was able, without difficulty, to apply to the Supreme Court of Mali to examine the dispute between it and the defendant and that there was a regular exchange of pleadings between the parties before the case was taken under advisement for a decision to be handed down on 6 February 2014, even though this advisement was, at one point, adjourned and extended sine die.

40- As for the second point, based on the right to have one's cause heard within a reasonable period of time, the Court observes that the Applicant applied to the Supreme Court of Mali on 11 April 2013 for compensation for the above-mentioned damages. On 13 June 2013, the case was enrolled for a hearing on 23 January 2014. On this date, the case was put under advisement for decision to be rendered on 06 February 2014.

41- On 06 February 2014 the case was adjourned to 08 October 2015. Concerned about these inexplicable delays, the Applicant had, in the meantime, sent a letter to the President of the administrative division of the Supreme Court of Mali, attached to the file, dated 24 June 2015, seeking a ruling on the case. There was no follow-up to this letter.

42- On 8 October 2015, the Court decided again and without reason the dismissal sine die of the case according to the extract of the docket of its registry attached to the file.

43- In view of these facts, the Court considers it appropriate to recall at this stage the raison d'être of the "reasonable time" requirement before putting it into context: the old French adages ("justice rétive, justice fautive") and the English adages ("justice delayed, justice denied") express in a striking manner the raison d'être of the requirement of speed in both national and international legal proceedings.

44- The Court recalls in this respect that it is settled doctrine and case law that the reasonableness of a proceeding is to be assessed in an overall manner according to the circumstances of the case, taking into consideration some criteria, in particular the complexity of the case, the conduct of the Applicant and that of the competent authorities, as well as the stakes of the dispute for the parties.

45- Therefore, the Court considers the concept of "reasonable time" as enshrined in Article 7 of the African Charter on Human and Peoples' Rights and enshrined in Article 10 of the Universal Declaration of Human Rights, as a right of major importance.

46- The importance of this right obliges each State concerned to develop its judicial system in such a way as to meet the requirement of prompt justice or risk incurring its own liability.

47- In the present case, it is a fact that the case in question has undergone incomprehensible procedural twists and turns, bordering on a denial of justice, since it was subject to untimely, if not unjustified, referrals for more than three years before being, firstly, referred back indefinitely without any reason, and then, secondly, examined by the national court, after the Applicant had already referred it to the Court of Cassation for violation of its right to justice, then, in a second stage, examined by the national judge, after the Applicant had already brought the case before the present Court for violation of its right to have the case heard within a reasonable time.

48- The Court notes that after examining all the elements submitted to it, the Republic of Mali did not set out any facts or arguments that could lead to a different conclusion in the present case. It merely maintains that, with regard to the dispute between the parties, a decision was finally rendered by the Supreme Court of Mali without any pressure and that the delay in the proceedings is linked to the intervention of the *Compagnie malienne du développement des textiles* (CMDT). However, this intervention does not appear in the judgment filed in the proceedings, and in the assignment of certain judges of the said Supreme Court.

49- Consequently, the Court considers that the duration and the blocking of the procedure are excessive and do not meet the requirement of "reasonable time" as provided for by the above-mentioned international conventions duly ratified by the Republic of Mali.

50- That it follows that this dysfunction of the judicial service is attributable to the Republic of Mali.

2- On the reparation

51- Considering that the Applicant seeks the sum of 5,063,972,000 FCFA in principal and 500,000,000 FCFA as compensation for the damage it suffered.

52- Whereas at this stage, the Court recalls that it is not a judge of contracts and that as such, contrary to the courts of general law, it cannot draw any conclusions as to the performance or non-performance of the contract binding the parties.

53- However, this position of principle does not deprive it of the right to rule on any question of reparation when it concerns a violation of a human right by a State within the meaning of Article 10 of the Supplementary Protocol on the Community Court of Justice, ECOWAS of 19 January 2005.

54- That as it is clear that the right of the Applicant was not examined within a reasonable time by the Supreme Court of Mali, this Court considers it reasonable to award the sum of 10,000,000 CFA francs to compensate the Applicant for the damage suffered by it.

3- As to costs

55- Considering that the Republic of Mali has been unsuccessful, and that in application of the provisions of Article 66 of the Rules of Court, it should be ordered to pay the costs.

FOR THESE REASONS,

The Court, adjudicating in a public hearing, after hearing both parties, on the subject-matter of human rights, and after deliberating in accordance with the law, as a last resort,

In the formal presentation of the Application

- **Finds** that there is no reason to withdraw the deliberations;
- **Uphold** the claim of the Republic of Mali that the application filed by the limited company Maseda Industrie SA is inadmissible;
- **Dismisses** as unfounded the aforementioned plea of inadmissibility;

As to merit

The Community Court of Justice held that it is not a trial court for contracts;

- **Declares** also that the Applicant does not prove the violation of its right to an effective remedy before the courts of Mali;
- **Declares**, however, that the right of the Applicant to have its cause heard within a reasonable time was violated;
- **Holds** the Republic of Mali liable;

Consequently,

- **Orders** the Republic of Mali to pay to the Applicant the sum of 10,000,000 CFA francs as compensation for the damage suffered by the Applicant;

- **Dismisses** the remainder of the claim of the Applicant;

- **Orders** the defendant to pay the costs.

Thus pronounced and signed in Abuja, on the day, month and year above,

And the following have appended their signatures:

- **Honourable Justice Jérôme Traoré :** *Presiding.*
- **Honourable Justice Yaya BOIRO:** *Member.*
- **Honourable Justice Alioune SALL:** *Member.*

Assisted by

Athanase ATANNON (Esq.) - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 10TH DAY OF OCTOBER, 2017

SUIT N^{O}: ECW/CCJ/APP/20/15
JUDGMENT N^{O}: ECW/CCJ/JUD/03/17

BETWEEN

1. NOSA EHANIRE OSAGHAE
2. JONAH GBEMIRE
3. PETER AIKO OBABIAFO
4. DANIEL IKPONMWOSA
(SUING FOR THEMSELVES AND ON BEHALF OF NIGER DELTA PEOPLE)

} *PLAINTIFFS*

VS.

THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **SOLOMON OMOBUDU (ESQ.)** - *FOR THE PLAINTIFFS.*
2. **MAIMUNA LAMI SHIRU (MRS.), ABUBBAKAR MUSA, TAIWO ABIDOGUN (ESQ.), T.A GAZALI, D. AGBE** - *FOR THE DEFENDANT.*

- Jurisdiction - Admissibility of application
- Human rights violation- Economic, Social and cultural rights
- Self-determination - Cause of action - Locus standi
- Res judicata - Pendency of action - Burden of proof

SUMMARY OF FACTS

The Plaintiffs Nosa Ehanire and others lodged an application at the Court registry against the Federal Republic of Nigeria for various declarations and orders relating to the violation of their human rights.

The Plaintiffs claimed that they have suffered marginalization, unlawful takeover of communal natural resources, destruction of communal fishing water and farm land, due to oil spills from exploration.

The Plaintiffs further aver that the indigenous communities have no input whatsoever in the way and manner the explorations are carried out and the award of oil mining leases/licenses are lopsided, granted without adherence to due process and evidently biased.

The Defendant in response raised a preliminary objection on the jurisdiction of the court, the locus standi of the Plaintiffs and Plaintiffs failure to disclose any reasonable cause of action. On the merits, the Defendant contended that the award of operation license in the oil sector is done in compliance with global standards and are awarded to companies with the requisite experience in the operation of oil business.

Furthermore, that the revenue derived from its resources are shared between the three tiers of Government in compliance with the formula for distribution spelt out in the 1999 constitution.

The Defendant admits responsibility of preventing degradation of land in oil producing states and states that it has made efforts in the

reclamation of land, water and air composition of the affected communities.

ISSUES FOR DETERMINATION

1. *Whether this Application as conceived and constituted can be entertained by this Court.*

2. *Whether the Plaintiffs have the standing to represent the Niger Delta people.*

3. *Whether the Plaintiffs have disclosed a reasonable cause of action*

4. *Whether from the facts presented, the Plaintiffs have led sufficient evidence to substantiate their claims against the Defendants*

DECISION OF THE COURT

The Court dismissed the Defendant's objection on its competence as it relates to the subject matter.

As to the admissibility of the application, the Court held that the suit is admissible with regard to the Personal rights of the Plaintiffs alleged to have been violated. The court further held that the Plaintiffs lack the locus standi to act on behalf of the people of Niger Delta.

As to cause of action, the Court pointed out that the facts alleged by the Plaintiffs are precise and discloses a reasonable cause of action.

As to the merits of the case, the Court found that the Plaintiffs have failed to sufficiently provide evidence to support the facts they bring forth or to buttress the discrimination they claim to have been victims of. The Court therefore declared that the Plaintiffs case is unmeritorious and dismissed it in its entirety.

JUDGMENT OF THE COURT

3. This Application is brought pursuant to Article 32 (1-5) & Article 33 (1-7); of the Rules of the Community Court of Justice, Article 11 (1-2) of the Community Court of Justice Protocol, Article 10 of the Supplementary Protocol, Article 1, 2, 4, 9, 16, 21, 22, 23 & 24 of the African Charter on Human and People's Rights (ACHPR), Articles 1, 2, 3, 6 & 8 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 1, 2, 3, 5, 9, 11, 12 & 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

4. NAMES AND ADDRESSES OF THE PLAINTIFF:

Mr. Nosa Ehanire Osaghae, Mr. Jonah Gbemre, Mr. Peter Aiko Obobaifo and Mr. Daniel Ikponmwosa of No. 18 Ezoti Street, Off Airport Road, Benin City, Edo State, Nigeria.

5. DESIGNATION OF THE DEFENDANT:

Federal Republic of Nigeria

6. SUBJECT-MATTER OF PROCEEDINGS:

Violation of the Plaintiffs fundamental human, civil, social and economic rights and that of the Niger Delta people of Nigeria.

7. FACTS AS PRESENTED BY THE PLAINTIFFS

The 1st to 4th Plaintiffs are citizens of the Federal Republic of Nigeria and reside at no. 18, Ezoti Street, off Airport Road, Benin City, Edo State.

The Defendant is a Member State of the ECOWAS and a signatory to the Revised Treaty establishing the ECOWAS.

The 1st Plaintiff who is from Edo State avers that he has suffered marginalization from the Defendant and its agents in the Niger Delta region. The 2nd Plaintiff is from Delta state and claims to be a victim of injustice being perpetrated by crude oil exploration/mining companies arising from crude oil spills, gas flaring and environmental degradation. The 3rd Plaintiff is from Edo State and avers that he is a victim of apparent destruction of communal fishing water in the Niger Delta region by oil companies. Lastly, the 4th Plaintiff from Edo State claims to be a victim of unlawful takeover of communal natural resources and environmental degradation. The Plaintiffs are suing for themselves and on behalf of the Niger Delta people of Nigeria.

The Plaintiffs claim that the core Niger Delta Region of Nigeria made up of 6 States in the South-South Geopolitical Zone namely: Edo, Delta, Bayelsa, Rivers, Akwa Ibom, and Cross River States are perpetually under serious environmental attack by the agents and companies purportedly holding Oil Mining Lease (OML) granted to them by the Defendant. That they have been faced with unprecedented degradation, destruction, poisoning, and pollution of the environment through crude oil spills and gas flaring thereby destroying their social and economic life. The spills have destroyed Farmlands and Rivers which is the only source of clean drinking water and also used for fishing.

The Plaintiffs further state that the indigenous Communities where these oil and gas explorations are carried out have no input whatsoever in the way and manner the explorations are carried out based on the undemocratic, unlawful, oppressive, repressive, abusive, and discretionary use of Constitutional laws imposed on the underdeveloped and impoverished indigenous owners of the land.

The Plaintiffs state that the gas flaring and exploration are done in ways and manner injurious to the Niger Delta region environment thus making such environments a death trap that has led to indiscriminate killings and brutal massacres by the military of thousands of innocent indigenes including old men, women, and children. This precipitated militant

retaliatory attacks by the heavy armed indigenous youths against the Defendant and the oil companies.

The Plaintiffs further aver that the Defendant has fraudulently awarded oil and gas mining licenses/leases to both indigenous and non-indigenous firms some of whom have no prior experience or qualification in the upstream oil production and are even co-owned by a single individual with some of their family members, friends and associates. Some of the licenses were awarded for a long period of up to 20 years. The Plaintiffs state that this has not been done in accordance with the legal requirements.

That the award of such contracts are lopsided, do not follow due process, and are evidently biased as most owners of the oil blocs are Northerners and Westerners while the Southerners have not been given any opportunity to benefit from what rightfully belongs to them.

That the allocations were based on tribalism, nepotism, favoritism and frivolous whims and thus gives notice to the Defendants to produce a detailed information on how oil blocs mining leases were awarded, and also documents showing how and when the indigenous oil companies were incorporated, the incorporation documents as well as values of each shareholder.

That the Defendant has perfected its plans to once again corner the impoverished and poverty-stricken people of the Niger Delta by unilaterally renewing these same oil blocs licenses without recourse to the impact and damage the activities of the crude gas explorations have done and are still doing to the Niger Delta. The Plaintiffs further state that the Defendant has failed or neglected to reduce the frequent incidences of crude oil spills and gas flaring that have killed or incurred health hazards to thousands of people in the Niger Delta.

That the above acts complained of constitute a violation of their fundamental human, civil, social and economic right of ownership, use and benefit of the natural resources in their ancestral land. The Defendant has overlooked the apparent inhuman suffering and recurrent deaths

occasioned by ill-health caused by severe damage to the environment in the oil producing communities. That unless the Defendant is restrained from renewing the already expired oil mining blocs exploration licenses, the people of the Niger Delta shall continue to suffer from these crude oil exploration activities.

Whereupon the Plaintiffs filed this application seeking for the following orders:

i) A **DECLARATION**: that the unilateral allocation of Crude Oil Blocs to private Nigerians and their firms by the Federal Government of Nigeria in total disregard to the people of the communities in whose lands the crude oil is located is unlawful and same violates their Fundament Rights as entrenched in Article 21, 22 & 24 of the African Charter on Human and Peoples Rights (ACHPR); Article 1 (1-3) of the International Covenant on Civil and Political Rights (ICCPR); and Article 1 (1-3) & 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

ii) A **DECLARATION**: that the unbridled crude oil exploration, gas flaring and resultant pollution and deaths of people in the Niger-Delta region in the past 30 years which has led to severe environmental degradation and destruction without proper steps being taken by the Federal Government of Nigeria to prevent same is unlawful and a clear violation of their Fundamental Rights to life, and the dignity of Nigerians living in the oil producing areas of the Niger-Delta Region, Right to Self Determination, Right to healthy Environment and same is contrary to the provisions of Article 1, 2, 4, 16 & 24 of the African Charter on Human and Peoples Rights (ACHPR); Article 1 & 6 of the United Nation's International Covenant on Civil and Political Rights (ICCPR); Article 1 & 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

iii) AN **ORDER:** directing the Federal Government of Nigeria to immediately declare a MORATORIUM on all oil blocs transactions by suspending or ceasing all onshore and offshore Oil Blocs acquiring, awarding, leasing, renewing, prospecting, buying and selling in any form whatsoever pending the hearing and determination of the substantive matter (ACHPR: Article 1 & 21.2).

iv) **AN ORDER:** mandating the Federal Government of Nigeria to re-allocate the ownership of all onshore and offshore oil blocs in the Niger Delta region back to the indigenous oil communities (ACHPR: Article 21 & 22) & (ICESCR Article 11).

v) **AN ORDER:** directing the Federal Government of Nigeria to immediately pay remedial environmental damages for an immediate clean up exercise in the oil polluted Niger Delta region to the tune of **$30 billion** for the excess of **9 million barrels of spilt crude oil** in the Niger Delta region and for hazardous gas flaring over the last fifty years of oil exploration and exploitation in the Niger Delta region (ACHPR: Article 1**,** 21 & 24;) & (ICESCR Article 12).

vi) **AN ORDER:** mandating the Federal Government of Nigeria to facilitate an enabling environment for the people of Niger Delta in actualizing their innate desire, yearning, cry, call and demand for the conduct of a SELF-DETERMINATION REFERENDUM for the over 30 million people of the Niger Delta region who are impoverished, deprived, aggrieved, and who are unlawfully and unjustly being marginalized by successive Federal Governments of Nigeria since independence till date (ICCPR & ICESCR: Article 1.1, 1.2 & 1.3).

8. The Defendant being out of time to file its defense, filed an application for extension of time dated 10/12/15 to which it attached its defense. Defendant averred that the nature of the case necessitated the need to liaise with other Government agencies for the defense hence their being out of time. On 15/12/15, the Defendant filed a preliminary objection challenging the jurisdiction of the court on the following grounds:

    - The Plaintiffs have no locus standi to institute this suit;
    - The Plaintiffs' are faceless people without identity;
    - Some aspects of the Plaintiffs claim are res judicata while some are statute barred;
    - The Plaintiffs suit is speculative and does not disclose a reasonable cause of action;
    - The suit constitutes an abuse of Court process;
    - That there's a feature in the Plaintiffs suit which robs this court of jurisdiction, and
    - That the subject matter of the Plaintiffs suit a subject of their domestic court.

In defence to the Plaintiffs Application, the Defendant denied each and every material allegation of fact contained in the Plaintiffs' application and puts the Plaintiffs' to the strictest proof of those facts.

Defendant further states that the facts relied upon by the Plaintiffs are false and made with the sole intention of misleading the court. That the award of operation license in the oil sector in Nigeria is done in compliance with global standards and are not made to individuals or families but to companies with requisite experience in the operation of oil business. That the award of oil blocs are done in line with the relevant laws regulating

the operations of the oil sector and that the procedure for the issuance and renewal of licenses is prescribed by law.

That the Petroleum Act of the Federal Republic of Nigeria has laid down guidelines on the necessary requirements needed before license is granted and the agency charged with the issuance of license complies with the due process. That the Plaintiffs failed to indicate any company that applied and was refused license on the ground that it comes from the Niger Delta.

The Defendant admitted that there are companies who exercise their right of renewal of the mining lease but that the treaties and laws the Plaintiff relied upon only confirms the ownership by the Defendant of her land and resources found within her boundaries. The Defendant added that the revenue derived from its resources are shared between the three tiers of Government in compliance with the formula for distribution spelt out in the 1999 Constitution.

The Defendant contends that in compliance with the provisions of its constitution, the Plaintiffs have representatives both in the senate and House of Representatives, and by virtue of their representation, the Plaintiffs lack the requisite standing to sue for and on behalf of the alleged 6 states.

That the Federal Government of Nigeria only oversees the oil sector but all the revenue accruable to the federation account from this sector is shared to all the three tiers of government in accordance with the laid down law after paying 13% derivation to oil producing states who also benefit from the remaining 87%.

On the issue of environmental degradation, the Defendants aver that it is their responsibility to prevent degradation of land in oil producing states. That it has made tremendous efforts and it is still putting more resources in the reclamation of land, water, and air composition of the affected communities. That recently, in line with her internal, regional and international obligation, the government released the sum of N10,

000,000,000.00 (Ten Billion Naira) for the reclamation of Ogoni land as part of ongoing mechanisms to curtail oil pollution in the affected communities. They have also created a Niger Delta Corporation and the Ministry of Niger Delta which in partnership with the oil companies, international organizations, agencies, both private and public are working to reduce gas flaring, oil pollution, degradation of land, air and water pollution amongst others. That this is apart from the 13% derivation benefit from the National Revenue that is paid to the oil producing communities, and other forms of royalties the oil companies pay the affected communities i.e. the fees, tax, duties, and levies paid to the affected states.

The Defendant state that the issue of degradation is a collective problem which does not just affect a single community. On the notice given to the Defendant by the Plaintiffs to produce certain agreements entered into with various companies, organizations and corporations, the Defendant states that it is not a registry or a depository of agreements and can therefore not produce what is not in its possession.

Finally, the Defendant submits that the Plaintiffs are not entitled to reliefs relating to the right to self-determination as same can only be achieved by a referendum called by the National Assembly and not the court. As to the monetary reliefs sought, the Defendant submits that the Plaintiffs are not entitled to same having failed to pin point any victim of the oil pollution and urged the court to dismiss this suit in its entirety.

9. ANALYSIS OF THE COURT.

From the foregoing, the issues were joined between the Plaintiffs and the Defendant bordering on violation of the Plaintiffs right to self-determination, the right to the management of their resources among others. The cases raises issues on preliminary and substantive issues. Consequently, the Court will consider them in that light.

9.1: PRELIMINARY OBJECTION

In deciding on the preliminary objection raised by the Defendant, this court has to consider the following issues:

1. Whether this application as conceived and constituted can be entertained by this court.

2. Whether the Plaintiffs have disclosed a reasonable cause of action.

9.2: SUBSTANTIVE APPLICATION

Whether from the facts presented, the Plaintiffs have led sufficient evidence to substantiate their claims against the Defendants.

9.3: ON WHETHER THE APPLICATION AS CONCEIVED AND CONSTITUTED CAN BE ENTERTAINED BY THIS COURT.

Whereas the Plaintiffs allege a violation of their human rights as enshrined in Articles 1, 2, 4, 9, 16, 21, 22, and 24 of the African Charter on Human Peoples Rights (ACHPR), Article 1 of the International Covenant on Civil and Political Rights (ICCPR), and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Defendant submits that this court lacks the jurisdiction to entertain this suit on grounds of the Plaintiffs lack of standing and identity, res judicata, lack of reasonable cause of action, and that the suit constitutes an abuse of process of the court.

In purported response to the Defendants objections, the Plaintiffs submit that the Defendant is treaty bound by international law to acknowledge and recognize that the Niger Delta people are the de facto, natural and legitimate owners by birthright of the Niger Delta land with all its antecedent natural resources. That this inalienable and incontestable fundamental human right is absolutely sacrosanct and guaranteed by the International

Law Treaties, Charters and Covenants. That their application is perfectly in accordance with the Court's Protocol, Rules of Procedure, and the Revised Treaty. That the objections raised by the Defendant are just legal technicalities. The Plaintiffs further state that the Defendant is in serious breach of its Treaty obligations in the ceaseless, incessant and relentless violations of the Human rights of the Niger Delta people for decades.

The Plaintiffs failed to address the issues raised by the Defendant in the preliminary objection. This court in its inherent jurisdiction to do justice at all times will however proceed to analyze the issues raised in line with the facts presented by the Plaintiffs in the initiating application. This is more so as jurisdiction is determined from the facts presented in a Plaintiffs application and not from the defence.

The facts as presented by the Plaintiffs is that they are victims of marginalization, injustice perpetrated by crude oil exploration/mining, crude oil spills, gas flaring, environmental degradation, apparent destruction of communal fishing water and land, and unlawful take-over of communal and land resources. They relied on Articles 1, 19, 20, 21, 22, 23 and 24 of the African Charter in which they claim that their economic, social and cultural rights, and the right to self-determination have been violated by the Defendants.

On the Plaintiffs standing to institute this action a careful perusal of the facts shows that the Plaintiffs claims are in two parts. On one part the Plaintiffs allege personal injuries/violations of their rights by the Defendant while on the other part they allege violation of the rights of the peoples of Niger Delta. The Plaintiffs action are first for themselves and secondly on behalf of the people of Niger Delta. To properly address the issue of Plaintiffs standing these two prongs will be addressed separately.

The term *locus standi* connotes the interest a party has in the subject matter of litigation before a Court. Generally, to be granted audience by a Court, a party must prove sufficient interest in the subject matter. There

is however the exception here in cases of action popularis whereby duly constituted NGOS and public-spirited individuals are given access without the requirement of personal interest.

As regards the allegation of personal injuries caused the Plaintiffs due to crude oil spills, gas flaring, environmental degradation and pollution of communal fishing water, these allegations fall within the ambit of internationally protected rights which if substantiated will amount to violations of human rights.

By virtue of Articles 9(4) and 10(d) of the Supplementary Protocol this Court has jurisdiction to determine cases of violation of human rights that occur in any Member State and individuals have direct access to it for application for relief for violation of their human rights.

In **Serap V. Federal Republic Of Nigeria & 4 Ors, (2014) ECW/CCJ/JUD/16/14** *(unreported),* the Court held that the mere allegation that there has been a violation of human rights in the territory of a member State is sufficient prima facie to justify the jurisdiction of this Court on the dispute, surely without any prejudice to the substance and merits of the complaint which has to be determined only after the parties have been given the opportunity to present their case, with full guarantees of fair trial.

In **Bakary Sarre & 28 Ors Vs. Senegal (2011) (unreported) Pg. 11, Para.25***,* the Court held that its competence to adjudicate in a given case depends not only on its texts, but also on the substance of the Initiating Application. The Court accords every attention to the claims made by the Applicants, the pleas in law invoked, and in an instance where human right violation is alleged, the Court equally carefully considers how the parties present such allegations.

Similarly in **El Hadji Aboubacar Vs. BCEAO & Rep. of Niger (2011) CCJELR** *(unreported) pg. 8, Para 25,* the Court found that for an application to be admissible in matters of human rights, the mere citing of

the facts connected with such description suffices to confer competence on it.

The Court therefore looks to find out whether the human right violations as observed, constitute the main subject matter of the application and whether the pleas in law and evidence adduced if proven will establish such violations. The invocation of facts which fall in line with the subject matter is sufficient on its own to establish its competence on human right matters.

Applying the above authorities in relation to the facts of this case, and in the absence of anything to the contrary, this matter falls within the ambit of the Court's jurisdiction and the Plaintiffs who allege violation of their rights have the right to bring same for adjudication. The Defendant's objection in this regard is therefore not tenable.

The second arm of Plaintiffs allegation is on the alleged infringement of the rights of the peoples of Niger Delta. Human rights are human centered and the admissibility of an application is linked among other criteria to the status of the victim. This condition necessarily entails the Applicant, acting on personal grounds as a result of a legally protected injured interest, or in a representative capacity, having the mandate to act on behalf of an identifiable group whose legally protected interest have been harmed.

Where a petition is submitted on behalf of a victim, it must be with their consent, unless submitting it without their consent can be justified. Such justification would be the case of serious or massive violations pursuant to article 58 of the African Charter or a documented and well-reasoned problem for the victims in doing so themselves.

In Aumeeruddy-Cziffra and Others v. Mauritius *(Communication No. R.9/35) 9 April 1981,* the United Nations Human Rights Committee pointed out that to bring an Application before it, an individual must be 'actually affected' by the act complained of and that 'no individual can in the abstract, by way of *actio popularis,* challenge a law or practice claimed to be contrary to the Covenant'.

For the Plaintiffs to access the court for and on behalf of the people of Niger Delta, they need the mandate upon which they act and when questioned must establish consent of the people or a justification for acting without such consent. This is different where the Application is brought by an NGO. While the NGO's enjoy a wide range of access to Court on behalf of individuals, the individuals on the other hand have access mainly in their personal capacity on alleged human rights violations and approaching the Court in a representative capacity requires authorization.

In **Mikmaq V Canada Communication *No. 78/1980***, views adopted on 29th July 1984, where a communication was brought by a representative of the Mikmaq tribal society who claimed that Mikmaq peoples' right of self-determination had been violated by Canada. The Committee held that the complaint was inadmissible on the basis of lack of locus standi of the tribe's representative- in light of failure of the Grand council, in its legal entity, to authorize the author.

In **Serap V. Federal Republic Of Nigeria, (2012) CCJELR** *(unreported)* where the Plaintiff, an NGO, filed the action on behalf of the People of Niger Delta, against the Federal Republic of Nigeria, the Defendants challenged the Plaintiffs locus on the grounds that the application was filed without the prior information, accord and interest of the people of Niger Delta and that Serap acts in its own name with no proof that it is acting on behalf of the People of Niger Delta, the Court held that the NGO known as SERAP has the locus standi to institute this action.

Relating this to the instant case, it is important to distinguish the capacity upon which the parties act, i.e. as non-natural and natural persons. While in SERAP supra, the Plaintiff by virtue of its registration under the Laws of Nigeria is recognized to represent the People of Niger Delta without the need to produce any proof of authorization. The Plaintiffs in this case are natural persons claiming to appear on behalf of the People of Niger Delta without authorization. The proof of authorization in the case of natural persons acting on behalf of a group cannot be dispensed with.

The Niger Delta is so vast that an action brought for and on behalf of the said people without authorization sounds questionable. The Plaintiffs have failed to attach a mandate if any, given to them to clear the air in this regard. Above all no proof that the Niger Delta Region is a "people" within the context of the right of self-determination. The term is merely a coinage for administrative purposes and that does not qualify them as a people to which the right of self- determination in international law can be claimed.

In **Bakary Sarre & 28 Ors V. The Republic of Mali (2011) CCJELR pg. 72 para 38** where the Applicant claimed to act for and on behalf of a group of people vide a power of attorney, the Court noted that the said power of attorney which carried a joint representation does not vest powers on the Applicant to act on behalf of the group. The Court therefore held that the Applicant does not have the locus standi to lodge the complaint.

In Bakery's case, the Court stressed that the criteria for representation must be respected. A party authorized to act on behalf of another person or for a group of people shall exercise the power of representation in such action by virtue of the vested power.

For an application of this nature to succeed, the victims must be identifiable, and the representatives must present a mandate from the said victims authorizing them to act on their behalf. Where it is impracticable to obtain a mandate, the representatives must give reasons why it is so impracticable.

In view of the foregoing, The Court is of the view that the Plaintiffs lack the locus standi to act on behalf of the people of Niger Delta.

ON RES JUDICATA

The Defendant again contends that some aspects of the Plaintiffs claim are *res judicata* and thus prohibits the Court from entertaining same.

The doctrine of *res judicata* simply states that once a matter/cause has been finally determined, it is not open to either party to re-open or re-litigate that same matter.

A matter is said to be *res judicata* if it has already been adjudicated upon by a competent Court. This prevents it from being pursued further by the same parties. *Res judicata* precludes the continued litigation of same issues between the same parties. The matter cannot be raised again either in the same Court or in a different Court. In other words, for a plea of *res judicata* to be sustained, both the subject matter and parties must be the same.

In the instant case, the Defendant is challenging the admissibility of the suit on the grounds that part of the claims of the Plaintiffs have already been decided upon by this Court in the case of **SERAP V. FRN. (2012) CCJELR** *(unreported).*

A comparative analysis of the instant case and SERAP supra, shows that though the claims are similar in nature, the reliefs sought are not the same. Particularly, the parties in both suits are not the same.

The rule on res judicata is clear and unambiguous and therefore not applicable in this case. An argument on res judicata can only be upheld if it is established that the case brought before the court is essentially the same as another which has been adjudicated upon by another competent Court. In other words, the parties are the same, the subject matter is same and had previously been litigated upon.

In **Aliyu Tasheku V. FRN, ECW/CCJ/RUL/12/12***, (unreported),* The Court was of the view that the argument concerning res judicata can only succeed when it is established that the Application brought before it is essentially the same as another one already satisfactorily decided upon before a competent Domestic Court or an International Tribunal.

The Defendant has failed to establish that this case has been satisfactorily decided by a National Court. They have also failed to prove that the

Application brought before the Court is essentially the same as that of SERAP *i.e.* in terms of the subject matter and parties.

From the foregoing, the issue of res judicata does not apply to the instant case and therefore fails.

ON PENDENCY OF SUIT BEFORE A DOMESTIC COURT

The Defendant in challenging the jurisdiction of this Court argues that there is a pending case on the same subject matter before its Domestic Court.

Article 10 (d) of the Supplementary Protocol provides:

> *Access is open to individuals on application for relief for violation of their human rights; the submission of Application for which shall:*
>
> *i) Not be anonymous; nor*
>
> *ii) Be made whilst the same matter has been instituted before another international Court for adjudication.*

This Court has repeatedly stated that the pendency of a case before a Domestic Court does not oust its jurisdiction to entertain a matter. As long as the matter is not before another International Court, this Court has the competence to entertain same.

In **Valentine Ayika V. Republic of Liberia (2011) CCJELR pg. 237, para 13** the Court held that the Supreme Court of Liberia and for that matter any other Court in Member States does not qualify as international court within the meaning of Article 10 (d)(ii) of the Protocol as amended.

ON WHETHER THE PLAINTIFFS HAVE DISCLOSED A REASONABLE CAUSE OF ACTION

The Defendant further contends that the Plaintiffs have not disclosed any reasonable cause of action.

A cause of action is a set of facts sufficient to justify a right to sue. It must contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity to enable the opposite party to reply thereto. The term "**cause of action**" was defined in McKenzie v Farmers' Co-operative Meat Industries Ltd.1922 AD 16 at 23 as:

> ***"..."every fact which would be necessary for the Plaintiff to prove, if traversed in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact; but every fact which is necessary to be proved"***
> *See also* **Mousa Leo Keita** (2004-2009) CCJELR pg. 75

See also **Afolayan V. Oba Ogunrinde & 3 Ors (1990) 1 NWLR (Pt. 127) 369 @ 371. SCNJ 62. Where Karibi-Whyte JSC** stated that a cause of action means: a)

> ***"A cause of complaints; b) A civil right or obligation for the determination by a Court of law; c) A dispute in respect of which a Court of law is entitled to invoke its judicial powers to determine"***

The crux of this application is the Plaintiffs' allegation of crude oil spills, gas flaring, environmental degradation, destruction of communal fishing water and unlawful takeover of their communal natural resources by the Defendants. The above are issues and elements suggestive of rights violation.

The object of pleading is to ascertain with precision the issue between the parties. The facts alleged by the Plaintiffs as summarized above are precise and discloses a reasonable cause of action which if established will entitle them to the reliefs sought. The argument of the Defendant on this ground therefore fails.

SUBSTANTIVE ISSUES

On the substance of the Application this Court has to determine whether from the evidence presented, the Plaintiffs have substantiated their allegations against the Defendant as to entitle them to the reliefs sought.

The Plaintiffs allege that their economic, social and cultural rights as well as their right to self-determination have been violated due to environmental degradation. The Plaintiffs also allege that the allocation of oil mining lease licenses by the Defendants are lopsided. Plaintiffs placed reliance on Articles 1, 19, 20, 21, 22, 23 and 24 of the African Charter. The provisions of these articles are summarized below:

- **Article 1** provides for the recognition by Member States of all the rights enshrined in the Charter, and adoption of means to give effect to them.

- **Article 19** provides for the equality of **all peoples,** having the same rights and not to be dominated by other people.

- **Article 20** provides for the right to existence of **a people,** their self-determination as well as economic and social development.

- **Article 21** guarantees the rights of **all peoples** to freely dispose their wealth and natural resources, recovery in the case of spoliation and dispossession, and the right to be fully compensated.

- **Article 22** makes provisions for **peoples** right to economic social and cultural development with due regard to their freedom and identity and the equal enjoyment of the common heritage of mankind.

- **Article 23** provides for **all peoples'** right to international peace and security, while Article 24 provides for **all peoples** right to a general satisfactory environment favorable for their development.

It is important to note that the rights guaranteed under the African Charter are categorized. While one part strictly protects individual rights, the other part protects collective rights.

The combined purport and intendment of articles 19 to 24 as can be inferred from the above is the protection of peoples' collective rights as against individual rights. In other words, these articles refer to collective rights belonging to a people as against personal right. In **Kemi Penheiro SAN V. Republic of Ghana, ECW/CCJ/JUD/11/12 (2012)** (Unreported), where the Applicant alleged the violation of Articles 20 and 22 of the African Charter, the Court stressed that it is *opinio juris communis* that the rights referred to in Articles 19-24 of the African Charter are rights of (all) "peoples" in contrast to the rights of "every individual", "every human being", or "every citizen" proclaimed in Article 2-17.

Self-determination on its own denotes the legal right of a people to decide their own destiny in the international order. Under the United Nations Charter and the International Covenant on Civil and Political Rights, self-determination is protected as a right of "all peoples." It refers to the rights of people indigenous to an area to determine their destiny. Indigenous peoples' rights are collective rights. In other words, they are vested in indigenous persons that organize themselves as peoples. With the adoption of the UN Declaration on the right of indigenous people, the international community clearly affirms that indigenous peoples require recognition of their collective rights as peoples to enable them to enjoy human rights.

For the Court to determine whether or not a violation of the Charter has occurred, it must have access to credible evidence and information on the alleged violation. The burden of presenting this evidence is on the Plaintiff as he stands to fail if no such evidence is adduced.

In **Petrostar (Nigeria) Limited V. Blackberry Nigeria Limited & 1 Or *(2011) CCJELR***, the Court in its consideration reiterated the cardinal principle of law that "he who alleges must prove". Therefore, where a party asserts a fact, he must produce evidence to substantiate the claim.

It is not sufficient simply to challenge a law or State policy or practice in the abstract *(actio popularis)* without demonstrating how the alleged victim is individually affected. The complaint must be sufficiently substantiated. *See* **Aumeeruddy-Cziffra and Others v. Mauritius** (Communication No. R.9/35) 9 April 1981 decided in the African Commission on Human and People's Rights.

Environmental issues such as the ones alleged in this case can impact on individuals and communities enjoyment of fundamental rights including the right to health, the right to adequate standard of living, the right to self-determination, and the right to life itself. These are rights which are guaranteed under international human rights instruments in relation to which the state bears certain responsibilities. However, these responsibilities cannot be borne by the state unless the party alleging the violation discharges his burden of proof.

The Plaintiffs failed to adduce evidence to support their allegation. They did not attach any photograph, or expert report to show the extent of the said degradation and its negative impact on them personally.

In **Kemi Penheiro SAN V. Republic of Ghana, supra**, where the Applicant alleged the violation of Articles 20 and 22 of the African Charter, the court held that the Plaintiff as an individual has failed to specify how he became the bearer or the holder of those rights and how the rights have been violated by the Defendant.

In **Hordes and Temeharo v. France Communication No. 645/199UN Doc. CCPR/C/57/D/645/1995 (1996)** where the claimants attempted to place the burden of proof on the Government, the United Nations Human Rights Committee found the case inadmissible on the ground that the claimants did not qualify as victims of a violation.

The Committee further held that the Applicants had not substantiated their claim. Thus, the lack of scientific certainty coupled with the burden of proof on the Applicants, limited the claimants' ability to obtain relief through human rights proceedings.

The Plaintiffs have failed to establish personal injury to their persons as to entitle them to the reliefs sought under this head.

As to the award of oil mining leases, the Defendants denied the Plaintiffs allegation and states that the award are done in compliance with the due process in its National Laws. The Plaintiff failed to lead any evidence or establish with specificity that any of them applied for the said mining license and was denied on the sole reason that he is from the Niger Delta. They thus failed to discharge the evidential burden of proof necessary to establish their allegation. Above all the Defendants acted within the purview of its Domestic Law which this Court lacks competence to question same in situation that its provisions have the effect of violating the rights of the Plaintiffs.

In **Front for Liberation of the State of Cabinda V. Republic of Angola 5th November 2013, ACHP, 328/06, 54th Ordinary Session**, where the Plaintiffs brought the application on behalf of the People of Cabinda on alleged violations of Articles 19, 20, 21, 22 and 24 of the African Charter, by infringing on their rights to natural resources, authorizing exploitation activities that did not favor the development of the people of Cabinda and allowing companies to operate in manners that are harmful to the environment and human health. The Commission held that the complainant failed to adduce evidence to support that the people of Cabinda were treated unequally in comparison to other people in Angola in violation of Article 19 of the Charter.

By virtue of its independence, Nigeria remains an indivisible and indissoluble state. With regards to the ownership of land, Section 1 of the Land Use Act 1978 vests all land in the Government of Nigeria to hold such Land in trust and administered for the common benefit of the people and would be responsible for allocation of land in all urban areas to individuals resident in the State and to organisations for residential, agriculture, commercial and other purposes.

In the **Cabinda case** above, the Commission made a distinction between indigenous rights to land that warrant special protection, and other rights to land, which can be legitimately limited by the state on public interest grounds.

In **Balmer-Schafroth & Ors V. Switzerland 1997 IV ECHR** Judgment of 26th August 1997, where the Applicants argued that they were entitled to a hearing over the Government's decision to renew an operating permit for a nuclear power plant, the European Court found that the Applicants had not established a direct link between the operating conditions of the power station and their right to protection of their physical integrity, because they failed to show that the operation of the power station exposed them personally to a danger that was serious, specific and above all imminent. They failed to establish the dangers and remedies with a degree of probability that made the outcome of the proceedings directly decisive for the right they invoked.

Assuming that the Plaintiffs have the right to challenge the award of oil mining licenses, they have failed to sufficiently provide evidence to support the facts they bring forth or to buttress the discrimination they claim to have been victims of. They have failed to prove that they actually participated in a bid and were disqualified, neither did they attach any documents to show that they complied with the requirements for the grant of mining license and were so disqualified on the sole ground that they are from the Niger Delta.

In all, the Plaintiffs case is unmeritorious, and should be dismissed in its entirety.

DECISION:

The Court adjudicating in a public sitting after hearing the parties in the last resort after deliberating according to law:

1. AS TO ADMISSABILITY:

DECLARES:

i. That the suit is admissible with regard to the personal rights of the Plaintiffs alleged to have been violated; and all preliminary objections to the suit be dismissed and is hereby dismissed.

2. AS TO THE MERITS

- **DECLARES** that Plaintiffs case is unmeritorious and should be dismissed in its entirety on the basis of the reasons adduced above.

3. AS TO COSTS:

Parties should bear their own costs.

DATED AT ABUJA THIS 10TH DAY OF OCTOBER, 2017.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES;

1. **Hon. Justice Friday Chijioke Nwoke** - *Presiding.*
2. **Hon. Justice Yaya Boiro** - *Member.*
3. **Hon Justice Alioune Sall** - *Member.*

Assisted by:
Tony Anene-Maidoh (Esq.) - *Chief Registrar*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN IN ABUJA, NIGERIA

THIS TUESDAY, THE 10TH DAY OF OCTOBER, 2017

SUIT NO: ECW/CCJ/APP/24/15
JUDGMENT NO: ECW/CCJ/JUD/04/17

BETWEEN
WING COMMANDER DANLADI ANGULU KWASU - *PLAINTIFF*

VS.
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** -*PRESIDING*
2. **HON. JUSTICE JEROME TRAORE** -*MEMBER*
3. **HON. JUSTICE HAMEYE F. MAHALMADANE** -*MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) -*DEPUTY CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **ABUBAKAR MARSHALL** - *FOR THE PLAINTIFF*
2. **UZOEWULU CHIKA & O.M. OGUNDIJI.** - *FOR THE DEFENDANT*

Jurisdiction - State Responsibility - Effective investigation -Human Rights violation -Right to life-right to dignity -Right to security of person.

SUMMARY OF FACTS

The Applicant Danladi Angulu Kwasu is the father of the deceased Cadet El Shaddai Zishindung Kwasu who until his demise, was a member of the 66th Regular Course of the Nigerian Defence Academy (NDA). He has filed this application for the violation of the right to life of his son by agents of the Defendant.

The Applicant stated that as part of the training exercise, the agents of the Defendant (NDA) caused the deceased and his mates to participate in a camping exercise which included swimming. Agents of the Defendant pushed the deceased who did not know how to swim into the water of the Kangimi Dam in the outskirts of Kaduna, Nigeria, without the provision of life jackets or any measure to ensure his safety inside the water. There were also no lifeguards or divers that could go into the water to save lives in case of emergency.

The Applicant states further that his son was pushed into the water despite protestation, and that it took the NDA over 3 hours to bring his body out of the water with the services of a local diver who used a fish hook to pull him by the mouth like a fish.

The Defendant denied the Applicants allegations and contend that the Applicant signed the consent form which states amongst others that he shall not claim any compensation or relief for any injury or death, which may occur in the course of test/exercise conducted by the Armed Forces selection Board. The Defendant aver that adequate measures were put in place to prevent any form of injury or death during the course of the training and sought an order dismissing the application for lack of cause of action and merit.

ISSUES FOR DETERMINATION

- *Whether the Court has Jurisdiction to entertain this suit?*
- *Whether from the totality of the evidence offered, there are reasonable grounds to support the claim?*
- *What orders, if any, can this Honorable Court make in the circumstances?*

DECISION OF THE COURT

The Court held:

- *That the Applicant had identified a right which has been enshrined for the benefit of the human person and therefore falls within the ambit of its jurisdiction.*
- *Dismissed the defence of consent, that the fact that the Applicant and the deceased signed a consent form does not exonerate the Defendant from exercising due care and diligence in the course of any exercise.*
- *That the circumstances leading to the loss of life of the Applicant's son was due to the failure of the officials of the NDA to take steps to prevent the deceased from drowning.*
- *That the Defendant is responsible for the violation of the right to life of the deceased and the failure to investigate the circumstances of the death with a view to preventing further occurrence and/or prosecuting and punishing officials found wanting amounts to a violation of the international obligations of the Defendant under the African Charter.*
- *Awarded the sum of $75,000.00 (Seventy-Five Thousand United States Dollars) to the Applicant as compensation for the arbitrary and unlawful deprivation of his son.*

JUDGMENT OF THE COURT

3. SUBJECT-MATTER OF THE PROCEEDINGS:

Violation of the Right to life guaranteed by Articles 1, 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights.

4. DOCUMENTS SUBMITTED,

i. Witness depositions of one Halim Ali

ii. Nigeria Defence Academy Parent/ Guardian Consent Form.

iii. Letter from the Nigeria Defence Academy dated 2/5/15 titled "Notice of Casualty: NDA/ 10037 OFFICER CADET EZ KWASU and Addressed to Wing Commander Danladi D. Kwasu (RTD) (letter of Condolence).

iv. Daily Trust Newspaper of July 11, 2015 P. 53

v. Medical certificate of cause of Death issued by Nigerian Defence Academy with respect to E.Z. Kwasu (19 years) Dated 5/5/2015

5. FACTS AND PROCEDURE:

1. Facts as presented by the Plaintiff:

The Applicant in this Application is Danladi Angulu Kwasu, the father of the deceased (the subject matter of this action), a Nigerian and a Community Citizen residing in Kaduna Nigeria. The Defendant is the Federal Republic of Nigeria, a member State of the Economic Community of West African States (ECOWAS).

The Applicant avers that his son late Cadet El Shaddai Zishindung Kwasu (NDA/10037) was admitted by the Nigerian Defence Academy (NDA) an Institution run by the Defendant in September 2014 as a member of the 66th Regular Course.

As part of the training, on the 30th of April, 2015, the NDA caused the deceased and his mates to participate in a camping exercise which included swimming.

He further avers that the deceased who did not know how to swim, was pushed into the water of the Kangimi Dam in the outskirts of Kaduna Nigeria without the provision of life jacket and without any other measure being taken to ensure the safety of anyone inside the water. There were also no life guard or divers that could go into the water to save life in case of emergency.

It is the case of the Applicant that his son (the deceased) who was pushed into the water despite protestation got drowned and that it took the NDA over 3 hours before bringing him out from the water via the services of a local diver who used a fish hook to pull him by the mouth like a fish dragging him out of the water dead.

Following this incident, the Applicant brought this action before the Community Court of Justice seeking the following reliefs:

1. A **DECLARATION** that the killing of the Applicant's son by the agents of the Defendant through drowning is illegal and a violation of Articles, 1, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights.

2. A **DECLARATION** that the failure of the Defendant to investigate and prosecute those involved in the killing of the Applicant's son is illegal as it violates 33 of the 1999 Constitution of the Federal Republic of Nigeria as well as Article 4 of the African Charter on Human and Peoples' Rights.

3. AN **ORDER** directing the Defendant to investigate and prosecute the individuals involved in the negligent killing of the Applicant's son forthwith.

4. An **ORDER** directing the Defendants to pay the sum of USD 10 million to the Applicant as compensation for the unlawful killing of his son.

5(ii) THE DEFENDANTS CASE:

In their statement of Defence, the Defendants denied all the allegations especially paragraphs 4, *5* and 6 of the Applicant's narration of facts and required the Applicants to prove same.

More specifically the Defendant avers that the Applicant signed and declared in the consent form (Annexed in the Application) provided by the NDA upon the deceased application for admission that:

a. Upon invitation by the NDA his son shall attend the Armed Forces Selection Board interview.

b. He shall not claim any compensation or relief for any injury or death, which may occur in the course of test/ exercise conducted by the said Armed Forces Selection Board.

c. He shall not enter into any correspondence with the NDA on the outcome of the Armed Forces Selection Board.

d. The Applicant consented to the training of his son by the NDA if he is selected by the Armed Forces Selection Board.

e. The Applicant shall not claim any compensation or relief for any injury or death which may occur in the course of his son's training and subsequently on successful completion of training when he is in service as commissioned officer; and

f. The Applicant understood that his son shall be subject to the Armed Forces Act as amended. The Defendant also aver that the Applicant having consented to the conditions of training and services at the NDA, cannot complain and ask for compensation. Furthermore, the Defendant contends that the Applicant's son is just one of the students for the watermanship exercise and that adequate measures were put in place to prevent any form of injury or death during the course of the training. The Defendant also avers that they were not negligent

in providing adequate measures to prevent occurrence of injury and death during the course of the training.

In consequence thereof, the Defendant sought an order of this Honourable Court dismissing the Application for lack of cause of action and merit.

Thus, issues were joined by the Parties and the Suit slated for hearing. When the matter came up for hearing on the 6th of December, 2016, the Applicant brought an Application to call witnesses **(DOC No. 6)** the Applicant and one Haliru but could not be heard on account of the Defendant having just been served in Court, The Applicant had earlier brought an Application to amend their originating Application **(DOC No. 4)** which was granted on the 11th of October, 2016.

The motion on notice to call witnesses **(DOC No. 6)** was granted on the 17th of May, 2017. The Court also heard the case on the same day.

In his testimony (PW1) who identified himself as Haliru Ali and speaks Hausa, testified that he is from Rugogi Dam in Kaduna -Nigeria. He also testified that he is a fisherman, He also testified that the NDA usually contract his father (now late) to come as a diver in the course of their camping exercise. He took over from his father. That on the 30th of April 2015, NDA officials informed him they intended to hold a training. He opened the gate to the dam for them and left for his house, on their instructions. Later the NDA people came to his house and informed him that one of them fell into the water and asked him to come and rescue him. According to him he took four of his colleagues and went to the dam. we searched for two hours but couldn't find the victim. The officials of NDA asked them to try the tactics they use in catching fish in doing the rescue. He and his colleagues went home fetched a hook and inserted it in the water and finally brought out the victim who was already dead. At the time the victim was brought out he was wearing only a pant.

Following this incident, the NDA officials now asked us to be on standby to rescue those not wearing life jacket and we did till the training was over.

On cross examination by the Defense Counsel, he stated that the distance between his house and the dam is about 30 (thirty) minutes' walk. He also stated that when the "NDA people train", they use to push people into the water, if they are afraid of going in voluntarily.

He however stated that he was not there when the deceased was pushed into the water.

The Second Plaintiff witness (PW2), Commander Danladi Kwasu (the Applicant). The witness who affirmed to speak the truth testified that he lives at No.5 Calvary Street Mando Kaduna. He is a retired Airforce officer with 24 years of meritorious service and presently a member of the Kaduna State House of Assembly. He testified also that the deceased is his first son admitted to the NDA in 2014. He stated he was aware that he will attend camp, having gone through same. He stated that when one goes for watermanship training, he must be trained on how to swim.

One does not go into the deep without life jacket. That divers are always around during such exercise in case of any failure. To him this is the standard international practice. He consented to the training knowing that safety measures are usually provided for the training. That that is the minimum standard. He said that I was informed of the death of my son through the phone by the Director Administration of the NDA, one Commodore Yakubu Wambai. After the call, they carried on as if nothing happened. He testified that he had to call the authorities to tell them that they offered no explanation as to how his son died nor availed him the opportunity of seeing his corpse, and that if they don't, he will not consent to the burial. They sent two officers who took him to the mortuary. When he saw the corpse it has a wound in the mouth and the two officer explained that they did not have the means of rescuing him and fishermen were called to use a hook.

He further testified that certain documents attached to his application were photocopies because his house was burnt down and he lost the originals.

The Defendant's Counsel raised objection to their admissibility on the grounds that there was no affidavit supporting the claim that the originals have burnt and there is no pleading to that effect.

The Applicant's Counsel countered that the objection was unfounded since the foundation has been laid. The Court thereafter reserved ruling till the final judgment. For the avoidance of doubt, these documents include:

i. Death Certificate on the deceased

ii. The photocopy of Trust Newspaper of July 11, 2015

iii. Letter of condolence from the NDA.

On cross examination, the Defendant admitted signing the consent form to enable his son the (deceased) participate in the military training having himself understood what it means to undergo military training.

On further questions by the Court, the witness testified that his son was 19 years and I month when he died. He was tall but slim and healthy. He also stated that his aim for bringing this action is to stop the death of other persons resulting from the carelessness of the Nigeria Army, an Institution of the Defendant.

6.1 ANALYSIS BY THE COURT.

This is a claim by the Applicant against the Defendant for the death of his son as a result of the acts and omission of the agents of the Defendant. The facts of this case are straight forward. The Applicant's son one EL Shaddai Zishindung Kwasu (now deceased) was enlisted for training as a cadet officer by the Nigeria Defence Academy (NDA) an institution of the Defendant established to train officers who intend pursuing a career in the Armed Forces.

As part of the training, the NDA took the Applicant's son and his mates to a camping exercise which included participation in swimming. The Applicant's son did not know how to swim but was pushed into the water

at Kanginni Dam in Kaduna Nigeria without any measures being taken for his safety. The deceased was forcibly pushed into the water despite protests from him that he couldn't swim. The deceased as a result lost his life by drowning.

Following the incident, it took the help of local divers by the use of fish hook three hours to bring out the corpse of the deceased from the water. The Applicant being aggrieved brought this action seeking the reliefs already stated above. In support of his claim the Applicant argued that:

i. The right to life is a fundamental right guaranteed by the Constitution of the Defendant as well as Article 4 of the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights.

ii. The Defendant is under obligation by Article 1 of the African Charter to recognize, protect the rights guaranteed by the Charter.

iii. The failure of the NDA to provide safety measures like life jacket, life guard or diver prior to letting the Applicants' son into water at Kanginni Dam, which ultimately resulted in his death is illegal and a violation of Articles 2, 3, 4, 5, 18 and 23 of the African Charter. To Him, by its negligence, the Defendant herein has thus infringed on the right to life of the deceased, the dignity of his person as well as his security.

iv. The effect of the African Charter is that States will be responsible if they act without due care and diligence in preventing the violation of the right to life or for failure to investigate and punish acts violating the rights enshrined and must also pay adequate compensation. To further buttress his argument reliance was placed on the case of **Amnesty International Vs. Sudan (2000) AHLR 297** (a decision of the African Commission on Human and Peoples' Rights) where it was held that the Government has a responsibility to protect

all people residing under its jurisdiction and even when the Country is going through Civil War, the State must take all possible measures to ensure that its Citizens are treated in accordance with International Humanitarian Law. *See also*; **Malawi African Association & Ors Vs. Mauritania (2000) AHLR 149 at 164-165**.

v. That the duty of due diligence in International law extends to the obligation of a State to prevent human rights violations and where they occur, to investigate, prosecute and punish the perpetrators and failure to this incurs the responsibility of the State. The State is also obliged to provide effective remedies to victims of human rights violations and/or their Dependants. *See*: **Mulezi Vs. Democratic Republic of Cong, (2004) AHLR 3**, where the Respondent State was direct to conduct through investigation into the killing of the complainant's wife, and to bring to justice those responsible for these violations, and pay appropriate compensation for these violations. *See*: **Sankara Vs. Burkina Faso (2006) AHLR 23**.

vi. Victims of arbitrary killings are entitled to adequate compensation from the State where the violation was committed, this is aside from conducting, prompt, transparent and effective investigations and punish the offenders. This Court was referred to its decision in **Karou Vs. Republic of Niger (2010) CCJ L R (PT3) 1** where it held that Hadijatou Mani Karaou was a victim of slavery and that the Republic of Niger is to blame for the inaction of its administrative and judicial authorities.

vii. The case of **Dorcas Afolalu Vs. Federal Republic of Nigeria** (unreported) Suit N°: ECW/CCJ/APP/04/12 which according to him is at all fours with this case, this Court awarded compensation and directed the prosecution of those

involved in the violence that led to the death of the deceased. The Applicant concluded that "having regard to the inexplicable negligence of the Defendant, the brutal and callous manner of the death of his 19 years old son of the Applicant by drowning, following the failure of the Defendant to provide safety measures the removal of the body of the deceased like a fish by a local diver, the refusal of the Defendant to investigate and arrest those responsible for the tragic incident, the Honourable Court ought to award colossal damages to the "Applicant".

In their own submissions, the Defendant submitted as follows;

i. That the right to life is the most fundamental of all human rights since other rights can only be exercised by a person who is alive, *See*: **Forum of Conscience Vs. Sierra Leone (2000) AHLR 293**.

ii. That the right to life is guaranteed by Article 4 of the African Charter

iii. That S.2 of the Nigeria Defence Academy Act Cap N. 101 LFN 1990 provides that *"The Academy shall prov1de each officer cadet with the knowledge skills and values necessary to meet the requirements of a military officer through military academic and character development"*. The law also provides processes for enlistment and training as a member of the Armed Forces of the Defendant.

iv. That the provisions emphasizes the importance of training the Applicant's son (now deceased) was subjected to as was done to every other cadet officer in the Academy.

v. That the Applicant and his son (now deceased) having consented to enlistment into the Academy, cannot be heard complaining and claiming damages for an alleged negligence, and this robbed the Court of jurisdiction as it has no jurisdiction

to try allegations of negligence. He referred the Court to Article 9 of the Supplementary Protocol (A/SP/01/05) and Article 10(d) thereof.

vi. That following the express and unequivocal consent of the Plaintiff (Applicant) to the training of his son, he cannot maintain an action in the tort of negligence. The defence of *volenti non-fit injuria* applies.

vii. That being an action in tort, the Court lacks jurisdiction to entertain the same as it has nothing to do with the violation of human rights.

In conclusion, the Defendant urged the Court to decline jurisdiction for lack of cause of action and merit and to discountenance the witness depositions on oath as being baseless inconsistent and failing short of the requirement of law on oath taking.

6.2. ISSUES FOR DETERMINATION:

From the facts and pleas in law relied by the Applicant and the Defendant, the following issues calls for determination:

i. Whether the Court has jurisdiction to entertain this suit

ii. Whether from the totality of the evidence offered, there are reasonable grounds to support the claim.

iii. What orders if any can this Honourable Court make in the circumstances.

These issues will now be considered seriatim;

I. Whether the Court has jurisdiction to entertain this suit.

The facts of this case are not substantially in dispute. First the Applicants' son applied and was admitted into the Nigerian Defence Academy, an Institution of the Defendant for the training of officers of its Armed Forces.

The Applicant and his son entered into an undertaking not to bring any action against the Institution in the event of death or injury to the Applicant's son during or after the course of the training. The training involved a camp which included watermanship (i.e. training in water).

On the 30th of April 2015, the deceased and other cadets went to one Kanginni Dam in Kaduna State Nigeria where in the course of the exercise the deceased was drowned. The Applicant alleged that his son would not have died if safety measures were provided for the exercise and that it was due to the negligence of the Defendant's Institution that led to the loss of life thereby violating Article 4 of the African Charter on Human and Peoples Rights.

He therefore brought this action claiming compensation for the death of his son and other ancillary orders. The Defendant questioned the jurisdiction of this Court on two major grounds;

i. That the action is founded on the tort of negligence and not on violation of fundamental human rights.

ii. That the consent given by the Applicant and his son to the Nigerian Defence Academy amounts to a defence of *volenti non- fit injuria*, and having consented to the training is a bar to an action against the Defendant.

For the avoidance of doubt, the jurisdiction of this Court is clearly spelt out by Article 9 of Supplementary Protocol (A/ SP.l/01/ 05) as follows:

The Court has jurisdiction to determine cases of violation of human right that occur in any Member State.

In the originating Application, the Applicant has clearly stated that Articles 1, 3, 4, 5, 18 and 43 of the African Charter on Human and Peoples' Rights, has been violated by the Defendant in relation to him as a result of the death of his son, caused by the acts or omission of the Defendant's agent.

The Defendant on the other hand has argued that the case is founded on the tort of negligence since it was alleged that it was the negligence of the Defendant that resulted in the death of the deceased.

This Court has consistently guarded its human rights mandate. In **Hissen Habre Vs. Republic of Senegal (2010) CCJ LR 20**, it held that in order to determine whether or not it has jurisdiction to entertain a matter, it has to examine:

a. If the issues submitted before it deals with a right which has been enshrined for the benefit of the human person;

b. Whether it arises from international or Community obligations of the State complained of, as rights to be promoted, observed, protected and enjoyed.

c. Whether it is the violation of that right which is being alleged.

Similarly, in **Bakare Sarre Vs. Mali (2011) CCJ LR P. 57**, this Court equally emphasized that once the human rights allegedly violated involves international or community obligation of a member State, it will exercise jurisdiction over the case. See also **SERAP Vs. Federal Republic of Nigeria (2014)**. **Sikiru Alade Vs. Federal Republic of Nigeria (2010)** (unreported) and the recent case of **Sambo Dasuki Vs. Federal Republic of Nigeria (2016)** (unreported).

From the facts of this case the Applicant has alleged that the right to life of his son was violated. Article 4 of the African Charter provides as follows:

> *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'*

It is obvious that the Applicant has identified a right which has been enshrined for the benefit of the human person. It is equally obvious that the Defendant as a signatory to the African Charter has undertaken to promote observe, protect the rights of persons within its jurisdiction.

It is equally true that what is being complained of is the violation of these rights. It does not matter the animus behind the violation, what matters is the substance and not the form it took.

Accordingly, applying these principles to the facts of the Applicant's claim, it is evident that it falls within the ambit of the Courts jurisdiction. The objection of the Defendant on this Court lacks merit and deserves to be discountenance as is hereby dismissed.

The Defendant has also raised the defence of consent or *volenti non- fit injuria* as a bar to this claim. This cannot be correct. *Volenti non -fit injuria* or simply put a person who consents to the harm done to him cannot be seen to complain. This Court having stated that it has jurisdiction, cannot bar itself from exercising it on the basis of a private law defence in tort. This is not a tort claim but a human rights litigation.

Even if the Applicant and the deceased to undertaking the training with no claim against the Defendant's Institution this did not exonerate the Defendants from exercising due care and diligence in the course of any exercise involving the deceased.

Assuming but not conceding that the defence is available to the Defendant, it is a matter to be considered in the substantive suit and not at the preliminary stage.

This can be no exclusionary clause in a human rights action consent to training coupled with the undertaken nor to maintain an action in the event of an injury is not an invitation to murder, suicide or any other malfeasance. The law must impute due care and diligence on the part of the training Institution only to the extent that it did not breach this duty of care, if not so such blanket protection will be catastrophic to society. Accordingly, the defence of consent must also fail.

II. Whether from the totality of offered there are reasonable grounds to support the claim.

This Application is anchored on the breach of Articles 1, 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights.

It is necessary at this juncture to outline the provisions of these Articles.

Article 1:

The member States of the Organization of African Unity (now African Union), parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative and other measures to give effect to them.

Article 2.

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any statues.

Article 3.

1. *Every individual shall be equal before the law*
2. *Every individual shall be entitled to equal protection of the law.*

Article 4.

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Articles 5, 18 and 23 are ancillary are not necessary for the determination of this suit.

From the totality of the claim, the Applicant's claim is essentially predicated OIJ. the Defendant's violation of the right to life of the deceased (the Applicant's son). To answer the question raised by issue no 2, it is necessary to examine the law and the facts relating to the nature and scope of the right to life and the principles governing them and juxtapose it with the facts and evidence adduced within the ambit of the case.

In doing so, the Court shall adopt as its own, the principles of Responsibility underlying unlawful killing in International law usually referred to as *"(General Comments No 3 on the African Charter on Human and Peoples' Rights to life)"* Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 - 18th November, 2015 at Banjul, The Gambia (Underlining ours).

i. The right to life covers issues including extra- judicial killings by State agents. The right to life is protected in the core-regional and universal human rights instrument including the African Charter on Human and Peoples' Rights (Article 4). Disregard for civilian loss of life may also involve violations of the right to life. The right to life has been widely recognized as a fundamental right without which other rights cannot be implemented or realized. It is the fulcrum of all other rights. It is non-derogable and applies to all persons at all times including institutions of Government.

ii. The Charter imposes responsibility on State parties to prevent arbitrary deprivations of life caused by its own agents as well as protect individuals and groups from such deprivation at the hands of others.

iii. The African Commission on Human Rights comment No 3 on Article 4 proceeds from the understanding that the Charter envisages the protection not only of the to life in the narrow sense but of dignified life requiring a broad interpretation of States responsibility to protect life.

iv. The right to life is universally recognized as a fundamental right recognized by Article 4 of the Charter and all other global instruments. It is part of customary international law and general principles of law aside from treaty rules. It is *jus cogens* norms binding at all times. It is also recognized by all national legal systems.

v. This right is subject to a broad interpretation and States are under obligation to develop and implement legal and practical framework to respect, protect, promote and enforce the right to life. This include the obligation to take steps to prevent arbitrary deprivation of life and to conduct thorough and transparent investigations into any such deprivation that might have occurred and hold responsible to account and providing for effective remedy and reparation for victim(s) including in appropriate circumstances the immediate family and Defendant States are responsible for the violations of this right by all their organs (Executive, Legislative and Judiciary) as well as all other public or governmental authorities at all levels.

Derogations is not permissible even in times of emergency, including in situation of armed conflict or in response to threats such as terrorism. In terms of the scope of the terms "arbitrary deprivation of life, the following principles have emerged:

a. The deprivation of life is arbitrary, if it is not permitted under international law or under protective domestic legislation. In interpreting arbitrariness, regard must be had to such considerations as appropriateness, justice, predictability, reasonableness, necessity and proportionality. Any violation arising from a violation of the procedural or substantive safeguards in the African Charter including on the basis of discriminating grounds or practices is arbitrary and thus, unlawful.

b. The failure of the State to transparently take all necessary measures, to investigate suspicious deaths and all killing by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes a violation by the State of that right. This is even more the case where there is tolerance of a culture of impunity. All investigation must be prompt, impartial, thorough and transparent.

c. Other issues to be considered include in appropriate cases, accountability, investigation and where necessary appropriate criminal prosecution. Accountability also encompasses measures such as reparation, ensuring non-repetition, disciplinary action, making the truth known, institutional review and where applicable reform.

d. Finally, reparation should be proportional to the gravity of the violations and the harm suffered. Victims should be treated with respect and appropriate measures should be taken to ensure their safety.

These are in a nutshell the principles to be adopted by a Court in appropriate cases regarding a complaint of the violation of the right to life. Transparency must be part of accountability. In the determination of this case the Court adopts the principles enunciated above as its own. Juxtaposing the facts of this case with the law enunciated above, what will be the result?

First, it is not in dispute that the Applicant's son was admitted by the Nigeria Defence Academy, an Institution of the Defendant for training for a career in its armed forces. Part of the training was an exercise in watermanship for which the deceased with other Colleagues were taken to a dam in Kaduna State.

The Applicant alleged that the officials of the Nigerian Defence Academy (NDA) did not provide safety measures like life jacket or divers in case of an emergency. The deceased had never swam before and was reluctant to undertake the exercise but was pushed into the river by the officers. There is evidence supporting this allegation by PW1 (Haliru Ali) who stated that where a cadet is afraid of getting into the river, he was usually pushed into it. Although the Defendant's stated that safety gadgets were provided, they could not substantiate that by evidence. More so, there is uncontradicted evidence that when the corpse of the deceased was removed from the water he was only wearing an under pant.

Uncontroverted evidence also showed that the Plaintiffs' son died of drowning due to the negligence of the officials of the Defendant. It is unreasonable to push a person into a deep water in the circumstances that it is evident he cannot swim. This is an unwarranted and unreasonable conduct by the Defendant. Accordingly, there is a causal link between the death of the deceased and the act or omission of the officials of the Defendant. Thus, the refusal, neglect or omission of the officials to provide safety equipment for the training that led to the death of the deceased and that was a foreseeable consequence. The officials of the Defendants ought to have taken all possible measures to ensure the safety of the Applicants son, and this they failed to do. This in itself is sufficient on a preponderance of evidence to elicit the international responsibility of the Defendant. *See*: **Amnesty international & Ors Vs. Sudan (Supra)** International Law admits the duty of due diligence which enjoins States to take action to prevent violations of human rights of persons within its territory. This obligation cannot be derogated from nor even by any purported agreement or consent. All actions of institutions or officials of States are imputed to a State as its own conduct. (See Art 4) International Law Commission (Draft Articles on States Reasonability).

Accordingly, it is clear that the right to life of the deceased cadet El Shaddai, Zinshin dung Zishiri Kwasu was violated by the acts of the officials of the Defendant. The Defendant merely made a general denial of the allegations and relied heavily on the consent purportedly given by the Plaintiff and the deceased to the NDA for the training and not to bring any claim in the event of injury or death. As earlier noted, there is no contracting out of a public right and the consent did not take away the duty imposed by law on the Defendant to act with due care and diligence in ensuring that the right to life of the deceased is not violated. To decide otherwise will be to encourage acts of impunity as is manifest from the acts of the officials of the Defendants.

It is sad that following the death of the Applicant's son, the officials of the Defendant's carried on as if nothing has happened. Apart from the letter of titled,

Notice of Casualty, addressed to the Applicant nothing else was done by the Defendants respecting the deceased. One would have expected that the Defendant should have investigated the circumstances of the death with a view to preventing future occurrence and /or prosecuting and punishing officials who may be found wanting in their conduct relating to the loss of life of the Applicant's son. This equally amounts to a violation of the international obligations of the Defendant under the African Charter. *See* **Mulezi Vs. Democratic Republic of Congo (Supra).**

It is equally axiomatic that no steps were taken to assuage the feelings of the Applicant by way of reparation for the loss he suffered. Above all, it is undignifying to have removed the corpse of the deceased by means of a hook.

The rule is simple:

> *"Every internationally wrongful act of a State entails the international responsibility of that State"*

Aside from the above, the internationally wrongful act must be attributable to the State under international law and also constitute a breach of an international obligation of that States. The Consequence of the breach of an international obligation entails a duty to make a full reparation for the injuries caused.

In this direction, the Defendant is a party to the African Charter, the Charter recognizes and protects the right to life of all human beings including the deceased in this case. The circumstances leading to the loss of life of the Applicants' son was due to the acts and /or omission of the officials of the NDA, an institution of the Defendant for failure to take steps to preserve the loss of the life of the deceased from drowning. In this direction, the Defendant is under a duty in international law to make full reparation for the unlawful death of the Applicant's son.

The Court holds that the case of violation of right for life of the Applicant's son, has been made out against by the Defendant.

iii. What Orders the Court can make in the Circumstances:

This question raised here appears to have been answered in the preceding sections. Where there is a right in law, there must be remedy. Having found this claim admissible and proved on a preponderance of evidence, the Applicant is entitled to the orders sought. From the totality of evidence available, the following are established;

i. The Defendant violated the right to life of the deceased by its official making the deceased undertake the watermanship training without providing him with the equipment necessary to save him from drowning and arbitrarily pushing him into deep water when they knew he could not swim.

ii. The Defendant following the death of the Applicant's son failed to investigate, prosecute and where necessary punish the officials responsible for this tragic and unlawful incident.

iii. The Defendant failed or neglected to take necessary steps to compensate the family of the deceased till date.

DECISION:

The Court adjudicating in a public sitting after hearing the parties in last resort after deliberating according to law:

i. AS TO JURISDICTION:

- **Declares** the case admissible and it has jurisdiction to entertain same.

ii. AS TO THE MERITS DECLARES:

1. That the killing of the Applicant's son, Cadet EL Shaddai Zishindung Kwasu by the officials of the Nigerian Defence Academy (NDA), an Institution of the Defendant and thus, its agent, through drowning at Kangimi Dam in Kaduna Nigeria

on the 30th of April, 2015 is illegal and amounts to unlawful killing, arbitrary deprivation of life and thus a violation of Article 4 of the African Charter on Human and Peoples' Rights.

ii. That the failure of the Defendant to investigate and prosecute those involved in the killing of the Applicant's son is illegal and a violation of Article 4 of the African Charter on Human and Peoples' Rights.

DIRECTS:

1. The Defendants to investigate the circumstances surrounding the arbitrary deprivation of the right to life of the Applicant's son with a view to prosecuting and punishing the individuals involved in the deceased's death on the 30th of April 2015,

AND ORDERS

The Defendants to pay the sum of $75,000.00 (Seventy five thousand United States Dollars) to the Applicant as compensation for the arbitrary and unlawful deprivation of the right to life of the Applicant son.

AS TO COSTS

Cost are awarded against the Defendants as assessed by the Registry of this Court.

DATED AT ABUJA, THIS 10TH DAY OF OCTOBER, 2017.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

1. **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
2. **Hon. Justice Jérôme TRAORÉ** - *Member.*
3. **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*

Assisted by:

Athanase ATTANON (Esq.) - *Deputy Chief Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN IN ABUJA, NIGERIA

TUESDAY 10TH DAY OF OCTOBER, 2017

SUIT NO: ECW/CCJ/APP/27/14
RULING NO: ECW/CCJ/JUD/05/17

BETWEEN
BENSON OLUA OKOMBA - *PLAINTIFF*

VS.
REPUBLIC OF BENIN - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE FRIDAY CHIJIOKE NWOKE - *PRESIDING*
2. HON. JUSTICE YAYA BOIRO - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) -*DEPUTY CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **UCHENNA ALLISON OJIABO (ESQ.)** - *FOR THE PLAINTIFF.*
2. **LUCIANO HOUNKPONOU (ESQ.)** *AND*
   WILFRED KOUNOU (ESQ.) -*FOR THE DEFENDANT.*

Human Rights violation - Right to the respect of dignity and torture - Right to liberty - Right to Property - Unlawful detention-Burden of proof - State responsibility (effective investigation)

SUMMARY OF FACTS

The Plaintiff filed an application alleging that on his way to Nigeria from Togo through the borders of the Defendant, the officers of the Defendant violated his rights to dignity, freedom from degrading treatment and torture wherein, they jointly assaulted him using their boots to pound on his chest until he began to vomit blood for failure to meet their demand for the sum of 300 CFA as gratification before he can pass through the border.

He alleged that the officers of the Defendant after beating him threw him into a lonely shallow cell and seized his passport. He was locked and detained for several hours before he was released to proceed on his journey.

The Defendant while denying the allegation avers that the officers requested the Plaintiff to present an identification at the checkpoint as part of their routine procedure and the Plaintiff rather than submitting his identification resorted to shouting and tried to force his way into its territory. That he was taken before the Head of the Brigade who advised the Plaintiff to lodge a complaint at the border police and thereafter ordered that the Plaintiff's passport be stamped and returned to the Plaintiff to continue with his journey.

The Defendant further contend that no physical pain was inflicted on the Plaintiff by the Police officers at the border post.

ISSUES FOR DETERMINATION

1. *Whether from the totality of evidence adduced in this case, the Plaintiff has established a breach of his fundamental rights as alleged.*

2. *Whether the Defendant has carried out effective investigation on the alleged violation of the Plaintiff's Rights.*

3. *Whether the Applicant is entitled to the reliefs sought.*

DECISION OF THE COURT

The Court held that:

- *The evidence adduced by the Plaintiff shows that the officers of the Defendant inflicted physical pain him. That the Plaintiff not having established his claim on torture that claim fails.* ***That the Plaintiffs claim on torture having not been established, fails****.*

- *Once there is a detention, the burden is on the Defendant to establish that it was not arbitrary. Unreasonably long detention for purposes of calming down or obtaining travel documents is not within the purview of the ECOWAS Protocol on free movement. Accordingly, the Plaintiffs detention amounts to deprivation within the meaning of Article 6 of the African Charter.*

- *The Plaintiff has not shown that the alleged seizure of his travel documents is a continued one to amount to a deprivation of his right to property.*

- *The circumstances leading to the temporal seizure of the Plaintiff's passport which the Defendant did not give a reasonable justification for, is as a result of the Plaintiff's refusal to pay the gratification sum to the Defendant's officers.*

- *It is the obligation of every State to carry out an impartial, prompt and effective investigation once an incident occurs within its territory and this was not done. The Defendant has therefore failed to fulfil its obligation to investigate.*

JUDGMENT OF THE COURT

Subject Matter of the proceedings:

i. Violation of the Plaintiff's right to dignity, respect and integrity of his person as a free citizen of Nigeria and ECOWAS as enshrined in Article 2 and 4 of the African Charter on Human and Peoples' Rights.

ii. Act of torture and inhuman treatment meted out to the Plaintiff by the Defendant contrary to Plaintiff's rights as enshrined in Article 5 of the African Charter on Human and Peoples' Rights'.

iii. Violation of the Plaintiffs' right to freedom of movement of his person as recognized by Article 12 of the African Charter on Human and Peoples' Rights and Article 32 of the Revised Treaty of Economic Community of West African States and the Protocol on free movement of persons and Goods.

iv. Violation of the Plaintiffs right to liberty and security of his person enshrined in Article 6 of the African Charter on Human and Peoples' Rights.

v. Breach of duty and State Covenant as enshrined in Article 1 of African Charter on Human and Peoples' Rights, Article 3(d) of the Supplementary Protocol A/SP.1/01/05. Amending the Protocol Relating to the Community Court of Justice and Article 4(g) of the Revised Treaty of ECOWAS by the Defendant.

FACTS

The Plaintiff is a citizen of the Federal Republic of Nigeria, a Member State of the Economic Community of West African States. A trader on part-time basis at Wuse Market, Abuja and also a student of Gremio De Y Modistas Valentia, Spain.

The Defendant is a Member State and signatory to the African Charter on Human and Peoples' Rights.

The Plaintiff avers that on the 14th March 2014, on his return to Nigeria from Lome, he was stopped for a routine check by the Defendants' police officers at Hillacondji border. After submitting his passport to the officers for the routine check, the Defendant's Police officers demanded a gratification in the sum of 300 CFA before his passport can be returned to him. He offered to pay the sum in Naira equivalent as he did not have up to the required sum in CFA.

On failing to fulfill their demands, about four officers jointly gave him a beating of a life time using their boots to pound on his chest until he began to vomit blood. He sustained injuries and cuts on the head, hands, elbow, shoulder, eyes, lungs, ribs, chest and stomach.

After he was beaten, the most senior officer who was at the scene ordered that they should throw him into a lonely shallow cell and seize his passport. He was locked in a cell and detained for several hours without food or water and in a pool of his own blood. This detention lasted for about five hours before he was released and his passport was returned stamped to enable him proceed on his journey.

When he arrived the Seme border that night, he reported the incident to the Nigerian Immigration Services and the Officers of the Nigerian Immigration cleaned him up and administered first-aid on him. An officer Mr. Oswald Okon Edet was appointed by the Chief Inspector of Immigration to see to his welfare and accompany him back to Cotonou to formally report the incident.

On arriving his home in Abuja, he presented himself at the Kubwa General Hospital, Abuja where he received treatment. Since the incident happened, he has suffered and has continued to suffer from post-psychosomatic trauma. This resulted to sleepless nights and horrible nightmares of the horror he endured from the Defendants officers. Even after his return to

school in Valencia, he was mandated to continue treatment for chest pain and psychosomatic trauma.

The Plaintiff further states that he reported this incident via a letter of complaint to the Nigerian Ministry of Foreign Affairs, the Nigerian Ambassador to the Republic of Benin Cotonou, the International Police (INTERPOL) dated 14/04/2014, 24/06/2014 and 12/05/2014 respectively. No conclusive investigation or response has emanated from any quarters up till date.

Upon request for a detailed report of investigations from the INTERPOL dated 28/08/2014 and 07/07/2014 by the Plaintiffs Counsel, the INTERPOL issued a report dated 17/11/2014 to his Counsel.

The Plaintiff alleged that in the report, the Defendants Officers admitted culpability and guilt to the INTERPOL and have vehemently refused to write a report on the incident.

Plaintiff submits that he has paid the sum ofN3,000,000.00 (Three Million Naira) to his Counsel as legal fee in pursuit to this suit.

Where upon the Plaintiff filed this Application seeking the following reliefs:

1. A **DECLARATION** that the assault, detention, degrading treatment and torture meted on the person of the Plaintiff by the officers of the Defendant on 14/03/2014 is a gross abuse of Plaintiffs fundamental rights contrary to rights enshrined and protected by the African Charter on Human and Peoples' Rights and the Revised Treaty of ECOWAS.

2. A **DECLARATION** that the seizure of the Plaintiff's passport and demand for gratification of 300 CFA before the Plaintiff could be allowed to proceed on his journey which resulted to Plaintiffs detention by officers of the Defendant is unlawful and a violation of Plaintiff's rights to free movement of his person as protected in Article 12 of the African Charter on Human and Peoples' Rights, Article

32 of the Revised Treaty of ECOWAS and the Protocol of the Revised Treaty of ECOWAS relating to movement of persons.

3. A **DECLARATION** that the Defendant by this gross abuse of the Plaintiff rights, has breached its duty and violated its solemn covenant to uphold the laws which the Defendant swore to in the African Charter on Human and Peoples' Rights and the Revised Treaty of ECOWAS.

4. The sum of N25,000,000.00 (Twenty-five Million Naira) only as compensation to the Plaintiff by the Defendant for physical, emotional and psychological trauma suffered and still suffered by the Plaintiff.

5. 10% interest of the judgement sum from the date of judgement until same is liquidated.

6. The sum ofN3,000,000.00 (Three Million Naira) only as the cost of funding investigation and this law suit.

7. A written apology from the Defendant to the Plaintiff.

The Defendant in response to the Plaintiffs application states that, the officers on duty on the said date requested the Plaintiff to present an identification at the checkpoint, he refused to be checked claiming that he is an ECOWAS citizen and based on the provisions on free movement of persons and goods he does not need to present any identification.

That the Plaintiff rather than submitting his identification resorted to shouting and tried to force his way into its territory. That a security officer who heard what was going on quietly led the Plaintiff to the office of the Head of the Brigade and requested that he should instead show his passport to the Head of the Brigade but still the Plaintiff refused to submit it.

The Head of Brigade advised the Plaintiff to lodge a complaint with the border police instead of engaging the security officers in a "brawl". The

Plaintiff then submitted his passport to the Brigade head who ordered that his passport be stamped and returned to the Plaintiff to continue with his journey.

That the Plaintiff left the border post in a good state of health both physically and mentally. That they were surprised when they received a notice that the Plaintiff lodged a complaint against its officers claiming that he was given a beating of a life time and his passport seized by the security officers.

After they received the complaint through the INTERPOL, the Beninois police cooperated in carrying out the investigation. In the course of the investigation, both the Police officers at the border and their superiors made their submissions as to the fact of the case.

The Plaintiff filed a response to the Defendants' statement of defence denying the submissions therein and averred that he has over the years passed the boarders of Hillacondji to the Republic of Togo without any problem or refusal to submit himself to the border control. That he went through the border post on his way to Togo two days earlier and it is very strange to say the least that while on his way back on the 14th March 2014, he refused to submit himself to the same boarder control in the Defendants' territory.

ISSUES FOR DETERMINATION

It appears from the totality of the issues raised the following questions call for determination;

1. **Whether from the totality of evidence adduced in this case, the Plaintiff has established a breach of his fundamental rights as alleged.**

2. **Whether the Defendant has carried out effective investigation on the alleged violation of the Plaintiff's Rights**

3. **Whether the Applicant is entitled to the reliefs sought.**

These issues will now be examined seriatim.

Whether from the totality of evidence adduced in this case, the Plaintiff has established a breach of his fundamental rights as alleged

The Plaintiffs case in a nutshell is that, on his way to Nigeria from Togo through the borders of the Defendant, the officers of the Defendant violated his rights to dignity, freedom from degrading treatment and torture wherein, they jointly assaulted him using their boots to pound on his chest until he began to vomit blood for failure to meet their demand for the sum of 300 CFA as gratification before he can pass through the border.

The Defendant in response denies the allegations and states that no physical pain was inflicted on the Plaintiff by the Police officers. They contend that a treatment is said to be inhuman, when it is applied with premeditation for a long period, and if it causes body injuries, actual pain or physical and mental torture, which in the instant case are not justified as the said medical certificate the Plaintiff presented was issued four days after the incident occurred. The Defendant therefore, puts the Plaintiff to the strictest proof of the said allegations. The Defendant equally called oral evidence in which the allegations were denied.

On allegation of physical assault:

Article 5 of the African Charter on Human and Peoples' Rights provides:

> *"Every individual shall have the right to the respect of dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery. slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited "*

The Plaintiff alleges acts constituting torture wherein the Defendant's officers jointly assaulted him using their boots to pound on his chest until he began to vomit blood. There is therefore need to clarify the distinction between torture and physical assault. A party alleging torture must prove

a high minimum of severity to fall within the meaning of 'torture' under Article 5 of the African Charter. On the other hand, physical assault falls within other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.

In **AV, the United Kingdom judgment of 23 September 1998,** Reports 1998, European Court of Human Rights in considering whether a violation meets the requirement of Article 3 of the European Convention which is similar to Article 5 of the African Charter held that:

> *III-treatment must attain a minimum level of seventy if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.*

In **Loayza-Tamayo V. Peru Judgment of September 17, 1997**, the Inter-American Court of Human Rights held that the violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.

It is a general principle of law that he who asserts a claim, must prove same.

The rule on burden of proof determines which party is responsible for putting forth evidence and the level of evidence which must be provided in order for their claim to succeed.

In most cases, the burden of proving the fact of a claim or allegation rests on the Plaintiff who is required to present a persuading evidence to support those allegations.

In **Falana & Anor V. Republic of Benin & 2 Ors Judgment N°: ECW/CCJ/JUD/02/12** unreported, this Court held that:

> ***"as always, the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the Court to believe the statement of the claim".***

In **Rangamrnal V. Kuppuswami and Ors**, **Civil Appeal No. 562 of 2003**, the Court held that the burden of proof lies on the person who asserts the fact and not on the person who denies the fact to be true. The responsibility of the Defendant to prove a fact to be true would start only when the authenticity of the fact is proved by the Plaintiff.

In the instant case, the Plaintiff in a bid to establish his case attached supporting documents to his Initiating Application as evidence of his averment to prove that he was physically assaulted but not tortured as alleged.

The Plaintiff attached photographs and medical reports both from Nigeria and Valencia showing he sustained lacerating injuries on his body from the physical assault inflicted on him. He also attached Photocopies of his Nigerian passport duly stamped by the officers at the border indicating that he had passed through the borders of the Defendant on the said date. He further attached a Police investigating report signed by the Assistant-Commissioner of Police (INTERPOL) confirming that from the preliminary enquiry conducted by the team, the Plaintiff was "assaulted" by officers from the Beninois National Police.

In light of the above, the evidence adduced by the Plaintiff shows that the officers of the Defendant inflicted physical on him notwithstanding the Defendant's denial. The Plaintiff has however not established his claim on torture.

In the witness testimony of DW 1 Mr. Yahoo Lafia Boni, Head of the special brigade who was present on the day the incident occurred,

admitted that the Plaintiff was brought into his office by one of his Staff though he denied beating the Plaintiff. The onus now lies on the Defendant to disprove that the injuries sustained by the Plaintiff were not caused by the officers at the border. It appears that Mr. Boni could not have known whether his offices inflicted any beating on the Plaintiff because he was not at the scene.

In **Sikiru Alade V. Fed Rep. of Nigeria Judgment N°: ECW/CCJ/JUD/10/12** unreported, this Court holds fast to the notion that every material allegation of claim must be justified by credible evidence and the defence should also sufficiently satisfy every defence and put forward what will rebut the claim or take the risk of not putting any evidence at all if the claim by their estimation is weak and unproven.

It is worthy of note, that on the day the incident occurred, the Plaintiff entered the Defendant's territory in good health. This the Defendant admitted in the testimony of DW 1. Subsequently after the Plaintiff departed from the territory of the Defendant, the medical examination revealed that he sustained injuries caused by physical assault.

In **Rudyak V. Ukraine (Application no. 40514/06) 4 September 2014**, the European Court of Human Right in its judgment held that:

> ***"where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of the cause of the injury this would not only ensure the Applicant's right are respected but would also enable the respondent Government to discharge their burden of providing a plausible explanation of those injuries. Falling which a clear issue arises under Article 3 of the Convention".***

Though the Defendant attached an investigation report where it narrated what transpired between the Plaintiff and the officers at the border, it failed to describe with specificity what led to the alleged assault on the Plaintiff or lead sufficient evidence to disprove the Plaintiffs claim. More

so, it did not present any evidence suggesting that at the time the Plaintiff left its border, he was in a good condition of health.

The Defendant also challenged the authenticity of the medical certificate presented by the Plaintiff. The mere fact that medical examination was carried out four days after the incident occurred does not invalidate the report.

In view of the above, and considering the injuries inflicted on the Plaintiff which the Defendant gave no convincing evidence in rebuttal, the Plaintiff has established facts of his allegation of physical pain inflicted on him which amounts to assault and not torture by the officers of the Defendant.

ii. <u>On allegation of Unlawful Detention</u>

The Plaintiff alleged that he was detained at the border in a small room used as cell for about five hours without food or water. That after he was released, he arrived Seme-border late at night and reported the incident to the Nigerian Immigration service. This assertion was denied by the Defendant.

The Defendant contends that the Plaintiff was only retained at the police post in Hillacondji when he refused to submit his travel documents for checking and as a means of calming him down.

Article 6 of the African Charter on Human and Peoples' Rights', Article 9(1) of the International Covenant on Civil and Political Rights as well as Article 3 of the Universal declaration of Human Rights guarantees person's right to liberty and security.

The above-mentioned human rights treaties, provides that deprivation of liberty within a State must in all cases be carried out in accordance with the law.

It is pertinent to distinguish between a lawful detention and an arbitrary detention. For a detention to be considered lawful, it must be compatible

with international law as well as domestic law. More especially, the grounds and procedure established by the national law must conform to international law. Arbitrary detention on the other hand is a detention not in conformity with the national or international law and which occurs without a legitimate or reasonable ground. What amounts to lawful detention or arbitrary detention depends on the circumstances of each case.

In Guzzardi V. Italy (Application no. 7367/76) judgment Strasbourg November 1980 the European Court of Human Rights held that in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

In **Badini Salfo V. The Republic of Burkina Faso ECW/CCJ/JUD/13/12** *unreported*, this court defined an arbitrary detention as any form of curtailment of individual liberty that occurs without a legitimate or reasonable ground, and is in violation of the conditions set out under the law.

Also, in **Saadi V. the United Kingdom Application No. 13229/03 Judgment 2008** the ECHR held that, detention would not be arbitrary if it meets four conditions: (1) carried out in good faith; (2) closely connected to the purpose of preventing unauthorized entry to the country; (3) the place and conditions of detention were appropriate bearing in mind that the detainee was an asylum seeker rather than a suspected criminal; (4) the length of the detention did not exceed that reasonably required for the purpose pursued.

In the present case, the Defendant contends that by virtue of Article 82 (3) of its code of penal procedure, the identity of every person entering into its territory must be controlled, with the view to prevent breach of public peace, especially the security of persons and goods.

The Defendant however, admitted that it retained the Plaintiff in compliance with procedural formalities. This assertion is unclear as to rebut the Plaintiffs claims.

The Defendant has not led sufficient evidence to disprove the Plaintiffs allegations. Neither have they shown that at the time the Plaintiff was stopped at the border for routine check, they suspected him of any criminal activity that warranted his detention at the border. The Plaintiff on the other hand did not prove that the said detention was arbitrary. The onus now lies on the Plaintiff to prove that the duration and manner which it was carried out was arbitrary.

In **Gahramanov v. Azerbaijan (Application no. 26291/06)**, the Court considered that:

> ***"the period during which the Applicant had been compelled to stay at the airport had not exceeded the time strictly necessary for fulfilling the relevant administrative formalities in order to clarify his situation. Indeed, his detention had not lasted more than a few hours and he had been allowed to leave the airport immediately after the checks had been carried out. Therefore, the Court concluded that his detention had not amounted to a deprivation of liberty within the meaning of Article 5§ 1 (right to liberty and security)."***

In light of the above, though the Plaintiff was detained, is there evidence to support arbitrary detention? We think so. The said detention could not have been a necessary means of obtaining the said passport. Once there a detention, the burden is on the Defendant to establish that it was not arbitrary. The law presumes that it is unlawful and arbitrary unless the contrary is proved. It is not lawful to detain a person for the purpose of his showing his travel documents or to calm him down. In this circumstance, the Plaintiff was leaving the Country after having passed through the same border two days earlier, May be the position would have been different if he was entering the Country; in which case it would have been reasonable to deny him entry or detain him.

Unreasonably, detention for purposes of calming down or obtaining travel documents is not within the purview of the ECOWAS Protocol on free movement.

Accordingly, the Plaintiffs detention amounts to deprivation of his liberty within the meaning of Article 6 of the African Charter.

On allegation of seizure of passport and demand for gratification:

The Plaintiff further alleged that the Defendants Officers demanded a gratification of 300 CFA before he could be allowed to proceed on his journey. His inability to meet their demands, led to the seizure of his passport. This the Defendant also denied.

Seizure is defined under the **Black's Law Dictionary 9th Edition** as "the act or an instance of taking possession of a person or property by legal right or process, especially, in constitutional law, a confiscation or arrest that may interfere with a reasonable expectation of privacy."

Article 14 of the African Charter on Human and Peoples' Rights' provides:

> *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."*

Right to property generally implies that an owner is entitled to no interference in the enjoyment of his property, in particular, by the government.

The above provision on right to property is not absolute under any international instrument. However, the right may be interfered with in the general interest of the community and in accordance with the provisions of appropriate laws.

Article 10 para 1 & 2 of the Harvard Draft before the senate committee on foreign relations on executives, E, G and H, 84th Congress and session, 15 (1956), para 3(a) defined 'a

> *"taking of property" as not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof, will not be able to use, enjoy or dispose of the property within a reason period of time after the inception of such interference."*

The Plaintiff has not shown that the alleged seizure or taking of his passport is a continued one to amount to a deprivation of his right to property. More so, the Plaintiff affirmed that the said passport was returned to him that same day to proceed on his journey. The alleged seizure complained of is therefore provisional as it did not prevent the Plaintiff from enjoying and using his property as he pleased of which he remained the owner.

It is observed that the Plaintiff has over the years passed through the borders of the Defendant and his passport in all instances duly stamped. Two days before the incident occurred, the Plaintiff equally passed through the same border without any problems with the officers at the post. It is difficult to ascertain what will warrant the Plaintiffs refusal to the Defendants routine check at the border which he has been plying over the years. It is assumed that someone who has passed through the same route for the past eight years is conversant with the border formalities. The general denial by the Defendant on the alleged demand for gratification without more, is not sufficient to disprove the Plaintiffs claim.

Consequently, this Court infers that, the circumstances leading to the temporal seizure of the Plaintiffs passport which the Defendant did not give a reasonable justification to, is as a result of the Plaintiffs refusal to pay the gratification sum to the Defendant's Officers.

1a. WHETHER THE DEFENDANT HAS CARRIED OUT EFFECTIVE INVESTIGATION ON THE ALLEDGED VIOLATION OF THE PLAINTIFF'S RIGHTS

The Plaintiff contends that the violation of his rights by the officer of the Defendant is a breach of duty and state covenant by the Defendant as enshrined in Article 1 of the African Charter on Human and Peoples rights and Article 3(d) of the Supplementary Protocol.

The rules of state responsibility applies to international human rights law.

Article 122 of the UN Draft Article on Responsibility of States for Internationally wrongful acts, adopted by the ILC at its 53rd session and submitted to the UN General Assembly provides:

1. Every internationally wrongful act of a state entails the internal responsibility of that State.

2. There is an internationally wrongful act of a state when conduct consisting of an action or omission.

   (a) Is attributable to the State under internal law; and

   (b) Constitutes a breach of an international obligation of the State.

In the instant case, there is no dispute on the fact that the police officers who stopped the Plaintiff at the border for a routine check are agents of the Defendant. This was admitted by the Defendant in its defence. Also, the capacity in which they carried their actions is not an issue.

In **Tidjane Konte v. Republic of Ghana Judgment No. ECW/CCJ/JUD/11/14** unreported, the court held that:

> ***"The State remains the sole obligator to respect, protect and fulfill human rights under the Treaty and placed reliance on Article 6 of the Report of the 53rd Session of International Law Commission which provides "the conduct of an organ of State shall be considered as an act of that State under***

International Law, whether that organ belongs to the constituent, legislative, executive, judicial or other power; whether its functions are of international or subordinate position in the organisation of the State":

In MOUKHTAR IBRAHIM AMINU V GOVERNMENT OF JIGAWA STATE & 3 ORS, this Court held that

"the question as to whether there has been an internationally wrongful act depends first, on the requirements of obligation which is said to have been breached, and secondly, whether the state party or the organs or agents or officials committed the breach which the state party should be held responsible of the action."

In line with the above, it is well-established that the conduct of any organ of a state is regarded as act of that state.

The Plaintiff contends that the Defendant did not conduct an effective investigation as the investigation report annexed to the Defendant defence reveals that the statement of the two police officers involved in the incident were taken at exactly the same time. A report can only be considered detailed and impartial if parties involved are interviewed separately. Where both parties involved in the incident are interviewed at the same time, the whole essence of the investigation is defeated as there would be a corroboration in the narrations.

There are no general rules as to what constitutes an effective investigation. In a case of an alleged ill-treatment as in the present case, it is the responsibility of a State to take necessary steps to conduct an effective official investigation. This investigation must be carried out impartially and promptly and must consist of a comprehensive report of all the submissions of the parties involved in the case which must be deduced separately, the conduct/manner, the place and time the investigation was carried out.

The Defendant failed to show that they have effectively investigated the alleged assault and demand of 300 CFA sum by its officials.

The alleged incident occurred on the 14th of November 2014, despite series of communications issued to the authorities of the Defendant by Plaintiff and the INTERPOL Nigeria respectively, they failed to respond or send a report on the incident.

The Plaintiff submits that the Defendant conducted its investigation on the 11th day of March 2015, over 10 months of its becoming aware of the incident and 4 months during the pendency of this suit. This shows lack of diligence by the Defendant in the discharge of its duties. The Defendant did not controvert or challenge this allegation. Fact uncontroverted are therefore deemed admitted.

In **FERNANDEZ ORTEGA ET.AL V. MEXICO. INTER.AM CT.HR (SER C) No. 215 (Aug 2010)**, the court noted that the State had the burden to provide conclusive information to disprove the alleged facts and having provided no evidence in contradiction of the Plaintiffs claim has failed to discharge that burden and so found the state responsible. It is the obligation of every state to carry out an impartial, prompt and effective investigation once an incident occurs within its territory. In this case, this has not been done.

In **Assenov V. Bulgaria, (1998) EHRR 1998-VIII. §102**. The Court noted that an investigation should:

> ***"be capable of leading to the Identification and punishment of those responsible"***

Without such a duty to investigate, the Court noted that:

> ***"the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity".***

The Human Rights Committee, in its **General Comment No. 20 on article 7 of the ICCPR** prohibiting torture and cruel, inhumane and degrading treatment stated that:

> *"It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"*

In view of the above, the Defendant is responsible for the act of its officials which led to the violation of the Plaintiff rights as found above.

i. In conclusion, it is obvious that the Plaintiff did not establish that he was tortured but assaulted contrary to established principles of law.

ii. He was temporarily deprived of his liberty in the circumstances unjustified by law and his property (his Passport) was also temporarily seized. Consequently, the Court is of the opinion that the claim of the Plaintiff partially succeeds in part.

DECISION:

The Court,

Adjudicating in a public sitting after hearing the parties in last resort, after deliberating according to law;

1. **DECLARES:**

i. That the Plaintiffs right to physical integrity was violated by the Defendant that;

ii. The Defendant arbitrarily violated the Plaintiffs' right to his personal liberty through his having been unlawfully detained and assaulted by the Defendants on the 14th of March, 2014.

iii. That the seizure of the Plaintiffs' Passport by the Defendant on 14th March, 2014 amounts to a violation of his right to property violated by the Defendants.

ORDERS:

The Defendants to pay the sum of XOF 8,000,000.00 (Eight Million FCFA) as compensation for physical, emotional and psychological trauma suffered by the Plaintiff.

AS TO COSTS

- **Cost** is as assessed by the Registry in favour of the Plaintiff.

DATED AT ABUJA THIS 10TH DAY OF OCTOBER, 2017.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Athanase Attanon (Esq.) - *Deputy Chief Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN IN ABUJA, NIGERIA

THIS TUESDAY, 10TH DAY OF OCTOBER, 2017

SUIT NO: ECW/CCJ/APP/33/16
JUDGMENT NO: ECW/CCJ/JUD/06/17

BETWEEN
1. OMAR JALLOW
2. AMADOU SCATTRED } *PLAINTIFFS*

VS.
REPUBLIC OF THE GAMBIA - *DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *DEPUTY CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **CHINONYE OBIAGWU & AMARACHI NWABIA, ROSELINE OKORO** - *FOR THE PLAINTIFFS*

2. **M.B ABUBAKAR, E. R DOUGAN** - *FOR THE DEFENDANT*

-Lack of Jurisdiction- Electoral Issues
-Discrimination (equality before the law)
- Burden of Proof

SUMMARY OF FACTS

The Plaintiffs lodged a complaint against the Republic of the Gambia alleging that the National Assembly of the Gambia passed the Election Amendment Act 2015, wherein, it made certain amendments which poses a threat to the Plaintiffs' right to participate in the Government of their Country.

That the said amendment which was not subjected to public debate or scrutiny greatly increased the amounts to be paid for Party registration and number of signatures needed to register a political party without due legal process.

The Plaintiffs further allege that there is no subvention for Political Parties in the Gambia. That while Ruling Party, the Alliance for Patriotic Reorientation and Construction used government administrative buildings as party Headquarters, and State vehicles for campaign, no such resources or facilities are made available to the opposition parties including that of the Plaintiffs.

The Defendant in response states that the Elections Amendment Act 2015 applies generally to all political parties without discrimination and eight out of nine Political Parties have complied with the requirement of the Election Amendment Act and also collected nomination forms in readiness for the December 2016 election.

That the said amendment was done in accordance with due process of the Laws of Gambia and has been operational for more than one year unchallenged by the Plaintiffs.

They further denied using government resources to fund the ruling party APRC and state that the main aim of the amendment is to streamline and guarantee effective representation.

ISSUES FOR DETERMINATION

1. *Whether the alleged amendment as alleged is discriminatory.*

2. *Whether the action complained of fall within the ambit of this Court's jurisdiction as to cloth it with competence to determine same.*

DECISION OF THE COURT

The Court in dismissing the application held:

- *That the Plaintiffs have not shown that the alleged amendment was discriminatory in nature, or targeted at their party, neither have they led evidence to establish that the amendment directly prevent them from choosing a representative of their choice in line with the provisions of Article 13(1) of the African Charter.*

- *That the Plaintiff have failed to substantiate their allegation that the Defendant diverted government funds to the Riling Party.*

- *That the Plaintiffs have not indicated any human rights violation within the context of the African Charter and other International Human Rights Treaties.*

- *That in the absence of any substance invoking human rights jurisdiction, the Court lacks the competence to adjudicate on the matter.*

JUDGMENT OF THE COURT

2. REPRESENTATION OF THE PARTIES;

The Plaintiff

i. Chinonye Obiagwu Esq.

ii. Alero Eyetsemitan (Mrs).

iii. Amarachi Nwabia.

LEDAP 4 Manzini Street, Wuse Zone 4 Abuja, Nigeria

The Defendant

M.B Abubakar

Deputy Director of Public Prosecution. Attorney- General's Office Marina Parade Banjul, The Gambia.

2. SUBJECT MATTER OF THE PROCEEDINGS.

i. Violation of Article 2 and 13 (1) of the African Charter on Human and People's Rights.

ii. Violation of Article 1(1) of the ECOWAS Protocol on Democracy and Good Governance.

4. SUMMARY OF FACTS

The 1st Plaintiff is a Gambian Citizen and therefore a Community Citizen of the ECOWAS. The 1st Plaintiff resides at No. 7, Ninth Street East Pipeline, Serrekunda. He is the President of the People's Progressive Party (PPP), a Political Party in the Gambia formed in 1959.

The 2nd Plaintiff is also a Gambian Citizen and a Former Minister of Information and Communication in the Gambia. The 2nd Plaintiff resides at 613 Red Oak Lane, Hinesville, GA 31313, USA.

The Defendant is a Member State of the Economic Community of West African States (ECOWAS) and signatory to the Revised Treaty of the ECOWAS.

The Plaintiffs have filed this Application on grounds of alleged violation of their rights as provided in Articles 2 and 13 (1) & (2) of the African Charter by the Defendants.

The Plaintiffs state that on the 7th of July 2015, the National Assembly of the Gambia passed the Election Amendment Act 2015 wherein, it made certain amendments which pose a threat to the Plaintiffs right to participate in the Government of their Country, as implementing the said amendment will lead to a shutdown and de-registration of opposition Political Parties.

That the amendments greatly increased the amount to be paid for Party registration from 5000 to 1,000,000 Dalasis, and the deposits for various positions, i.e. Presidential from 10,000 to 500,000 Dalasis, Parliamentary from 5000 to 50,000 Dalasis, Councilor from 2,500 to 50,000 Dalasis, and the post of District Chief from 2000 to 50,000 Dalasis.

The number of signatures needed to register a political Party was increased from 500 to 10,000 registered voters. Also, the registration of membership of a Political Party was increased from D500, to D10, 000 with at least 1000 candidates coming from each administrative area. The number of constituencies were increased from 48-53 without due legal process.

That the said amendment was not subjected to public debate or popular scrutiny at Constituency, Party or District Levels and was made without consultation with any of the seven opposition Political Parties. That the explanatory notes delivered to the National Assembly did not give reasons for increasing the deposits of the Candidates, neither did it highlight the defects of the current deposits, nor explain the necessity for increasing them.
That the statistical data captured for eligible Voters registering from 14th

January to 12th March 2016 were: Banjul - 649, KMC - 5,001, Brikama - 13,039, Kerewan - 6,245, Mansakonko - 2,732, Janjanbureh - 9,639 and Basse- 7,242. These figures makes the requirement of having at least 1000 Members from each Administrative Zone clearly unrealistic.

The Plaintiffs further allege that there is no subvention for Political Parties in the Gambia. That while opposition Political Parties will be subjected to this monumental hike, the Ruling Party, the Alliance for Patriotic Reorientation and Construction will not as they continue to make use of resources funded by tax payer's money.

That while the ruling party use government administrative buildings as Party Headquarters, and State Vehicles for campaign, no such resources or facilities are made available to the Opposition Parties including that of the Plaintiffs.

Finally, the Plaintiffs aver that the Independent Electoral Commission (IEC) through a media release dated the 9th of February 2016, has threatened Political Parties with deregistration if they fail to comply with the Elections Amendment Act 2015.

Whereupon the Plaintiffs filed this Application seeking for the following orders:

1. A **DECLARATION** that the Election Amendment Act 2015 of the Republic of the Gambia is a violation of Article 13 (1) & (2) of the African Charter on Human and People's Rights.

2. A **DECLARATION** that the Defendant has failed to recognize, promote a d protect the rights of the Plaintiffs and to take measures to give effect to their rights as provided under Article 2 & 13 (1) & (2) of the African Charter on Human and People's Rights.

3. A **DECLARATION** that the Defendant has failed to recognize and promote principles of democracy and good governance

as envisaged by the ECOWAS Protocol on Democracy and Good Governance.

4. AN **ORDER** directing the Government of the Gambia to amend or repeal the Elections Amendment Act 2015.

5. The Defendant on the other hand filed its defense via an application for extension of time on the 2nd of November 2016, which was granted.

The Defendant denied each and every material allegation of fact set out in the Plaintiffs Application and states that the Elections Amendment Act applies generally to all Political Parties without discrimination.

The Defendant in denying the Plaintiffs allegation on failure to subject the proposed amendment to public debate or scrutiny, states that the amendment was initiated based on a proposal made by the Independent Electoral Commission of the Gambia. That the Electoral Amendment Bill was published in the Gazette on 1st June 2015, and then introduced in the National Assembly on the 7th of July 2015 in accordance with the requirements of section 101 (3) of the Constitution of the Gambia. That the Electoral Amendment Act 2015 has been operational for more than one year unchallenged by the Plaintiffs.

The Defendant states that the explanatory memorandum delivered to the National Assembly complied with the requirements of section 101(2) of the Constitution of the Gambia.

The Defendant denies the allegation of using government administrative buildings and resources to fund the ruling party and further states that the activities, facilities and logistics needs of all the Political Parties in the Gambia, including the APRC are funded from the resources of the Political Parties and not from State Resources.

On the statistics provided by the Plaintiffs on eligible Voters, the Defendant states that it only represents the provisional figures of the Supplementary Voter Registration for 2016 and further states that the total number of registered voters stand at: Banjul - 22,731, KMC - 199,957, Kerewan - 101,717, Mansakonko - 49,198, Janjahbureh - 116,675, Basse - 115,185.

The Defendant states that the increase in Constituencies are in compliance with the Constituency re-demarcation Order 2015.

On the issue of press release, the Defendant stated that it was designed to remind and sensitize Political Parties on the need to comply with the Electoral Amendment Act 2015.

That Eight out of nine Political Parties have complied with the requirements of the Election Amendment Act and also collected nomination forms in readiness for the December 2016 election.

Finally, the Defendant assert that the Election Amendment Act 2015, is enacted for the legitimate aim of guaranteeing the rights to streamlined and effective representation. That the Plaintiffs action lacks merit and therefore not entitled to the reliefs sought.

From the issues raised by the Plaintiffs and the Defendant, the following matters calls for determination;

WHETHER THE ACTION COMPLAINED OF FALLS WITHIN THE AMBIT OF THIS COURT'S JURISDICTION.

The Plaintiffs herein have filed this Application against the Defendant on alleged violation of their rights as enshrined in the African Charter on Human and Peoples rights.

It is pertinent therefore to ascertain the extent of this court's competence as it relates to the substance of the Plaintiffs Initiating Application.

Article 9(4) of the Supplementary Protocol provides:

"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."

Article 10 (d):

Access to Court is open to the following:

(d) Individuals on application for relief for violation of their human rights the submission of application shall:

i) not be anonymous; nor

ii) be instituted whilst the same matter has been instituted before another International Court for adjudication."

The crux of the Plaintiffs application is the violation of their rights by the Defendant wherein the Defendant in amending its Electoral Act made it impracticable for the Plaintiffs to exercise their rights as enshrined in Article 13 of the African Charter.

The Defendant, in refuting the Plaintiffs allegations state that the Elections Amendment Act applies generally to all political parties without discrimination as eight out of the nine political parties have complied with the said amendment and collected nomination forms in readiness for the upcoming election. Further, that the said amendment was done in accordance with due process of the Laws of the Gambia and has been operational for more than one year unchallenged by the Plaintiffs.

The Defendant denies using government resources to fund the ruling party APRC and further states that the activities of each political party are funded from the party's resources and not from state resources. That the main aim of the amendment is to streamline and guarantee effective representation.

This Court has held that for its jurisdiction to arise, the alleged violation must be founded on an international or community obligation of the state.

In HISSEIN HABRE V. REPUBLIC OF SENEGAL (2010) CCJELR, the Court held that it shall examine:

- If the issues submitted before it deals with a right which has been enshrined for the benefit of the human person;
- Whether it arises from International or Community obligations of the state complained of, as human rights to be promoted, observed, protected, and enjoyed;
- Whether it is the violation of that right which is being alleged.

In **BAKARY SARRE & 28 ORS V. MALI (2011)** ***(Unreported)*** **Pg 11, Para 25,** the Court held that its competence to adjudicate in a given case depends not only on its texts, but also on the substance of the initiating application. The Court accords every attention to the claims made by the Applicants, the pleas in law invoked, and in an instance where human right violation is alleged, the Court equally carefully considers how the parties present such allegations.

Article 13 (1) of the African Charter on human and Peoples Rights guarantees the right of every citizen to participate freely in the Government of his Country, either directly or through freely chosen representatives in accordance with the provisions of the law.

The African Charter on Human and Peoples' Rights is the main source of the community's fundamental human rights and has enjoyed universal acceptance as the African Regional Human Rights framework. Other key international treaties which are *pari material* to the African Charter also guarantee voting rights.

Article 13 (1) protects individual rights to participate in the governance of their Country either directly or through a freely chosen representative.

This right is direct and grants free access to vote and be voted for in accordance with the provisions of the law. In any case, any act which restricts citizens from freely participating in the governance of their Country will amount to a violation. Such restriction may be in the form of denial of voting rights, campaigning for candidates, contesting for elections etc. Government can also interfere with this right by establishing an uneven playing ground. This is a form of discrimination and the allegation of the Plaintiff.

Concerning this allegation, the Defendant submits that the amendment is an internal affair of the State and same was conducted across borders without any form of discrimination.

The right to elections depends to a large extent on compliance with positive obligations of States. The State reserves the right to amend its laws without interference which forms part of its internal affairs. Such amendments should however not be discriminatory or targeted at a particular group.

The Blacks' Law Dictionary 9th Edition defined discrimination as:

> *"The effect of a law or established practice that confers privileges on a certain class or that demes privileges to a certain class because of race, age, sex, nationality, religion or disability"*

Discrimination is said to be unjust or prejudicial where no reasonable distinction can be found between those favored and those not favored.

Article 7 of the Universal Declaration of Human Rights **(UDHR)** provides that:

> *"all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'*

In **BADINI SALFO V THE REPUBLIC OF BURKINA FASO (2012) PARA 54 (Unreported),** the Court held that:

> ***"equality before the Jaw presupposes that equal treatment be accorded people finding themselves in similar situations·:***

Thus, examining the allegation of the violation of the principle of equality requires that, at least two similar legal situations be put side by side, so as to compare, and find out whether the treatment was concretely meted out to either one or both of them.

See also **NATIONAL CO-ORDINATING GROUP OF DEPARTMENTAL REPRESENTATIVES OF THE COCOA-COFFEE SECTOR (CNDD) V. COTE D'IVOIRE (2004-2009) CCJELR PG 328 PARA 58**.

The question as to whether the amendment is proportional can be answered by weighing the impact, nature and extent of the limitation. Such limitations and or amendments must be proportionate with and absolutely necessary for the advantages sought to be obtained.

It is an elementary principle of law that he who asserts must prove.

In **Falana & Anor V. Republic of Benin & 2 Ors Judgment N°: ECW/CCJ/JUD/02/12 (unreported)**, this Court held that "as always, the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the Court to believe the statement of the claim".

Having examined the Plaintiffs application, the Court is of the view that the substance of the Plaintiffs allegation borders on the internal affairs of the Defendant and does not raise any issue of human right violation. The Plaintiffs in this case have not proved that the amendment was unreasonable, discriminatory and unjust or targeted at any Political Party. Therefore, assuming jurisdiction amounts to examining the internal laws of the Defendant.

In **CDD V. MAMADOU TANDJA & ANOR, (2011) CCJELR**, the Court declared that it had no jurisdiction to examine the constitutionality or legality of acts which come under the domestic norm and laws of authorities of member States (vis-a-vis) violation of the provisions of the African Charter on Human and Peoples Rights as raised by the Plaintiffs.

Furthermore, this Court has held that there is no provision whether general or specific, that gives it powers to adjudicate on electoral issues which ordinarily is subject to the jurisdiction of National Courts. *See* **HON. DR JERRY UGOKWE V. THE FEDERAL REPUBLIC OF NIGERIA AND 1 OR (2004-2009) CCJELR**.

In the instant case, the Plaintiffs have not shown that the alleged amendment was discriminatory in nature, or targeted at their party, neither have they led evidence to establish that the amendment directly prevents them from choosing a representative of their choice in line with the provisions of Article 13 (1) of the African Charter. Furthermore, the Plaintiffs have failed to substantiate their allegation that the Defendant diverted government funds to the Ruling Party. The facts presented by the Plaintiffs have not indicated any human right violation within the context of the African Charter and other International Human Right Treaties. The Plaintiffs' Application anchors on the amendment of the Electoral Act which they allege violates their rights to participate in the upcoming elections.

From the foregoing, and in the absence of any substance invoking human rights jurisdiction, the Court holds fast that it lacks the competence to adjudicate on this matter.

DECISION:

The Court adjudicating in a public sitting after hearing the Parties in the last resort after deliberating according to law;

DECLARES:

- That it is incompetent to entertain the suit.

AS TO COSTS:

- Parties should bear its own costs.

Dated at Abuja this 10th day of October, 20 I7.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

1. Hon. Justice Hamèye Founé MAHALMADANE - *Presiding.*

2. Hon. Justice Yaya BOIRO - *Member.*

3. Hon Justice Friday Chijioke NWOKE -*Member.*

Assisted by:

Athanase ATANNON (Esq.) - *Deputy Chief Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA
IN THE FEDERAL REPUBLIC OF NIGERIA

ON WEDNESDAY, THE 11TH DAY OF OCTOBER, 2017

SUIT N°: ECW/CCJ/APP/14/16
JUDGMENT N°: ECW/CCJ/JUD/07/17

BETWEEN
REPUBLIC OF GUINEA - *PLAINTIFF*

VS.
1. **MR. IBRAHIM SORY TOURÉ**
2. **MR. ISSIAGA BANGOURA**

} *DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE MARIA DO CEU SILVA MONTEIRO** - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **MAURICE LAMEY KAMANO (ESQ.)** *&* **JOACHIM GBILIMOU (ESQ.)** - *FOR THE PLAINTIFF*
2. **DINAH SAMPIL (ESQ.)** *(PRESIDENT OF THE BAR ASSOCIATION OF GUINEA)*, **MOHAMED TRAORÉ (ESQ.)** *&* **RACHEL LINDON (ESQ.)** - *FOR THE DEFENDANTS*

Opposition - Admissibility - Inadmissibility - Partial retraction of Judgment - Confirmation - Principles of adversarial proceedings and equality of arms - Reasonable time - Discharge of any conviction - Counterclaim - Damages and interests.

SUMMARY OF FACTS

The Republic of Guinea, opposing the decision of the Court of Justice ECW/CCJ/JUG/03/16 of 16 February 2016, seeks the partial retraction of that judgment, considers that the adversarial principle and equality of arms and the right to be tried within a reasonable time were not respected. Therefore, It seeks to be relieved of any conviction.

The Defendants asked the Court for confirmation of the judgment and claim sums in costs.

ISSUES FOR DETERMINATION:

- *Whether the opposition is justified?*

- *Whether the Defendants' claims is justified?*

DECISION OF THE COURT

- *Declares inadmissible the opposition filed by the Republic of Guinea and received at the Registry of the Court on 29 April 2017 on the grounds of foreclosure;*

- *Orders the Republic of Guinea to bear entire costs.*

JUDGMENT OF THE COURT

I. PROCEDURE

1. On 19 April 2016, the Republic of Guinea, through its Counsel, filed its case before the ECQWAS Court of Justice for a review of Judgment No. ECW/CCJ/JUG/03/16 of 16 February 2016 delivered by same Court in a case in which it featured as the Defendant, against Messrs. Ibrahima Sory Touré and Issiaga Bangoura, then the Applicants.

2. On 4 May 2016, the Application was served on Ibrahima Sory Touré.

3. On 3 June 2016, Messrs. Ibrahima Sory Touré and lssiaga Bangoura, through their Counsel, lodged their Defence at the Registry of the Court.

4. On 13 July 2016, the Republic of Guinea lodged a Reply to the said Defence.

5. On 14 October 2016, Counsel to Messrs. lbrahima Sory Toure and Issiaga Bangoura lodged at the Court Registry their Rejoinder.

6. The case was scheduled for hearing on18 May 2017.

7. At the hearing, the Republic of Guinea did not enter an appearance in court.

8, The case was adjourned for deliberation, for judgment to be delivered on 11 October 2017.

II. THE FACTS OF THE CASE

CLAIMS AND PLEAS-IN-LAW OF THE PARTIES

9. By Application filed in the Registry of the Community Court of Justice, ECOWAS on 29 April 2016, the Republic of Guinea asked the Court for the following:

As to formality,

- To **declare** that the objection brought by the Republic of Guinea is admissible;

As to merits

- **Adjudge** that the said objection is well-founded:

Consequently,

- **Retract partially** Judgment No. ECW/CCJ/JUG/03/16 of 16 February 2016 of the Court of Justice of the Economic Community of West African States;

- **Adjudge**, in addition, that the principles of adversarial proceedings and equality of arms, as well as the right to be tried in reasonable time, were not violated by the Republic of Guinea in the instant case, to the prejudice of the Defendants;

- **Dismiss** all the claims brought by Messrs. Ibrahima Sory Touré and Issiaga Bangoura against the Republic of Guinea, as ill-founded;

- **Relieve** the Republic of Guinea of the burden of all the civil or monetary orders made against it.

As a counter-claim,

Order Messrs. Ibrahima Sory Touré and lssiaga Bangoura to pay jointly to the Republic of Guinea the sum of Five Hundred Million CFA Francs (CFA F 500,000,000) in damages for their inappropriate and vexatious action, notably on the basis of Article 11 of the Code of Civil, Economic and Administrative Procedure, and Article 1098 of the Civil Code.

10. In support of its claims, the Republic of Guinea pleads that they were not notified of the order for extension of time dated 12 June 2015; that it was not aware of the existence of such order.

11. The Republic of Guinea maintains that Messrs. Ibrahima Sory Touré and Issiaga Bangoura have not suffered arbitrary detention, violation of the right to effective remedy, violation of the principle of adversarial proceedings and equality of arms, nor violation of the right to be tried in reasonable time.

12. In their Defence, the Defendants in the application for review of judgment asked the Court to:

- **Declare** that the application for review of judgement as filed by the Republic of Guinea is inadmissible; and

Consequently,

- **Dismiss** all the requests filed by the Republic of Guinea;

- **Ask** the Republic of Guinea to pay the sum of Three Million CFA Francs (CFA F 3,000,000) to each of the Defendants of the application for revision of judgment, Messrs. Ibrahima Sory Touré and Issiaga Bangoura; and

Alternatively, if upon any extraordinary grounds, the Court should decide that the application for review of judgment as filed by the Republic of Guinea is admissible, the Court is requested to:

- **Confirm**, in all its provisions, the 16 February 2016 Judgment of the ECOWAS Court of Justice, which held that the Republic of Guinea violated the right of Messrs. lbrahima Sory Touré and lssiaga Bangoura, where the said Judgment declared that: "... their detention turned out as arbitrary during the period from 6 August to 29 November 2013;" and also that: "... the Republic of Guinea, through its judicial authorities, violated the Applicants' right to effective remedy, the principle of adversarial proceedings and equality of arms, and the right to be tried in reasonable time."

- **Confirm**, in all its provisions, the 16 February 2016 Judgment of the ECOWAS Court of Justice, which held that the Republic of Guinea violated the right of Messrs. Ibrahima Sory Touré and Issiaga Bangoura, where the said Judgment: "Asks the Republic of Guinea to pay to Ibrahim Sory Touré the sum of Thirty Million CFA Froncs (CFA F30,000,000) and to Issiaga Bangoura, the sum of fifteen Million CFA francs (CFA F 15.000.000) for all the harms done against them."

- **Ask** the Republic of Guinea to bear all the costs of the instant procedure on application for review, by paying the sum of Three Million CFA Francs (CFAF 3,000,000) to each of the Defendants. Messrs. Ibrahima Sory Touré and Issiaga Bangoura.

13. The Defendants maintain that the application for review of judgment was filed outside the time-limit and that the arguments invoked by the Republic of Guinea, in that respect, are not welt-founded in any way whatsoever.

III. GROUNDS FOR THE DECISION

1. As to admissibility of the Application for Review of Judgment

14. Whereas in the terms of Article 90(9) of the Rules of the Court:

> ***"The application to set aside the judgment must be made within one month from the date of service of the judgment and must be lodged in the form prescribed by Articles 32 and 33 of these Rules"***.

15. Whereas in the instant case, Judgment No. ECW/CCJ/JUG/03/16 of 16 February 2016 of the ECOWAS Court of Justice was served on the State Judicial Officer of the Republic of Guinea on 25 March 2016; whereas one month from the date stated herein, the Republic of Guinea had a time-limit of one (1) month to file its case against the judgment complained of.

16. Whereas the Republic of Guinea maintains that it transmitted a faxed copy to the Registry of the Court on 24 April 2016, a copy of the original of its application for revision of judgment deposited at the Court Registry is dated 29 April 2016.

17. Whereas however there is no pleading attesting to the transmission of the original copy of the said application dated 24 April 2016.

18. Whereas in regard to the date on which the Registry of the Court received the application for review of judgment filed by the Republic of Guinea, and in compliance with Article 90(9) of the Rules of the Court, there is a ground for declaring the Application foreclosed.

2. As to costs

19. Whereas in the terms of Article 66(1) (2) of the Rules of the Court:

> ***"1. A decision as to costs shall be given in the final judgment or in the order which closes the proceedings. The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings."***

20. Whereas in the instant case, the Republic of Guinea is the unsuccessful party in the proceedings.

21. Whereas as a result, it is well-founded that the Republic of Guinea be ordered to bear the costs.

FOR THESE REASONS

The Court.

Adjudicating in a public hearing, after hearing both Parties, in a matter on application for revision of judgment, in first and last resort;

- **Declares** inadmissible the Application brought by the Republic of Guinea and received at the Registry of the Court on 29 April 2017, on grounds of foreclosure;

- **Asks** the Republic of Guinea to bear all costs;

THUS MADE, DECLARED AND PRONOUNCED IN A PUBLIC HEARING AT ABUJA IN THE FEDERAL REPUBLIC OF NIGERIA, BY THE COMMUNITY COURT OF JUSTICE, ECOWAS ON THE DAY, MONTH AND YEAR STATED ABOVE.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Jérôme Traoré** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Maria Do Ceu Silva MONTEIRO** - *Member.*

Assisted by

Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, 12TH OF OCTOBER, 2017

SUIT N^{O}: ECW/CCJ/APP/17/14
JUDGMENT N^{O}: ECW/CCJ/JUD/08/17

BETWEEN

1. DOROTHY CHIOMA NJEMANZE
2. EDUOROKO
3. JUSTINA ETIM
4. AMARACHI JESSYFORD } *PLAINTIFFS*

VS

THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **BOLAJI GABARI (MRS)** - *FOR THE PLAINTIFFS*
2. **T. D AGBE** - *FOR THE DEFENDANT*

- Human rights violation - Right to dignity, arbitrary arrest and detention -Torture -Limitation statute -State responsibility - Burden of proof

SUMMARY OF FACTS

The Applicants, Miss Dorothy Chioma Njemanze and others, lodged an application at the Court registry against the Federal Republic of Nigeria for various declarations and orders relating to the violation of their fundamental rights.

The Applicants, claimed that they were abducted, illegally arrested and unlawfully detained by men of Abuja Environmental Protection Board, Nigerian Police and Nigerian Army in the course of carrying out their various activities.

The Applicants further aver that the agents of the Defendant in a bid to arrest them, sexually harassed and physically assaulted them on an unfounded allegation of prostitution.

The Defendant in response raised an objection to the 2nd Applicant's claim on the grounds that the alleged action arose more than three years ago and therefore caught by the limitation period prescribed under Article 9 (3) of the 2005 Protocol relating to the Court. On the merits, the Defendant contended that the Applicants were active commercial sex workers who at all times clashed with the authorities in their bid to sanitize the FCT of sex workers in public places at late hours of the night.

They contend further that the Applicants belong to the cadre of prostitutes popularly called "Big Aunty" who coordinate young girls involved in the business of commercial sex work and entice other young girls in need of help into prostitution for their own benefit, which acts are injurious to the moral life of the FCT and constitutes a crime under the Nigerian law, the Penal Code.

ISSUES FOR DETERMINATION

1. *Whether this action as constituted falls within the jurisdiction of the Court as to vest it with competence to entertain same.*

2. *Whether the claim of the 2nd Applicant is statute barred by effluxion of time*

3. *Whether the totality of evidence adduced in this case is sufficient to establish the Applicants allegations of arrest, detention and infliction of physical violence by officers of the AEPB and the Police*

4. *Whether from the totality of facts adduced the Defendant is in breach of its obligation to protect the Plaintiffs*

5. *Whether the Plaintiffs are entitled to the reliefs sought.*

DECISION OF THE COURT

The Court held:

(a) *That the violation complained of by the 2nd Applicant is a onetime act and not being a continuing violation as to keep alive the Applicant's cause of action, the action filed by the 2nd Applicant based on it cannot survive as it is statute barred.*

(b) *That the Applicants have established the facts of the allegation of harassment of 1st and 3rd Applicants and the arrest of 4th Applicant by the agents of the Defendant on the preponderance of evidence adduced.*

(c) *That from the totality of evidence before it the whole hug of the operation was targeted solely against women. This systematic sting operation directed against only female gender flourishes evidence of discrimination.*

(d) That the Defendant's having failed to investigate the Applicants complaint in order to decipher the truth and hold accountable those responsible for the alleged acts is in violation of its responsibility to fulfil its commitment to protect the rights of the Applicants.

(e) And awarded the sum of N6,000,000.00 (Six Million Naira) only to each of the 1st, 3rd and 4th Applicants against the Defendant.

JUDGMENT OF THE COURT

3. SUBJECT MATTER OF THE PROCEEDINGS:

Violation by the Defendant of the Plaintiffs fundamental human rights as guaranteed by:

i. Articles, 1, 2, 3, 5 and 18(3) of the African on Human and Peoples' Rights;

ii. Articles, 2, 3, 4(1) & (2), 5, 8 and 25 of the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (Women Protocol);

iii. Articles 2, 3, 5(a) and 15(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW);

iv. Articles 2(1) & (3), 3, 7 and 26 of the International Covenant on Civil and Political Rights (ICCPR) Articles 10, 11,12, 13 and 16 (1) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and

v. Articles 1, 2, 5, 7 and 8 of the Universal Declaration of Human Rights.

4. DOCUMENTS SUBMITTED

1. Witness depositions of the 1st, 2nd, 3rd and 4th Plaintiffs on Oath.

2. Petitions of the 1st Plaintiff to various Government Agencies of the Defendant (Annexures 2-12).

3. Video clips of recordings at the House of Representatives.

4. Newspaper Publications of the alleged violations against the Defendants.

5. FACTS AND PROCEDURE

1. Facts as presented by the Plaintiff

The 1st Plaintiff is a Nigerian citizen, a Member State of the Economic Community of West African States (ECOWAS). She is also a Nollywood actress, event planner and manager, a car racer, stunt driver, tourism promoter, investigative journalist and radio presenter and resides in Abuja, Nigeria.

The 2nd Plaintiff is a Nigerian with dual Nigerian/British citizenship. She works at the Nnamdi Azikiwe International Airport, Abuja and resides in Abuja.

The 3rd Plaintiff is a Nigerian citizen and resides in Port Harcourt. She is a Special Assistant in a company called *Buy Naija* and also Chief executive officer of J.E Inienes limited.

The 4th Plaintiff is a Nigerian citizen and resides in Abuja. She is a business woman and deals in sales of clothes, shoes, bags, jewelry etc. at Utako market, Abuja.

The Defendant is the Government of the Federal Republic of Nigeria and Member State of ECOWAS.

The 1st Plaintiff avers that on the 23rd of September 2011, she received a call from a friend of hers informing her that 3 bridesmaids who came for a wedding of a mutual friend were abducted by some people in a white bus.

The 1st Plaintiff states that she responded to the distress call which was placed around midnight and immediately communicated with the abducted victims to locate where they were taking them.

She later realized that there were 2 buses branded Abuja Environmental Protection Board and Society against Prostitution and Child Labour (SAPCLN) and both buses had plain clothed men and armed police men who were going around abducting women they saw on the streets of Abuja.

Continuing, the 1st Plaintiff states that when they got to the AEPB office in Area 3 Garki, Abuja, they pleaded with the officers at the gate to release the women. In response the officials rained abuses on them for pleading on their behalf.

The 1st Plaintiff alleged that while they stood outside the office, she saw the AEPB officials pulling the women out of the buses with guns pointed at them. They kept beating them and forced them to write their names. One of the abducted women who refuse to comply with them was jointly beaten by about 6 officials of the AEPB. The 1st Plaintiff took pictures of the incident to document it and every effort made by her to release some of the abducted women that night proved abortive.

The 1st Plaintiff avers that they went to Maitama Police station to file a complaint on the abduction. However, the police officer they met on duty by the name Mr. Ijeoma U. Ijeoma refused to book their complaint and went further to say that the AEPB officials were doing their job and that if it were up to him, he would have arrested all the women who accompanied the 1st Plaintiff because according to him they looked like prostitutes. After further insults from him he instructed them to leave and up till date he is yet to get back at them.

The 1st Plaintiff further states that some of the abducted girls were released the next day. The detained women were not given food nor water and some of them sustained injuries while another complained that her phone was stolen. The 1st Plaintiff further avers that she invited the media who arrived at the scene at about 10 am but access was not given to the media crew into the premises of the AEPB. She however went to the African Independent Television to grant an interview and granted other interviews to other newspaper agencies present about what had transpired.

Subsequently on the 29th of September 2012 at about 8 pm the 1st Plaintiff went to see her brother and suddenly a man wearing a *Man O'war* uniform grabbed her breast and held onto them in order to make her stop walking. He forced her to get into the bus which had AEPB and SAPLCLN written on it and she refused and started shouting for help.

Thereafter, three armed military officers started beating her and threatened to shoot her if she did not get on the bus. She offered to show the assailants her identity card but they refused to accord her the opportunity rather they kept forcing her into the bus and calling her names. Passersby who saw what happened intervened and identified her as a Nollywood actress and they let her go.

The 1st Plaintiff states that when her brother went to the AEPB office to enquire what had happened, the officers at the AEPB threatened to shoot him so she had the matter reported to zone 3 police station that same day. The police invited the then AEPB Director, one Mr. Isaa Shuaibu who explained that it was the SAPCLN staff and soldiers that assaulted the 1st Plaintiff and not the AEPB. Since the incident happened, no one was arrested or prosecuted based on her complaint.

Again, the 1st Plaintiff avers that on the 6th of December 2012 few weeks after the incident stated above occurred, a similar ordeal happened to her on her way to collect signatures from business owners whose businesses were directly affected by the activities of AEPB and SAPCLN. These men were identified to be officers of the AEPB and security officers of the Defendant.

That in response to the widespread reports about random abduction of women in Abuja, FCT by AEPB and law enforcement agents and due to her own personal experiences, the first Defendant set up an NGO, the Dorothy Njemanze Foundation to advocate for justice for victims of these violations.

The 1st Plaintiff avers further that she complained about her assault and random abductions to the Commissioner of Police, Public Complaints Commission, the National Human Right Commission, the Chief of Army Staff, and other Law Enforcement Agencies of the Defendant but she has not been provided with redress till date and these abductions against women on the street of Abuja still continue unabated.

On her part, the 2nd Plaintiff avers that on 9th January, 2010, on her way back from her brother's birthday with some of her friends, she was abducted by 10 men who came out of nowhere and started beating her and taking pictures of her as they almost stripped her naked. They touched her breast and her buttocks and some of them put their fingers in her vagina. While they were beating her, they hit her in her eyes and nose thereby causing a tear which blurred the vision in her left eye and left her with a chronic synopsis.

The 2nd Plaintiff further avers that the armed uniformed men threatened to shoot her if she did not enter into a waiting bus fearing for her life she complied. These armed men did not ask her for any form of identification, even when she identified herself as a student and Redbull employee, they still unlawfully arrested and took her and her friends to their office.

The 2nd Plaintiff states that around 11.00 pm on the same night, they took her and the other abductees to Life Camp Police Station. On their way, she used a friends' phone to take pictures of the two members of the taskforce.

When they got to the police station, they detained her in an overcrowded room that looked like a cell with no food, or water, without access to her counsel or family till about 3 pm the following day. She was not charged for any offence or given a reason for the said abduction.

The 2nd Plaintiff further states that she did not report the matter to the police as they were obviously involved in her detention. However, her lawyer sent a letter of complaint on her behalf to the Minister of the

Federal Capital Territory who responded by sending her a written apology. The 3rd Plaintiff avers that on October 25th 2012 she was out with a friend of hers called Mikey and suddenly a white Toyota pickup truck and a white bus pulled up and about 8 men in plain clothes and police uniform jumped down and ordered her to get into the truck.

The 3rd Plaintiff did not know who they were until she saw the AEPB (Abuja Environmental Protection Board) logo on the side of the bus and she realized they were the taskforce that pick up women believed to be prostitutes.

These men did not ask her to identify herself rather they dragged her towards the truck, pulling her hair, hands and legs, touching her breast and attempted to push her into their bus.

She started shouting and calling for help and the passersby who saw what was happening assisted in pulling her out of the men's grip. She had to go to the pharmacy that same night to get some medication and treat the bruises she sustained.

The 3rd Plaintiff further avers that two days after the initial incident, she was out with Fola and Romeo discussing the previous incident in front of a mechanic workshop. The mechanic upon hearing their discussion, joined in the conversation and mentioned that a lady was raped by the AEPB taskforce the previous day and when he tried to help her, he was stabbed in the head. When she went across the road to confirm if her car was locked, another group of men of the AEPB officials harassed and assaulted her.

The 3rd Plaintiff states that the harassment, abuses, sexual assault and humiliation meted out on her almost made her loose her crown as the finest girl in Niger Delta. She reported the incident to the police and went further to make her case public in a radio station as she did not believe that she would get justice from the police.

The 4th Plaintiff on her part avers that on 8th March, 2013 at about 7.30 pm, she went out with some of her friends to Kuramo Garden in Gwarinpa, Abuja. Just before they started eating, about six uniformed and armed police officers came into the garden and instructed them to stand up and show a means of identification. The 4th Plaintiff who however did not have her identity card on her was pushed into a waiting vehicle alongside other people at the garden.

The 4th Plaintiff states that the Police Officers took them to Gwarinpa Police Station and ordered them to sit on the bare floor inside the Police Station until 5am the following morning. The next day she was released with no reason(s) for her arrest and detention nor was she charged for any offence whatsoever.

The 4th Plaintiff further states that since the incident occurred, she has not had the courage to venture out of her house at night again till date.

As a result of these violations, the Plaintiffs claims or sought the following reliefs from the Court:

I. A DECLARATION that the failure on the part of the Defendant State to recognize, promote and protect the rights of the Plaintiffs and the failure to take measures to give effect to the rights of the Plaintiffs constitute multiple violations of Articles 1, 2, 3, 5 and 18(3) of African Charter on Human and Peoples' Right, Articles 2, 3, 4 (1) and (2), 5, 8, and 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of woman in Africa, Article 2, 3, 5 (a), and 15 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, Articles 2(1) and (3), 3, 7 and 26 of the International Covenant Against Torture and other Cruel, inhuman or Degrading Treatment or Punishment and Articles 1, 2, 5, 7 and 8 of the Universal Declaration of Human Rights.

II. A DECLARATION that the failure and /or refusal of the Defendant State to investigate, discipline and prosecute the persons responsible for the violations of the Plaintiffs' Rights (in this case agents of the AEPB, the Nigerian Police and the Nigeria Military) constitute a violation of Article l, the African Charter on Human and Peoples' Rights, Articles 5, 8 and 25 of the Women's Protocol, Articles 2(3) of the International Covenant on Civil and Political Rights, Articles 3 and 5 (a) of Convention on the Elimination of All Forms of Discrimination Against Women and Articles 10, 11, 12, 13 and 16 (1) of the Convention Against Torture.

III. A DECLARATION that the treatment meted out to the Plaintiffs by Agents of the AEPB, the Nigerian Police and the Nigeria Military constitutes gender-based violence contrary to Articles 3, 4(2) and 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

IV. A DECLARATION that the treatment meted out to the Plaintiff by Agents of the AEPB, the Nigeria Police and the Nigeria Military constitutes gender- based discriminatory treatment contrary to Articles 2,3, and 18 (3) of the African Charter on Human and Peoples' Rights, Articles 2 and 8 of the Protocol to the African Charter and peoples' Rights on the Rights of Women in Africa and of Articles 2, 3 and 15(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, Articles 2(1), 3 and 26 of the International Covenant on Civil and Political Rights and Articles 2 and 7 of the Universal Declaration of Human Rights.

V. A DECLARATION that the treatment meted out to the Plaintiffs by Agents of the AEPB, the Nigerian Police and the Nigeria Military constitutes cruel, inhuman and degrading treatment discriminatory treatment contrary to Articles 5 of

the African Charter on Human and Peoples' Rights, Articles 3 and 4(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Articles 2, 3 and 15(1) of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 7 of the International Covenant on Civil and Political Rights and Articles 1 and 5 of the Universal Declaration of Human Rights.

VI. DAMAGES/MONETARY compensation for the Plaintiffs in the sum of 100,000,000 (one Hundred Million Naira only) for the pain, suffering and harm to their dignity including physical, mental and emotional trauma.

VII. An ORDER for the enactment of a law eliminating all forms of violence, including sexual violence against women and the training of the Police, Prosecutors, Judges and other responsible Government Agencies on laws on violence against Women and gender sensitivity and the creation of specialized police Units and Courts dealing with cases of violence against women.

VIII. An order for the adoption of other legislative, social and economic resources as may be necessary to ensure the protection, punishment and eradication of all forms of discrimination against women.

IX. An order for the provision of support services for victims of violence against women including information, legal services, health services and counselling.

X. An order for the establishment of mechanisms or procedures for the protection of women, such as shelters, complaints mechanisms, reporting through educational, health or other Institutions, etc.

XI. An order for the development and wide implementation of awareness rising educational and communication strategies aimed at the eradication of beliefs practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women.

XII. Any such further order or orders as the Court deems fits m the circumstances.

5.2. The Defendant was served with the Plaintiffs' originating application, but did not respond within the time limit provided for by the Rules of this Court.

When the matter came up on the 17th of February 2015, for hearing, the Plaintiffs brought an application for Judgment to be entered for them in default of defence, which was opposed by the Defendant. The Court taking into consideration the fact that the Defendant was just served the motion for default judgment that morning adjourned the matter to the 14th of March 2016, for hearing of the Plaintiffs motion for default judgment. However, the Court did not sit on that date.

On the 24th of April 2016, when the matter came up, the Defendant had filed an application for extension of time within which to file their statement of Defence out of time and deeming the statement of Defence annexed as having been properly filed and served. The Plaintiffs did not oppose the application, which was granted by the Court and the case adjourned to the 25th of May 2015 for hearing and the motion for default judgment struck out at the Plaintiffs instance.

5.3. Defendants Case:

Following the grant of the Defendants application for extension of time to file her statement of Defence, the Defendant did so and averred as follows;

In response to the Plaintiffs' statement of facts, the Defendant state that no person(s) were arrested and/or detained by the Nigerian Police, Nigerian Military or men of the AEPB as alleged by the Plaintiffs.

That if at all the alleged three girls were arrested by the Nigerian Police and men of the AEPB, neither the 1st nor 2nd to the 4th Plaintiffs were, among them; the Plaintiffs therefore lack the legal capacity to bring a complaint on their behalf.

The Defendant states that the 1st Plaintiff did at no time have the alleged experience with the Nigerian Police, Nigerian Army or the men of the AEPB.

That the 1st Plaintiff is hiding under the canopy of human right activism to campaign for the legalization of prostitution in public places in the Federal Capital Territory.

That the 1st Plaintiff is actively involved in the coordination and conduct of the trade or business of professional commercial sex workers (prostitution) in the FCT.

The Government of the Federal Republic of Nigeria, the FCT administration and indeed the international bodies in Africa are against commercial sex workers popularly called ***"Ashawo"*** in Nigeria, as same constitutes nuisance and a violation of the moral values of our African society.

That the person described as a *Man O' War* by the Plaintiffs is not an agent of the Defendant.

That the Plaintiffs dress naked or half naked by the road side soliciting for men both interested and uninterested members of the public including innocent infants.

That only an insane or an idle person can be in the street at 12 mid-night in the name of collecting signatures.

That the 1st Plaintiff is an active commercial sex worker who at all times clashed with the authorities in the course of performing their duty sanitizing the FCT of sex workers in public places.

Further the Defendant states that the 1st Plaintiff by paragraph 4.53 of the Plaintiffs statement of facts has admitted being a prostitute.

That the 2nd Plaintiff was never arrested at any point by the men of AEPB, the Nigerian Police, the Nigerian Army nor any of the security agencies and no record exist to show that the 2nd Plaintiff or any of her imaginary friends (Muna, Mubo and Iveren) were arrested and detained.

The FCT administration has empowered the AEPB in collaboration with the Nigerian Police to arrest, detain and prosecute any woman soliciting/ offering herself for sexual service at night at any public place in the FCT.

That the 2nd Plaintiffs alleged incident of violation, allegedly occurred on 9th January, 2010 but this present suit was only filed on the 18th of September, 2014 more than 3 years after the alleged event took place.

The 3rd Plaintiff was not at any time arrested by either the men of AEPB, Nigerian Police, or the Nigerian Army at any time.

That the 3rd Plaintiff is one of those commercial sex workers that uses touts who patronize them to attack the men of the AEPB and hinder them from performing their legal functions.

That the name used by the 3rd Plaintiff in the statement of fact as her friends are non-existent and imaginary and there is no such incident of rape, and stabbing of a mechanic reported in any police station in FCT.

That the 4th Plaintiff was never at any point in time arrested by neither men of AEPB, Nigerian Police, nor the Nigerian Army within the time she alleged.

That the Plaintiffs belong to the cadre of prostitutes popularly called *"Big Aunty"* who gather and coordinate other young girls involved in the business of commercial sex work and with their weight of connection always cajole other young girls in need of help into prostitution for their own benefit.

That by the admission of the 1st Plaintiff that the Chairperson House of Committee on Public Petitions had asked her to coordinate other prostitutes, it is clear that the Plaintiffs belong to a syndicate of organized prostitutes.

That there is no international convention, domestic law or culture in Nigeria that recognizes prostitution as a legitimate business; it is actually a criminal offence to indulge in prostitution in public places.

The Defendant states that the activities of the Plaintiff (prostitutes) are injurious to the moral life of the FCT and a crime under the Nigerian law, particularly the Penal code, applicable to the FCT.

The Plaintiffs filed a reply to the Defendant's statement of defence and restated that their averments are true and personal experiences suffered in the hands of the men of the AEPB, Nigerian Police, Nigerian Military and Man O' War, all Agents of the Defendants.

The Plaintiffs state that this case has nothing to do with the legality or illegality of prostitution and is not a campaign for the legalization of prostitution.

The Plaintiff state that the person described as Man O'War is a de facto Agent of the government as he was being used by the AEPB and Nigerian Army to harass the 1st Plaintiff.

The Plaintiffs restate that it was the Chairperson of the House of Representatives' Committee on Public Petition (also an Agent of the Nigerian government) that advised the 1st Plaintiff to "mobilize other Prostitute" to stay off the streets pending the outcome of the hearing.

The Plaintiffs reiterate that the 2nd Plaintiff and her friends / colleagues were harassed, arrested and detained on 08th January 2011 (and not 09th January 2010 as previously stated in other processes as a result of typographic error on the part of Plaintiffs) by men of the AEPB.

The Plaintiffs state that the 2nd Plaintiffs cause of action is not statute barred and can be entertained by this Court.

The Plaintiffs state that there is a laid down procedure for arrest in Nigeria provided by the Criminal Procedure Code and the Agents of the AEPB did not follow this procedure.

That the Defendant makes no denial that its Agents arrest Women on the street for no reason other than for being women walking on the streets in the evening or at night and then label these women prostitute.

The 1st - 4th Plaintiffs deny that they are neither prostitutes nor coordinators of prostitutes.

On the 25th of May 2015, the Plaintiffs pursuant to Rule 43(2) of the Rules of this Court brought an application to call a witness (*one Apel Orduen*) to give oral testimony in support of their claim. The Defendant did not oppose the application and the Court granted the application and adjourned to the 02nd July, 2015 for hearing. The Court did not sit on the 02nd July, 2015 due to other exigencies.

When the matter came up on the 14th March, 2016, the Plaintiffs asked for adjournment on the grounds of their inability to produce some documents. The matter was reluctantly adjourned to the 10th of May, 2016, a date the Court did not sit. When the matter came up on 06th

October, 2016, the Plaintiff called all their witness who adopted their statement on Oath, and the other witness also testified and were cross examined by the Defendants. Thus, the Plaintiffs closed their case and the matter was adjourned to the 17th day of June, 2016 for defence.

However, the Court did not sit on that date. The matter came up on 14th October, 2016 for defence but could not go on due to the inability of the Defendant to produce the two witnesses it intended calling. The matter was therefore adjourned to the 08th November for definite defence. When the matter came up on the 08th of November, 2016, the Defendants failed to produce any witness and opted to answer to the case on points of law alone. The Court therefore closed the case of the Defendant, thereby dispensing with the Defendant's application to call oral witness with the concurrence of the Defendant.

6.1. ANALYSIS BY THE COURT

The Four Plaintiffs who were variously described in the narration of facts above brought this action for various declarations and orders relating to the violation of their fundamental human rights by Agents and institutions of the Defendant. The crux of the claim is the illegal arrest and detention, harassment, abduction and various forms of physical assaults committed by the Defendant via its agents at various times against the Plaintiffs. For the purposes of emphasis, in their pleas in law, the Plaintiff argued that;

i. That the treatment the Plaintiffs suffered in the hand of various government authorities of the Defendant, constitute gender- based violence in violation of Articles 3, 4(2) and 5 of the Women Protocol to the African Charter on Human and Peoples' Rights which enjoins State Parties to

    a. Take appropriate measures to enact and enforce laws prohibiting all forms of violence against Women including unwanted or forced sex, whether occurring in public or private.

b. Adopt legislative and other measures necessary to ensure prevention and punishment and eradication of all forms of violence against women.

c. Identify the causes and consequences of violence against women and take appropriate measures to eliminate them.

d. Actively promote peace, education through curricula and social communication in order to eradicate cultural beliefs practices and stereotypes that legitimate and exacerbate the persistence and tolerance of such acts. It further imposes obligation on States to punish perpetrators of violence against women, rehabilitate the victims, establish mechanisms and effective accessible services for information, rehabilitation and reparation for victims, prevent and condemn such practices as trafficking in Women and prosecute perpetrators of such acts as well as make adequate budgetary provisions and provide for resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women.

ii. That the treatment the Plaintiff's suffered in the hands of the Agents of the Defendants constitute unequal and gender-based discriminating treatment in violation of Articles 2, 3 and 18(3) of the African Charter on Human and Peoples' Rights, Articles 2, and 8 of the Protocol, Articles 2, 3, and 15 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Articles, 2(1), 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 of the Universal Declaration of Human Rights.

iii. That the physical, sexual and psychological violence and verbal assaults the Plaintiffs suffered in the hands of Agents of the Defendant, constitute, cruel inhuman degrading and ill-treatment and violations of their right to human dignity guaranteed under Article 5 of the African Charter on Human and Peoples' Rights, Articles 3 and 4(1)

of the Women Protocol, Articles 1 and 5 of the Universal Declaration of Human Rights. Articles 7 of ICCPR and Article 16(1) of the Convention Against Torture.

iv. That the failure of the Defendant to investigate the Plaintiffs' complaints of abductions, attempted abductions, physical, verbal and sexual assaults perpetrated by her Agents and failure to provide protection and redress to the Plaintiffs constitute violations of the Plaintiffs right to remedy and the Respondent State's Obligations under Article 1 of the African Charter on Human and Peoples' Rights, Articles 5, 8, and 25 of the Women's Protocol, Article 2(3) of the ICCPR, Articles 3 and 5(a) of CEDAW, Article 8 of the Universal Declaration of Human Rights and Articles 10, 11, 12, 13 and 16(1) of the convention Against Torture.

On their part, the Defendant after a general denial of the claims of the Plaintiffs in their defence which in most cases centred on the facts that the Plaintiffs are prostitutes, who solicit for men on the streets of Abuja and that Prostitution being a criminal offence, the Federal Capital Territory Administration (FCTA) of the Defendant empowered the Police and the Abuja Environmental Protection Board (AEPB) to take away Prostitutes from the streets of Abuja.

More particularly, the Defendant in their pleas in law contended as follow;

a) That the Court has no jurisdiction to entertain the suit on the grounds, that the Plaintiffs are Prostitutes and their action cannot be justified under the African Charter on Human and Peoples' Rights. That the jurisdiction of the Court is anchored on the violation of Human Rights occurring in Member States. That Article 6 of the African Charter on Human and Peoples' Rights (the main plank for the Plaintiffs action prohibits deprivation of liberty and security of the Human Persons, except for reasons and conditions previously laid down by law. That the Penal Code Cap.P3 Laws of the Federation of Nigeria (LFN) prohibits the acts of Prostitution in public places and that since

the arrest and detention of the Plaintiffs (if any is predicated on an existing law, they cannot invoke the jurisdiction of the Court.

b) That the action of the Plaintiffs is inadmissible because it will tantamount to the Court granting them freedom to violate a previously existing law of a member State of ECOWAS and further submitted that once it is established that an infringement on the liberty of the individual is in conformity with reasons and conditions previously laid down by law, the Courts jurisdiction cannot be invoked to challenge such infringement. Furthermore, that the Plaintiffs have not discharged the burden of proof placed on them in this case. They have not established by credible evidence that their rights have been violated since their stories appear fabricated aimed at misleading the Court to **"give them freedom to sell sex in the street"** *(Emphasis ours)*.

c) Finally, the Defendants contended that the 2nd Plaintiffs' action is statute barred not having been brought within the three year period stipulated by Article 9 (3) of the Supplementary Protocol of this Court 2005, and urged the Court to dismiss the action.

Having examined the issue in contention between the Parties, arising from the facts stated, the following issues calls for determination:

1. Whether this action as constituted falls within the jurisdiction of the Court as to vest it with the competence to entertain same.

2. Whether from the claim of the 2nd Plaintiff's is statute barred by effluxion of time.

3. Whether the totality of evidence adduced in this case is sufficient to establish the Plaintiffs' allegations of arrest, detention and infliction of physical violence by the officers of the AEPB and the Police.

4. Whether from the totality of facts adduced the Defendant is in breach of its obligation as alleged.

5. Whether the Plaintiffs are entitled to the reliefs sought.

The jurisdiction of this Court has been clearly spelt out in **Article 9** of the **Supplementary Protocol (A/SP.1/01/05).** Whereas the Plaintiff alleged a violation of their human rights, the Defendant maintain that the issue borders on legalization of prostitution. However, it is trite that jurisdiction is inferred from the Plaintiffs claim and not the defence.

A careful perusal of the facts presented by the Plaintiff brings out the following facts:

i. They were arrested by agents of the Defendant

ii. Their arrest was wrongful

ii. They were detained for several hours under inhuman condition

iv. They were subjected to degrading treatment, mental and physical abuse

v. They were released without charges and apologies

The Defendants generally denied these allegations.

Article 6 of the African Charter on human and peoples' rights provides:

> *"Every individual shall have right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained";*

Article 5 of the African Charter on human and peoples' rights provides:

> *"Every individual shall have the right to the respect of the*

dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment shall be prohibited."

An arrest which is lawful may otherwise become unlawful where it is carried out arbitrarily. In determining the lawfulness of an alleged arrest and detention of an Applicant, the human rights jurisdiction of this Court will be invoked.

Article 9 (4) of the Supplementary Protocol provides that:

"The Court has jurisdiction to determine cases of violation of human rights that occur in any member State".

In **HISSEIN HABRE V. REPUBLIC OF SENEGAL (2010) CCJELR**, this Court held that in order to determine whether or not it has jurisdiction to entertain a matter, it has to examine:

- If the issues submitted before it deals with a right which has been enshrined for the benefit of the human person;
- Whether it arises from international or community obligations of the state complained of, as human rights to be promoted, observed, protected, and enjoyed;
- Whether it is the violation of that right which is being alleged.

In **BAKARE SARRE V MALI (2011) CCJELR** pg. 57 this Court stressed that once the human rights allegedly violated involves international or community obligation of a member state, it will exercise its jurisdiction over the case.

Also, in **SERAP V. FRN & 4 ORS, (2014) UNREPORTED**, this court held that the mere allegation that there has been a violation of human rights in the territory of a member state is sufficient prima facie to justify

the jurisdiction of this court on the dispute, surely without any prejudice to the substance and merits of the complaint which has to be determined only after the parties have been given the opportunity to present their case, with full guarantees of fair trial.

See also **SIKIRU ALADE V THE FEDERAL REPUBLIC OF NIGERIA (2012)** unreported, where this Court held that an infringement on a persons' liberty as alleged by the Plaintiff/Applicant would fall neatly under Article 9(4) of the Protocol of the Court.

Applying the above decisions of this court to facts of the Plaintiffs' application as presented, it is evident that this matter falls within the ambit of this court's jurisdiction. The Defendant's objection to the Court's subject matter competence therefore fails.

ii. Whether the claim of the 2nd Plaintiffs is statute barred by effluxion of time.

Article 9(3) of the Supplementary Protocol A/SP.1/01/05 provides that:

> *"Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose.*"

From the facts before this Court, the 2nd Plaintiffs action arose on the 9th January 2010 as seen on the face of the originating Application. The Application was lodged at the Registry on the 17th day of September 2014.

This Court in determining when a cause of action arose has held that the right of action used in Article 9 (3) of the Protocol means the right to bring a specific case to a Court or Tribunal. That right is dependent on whether as of the date the action is brought to Court, all the necessary facts are available and any prerequisite legal or factual situations have been satisfied. See **Valentine Ayika V. Republic of Liberia 2011 CCJELR**.

The Defendant contends that the claim of the 2nd Plaintiff is Statute barred having been brought outside the limitation period. The Plaintiffs in response to the objection submitted that the 2nd Plaintiff was arrested and detained on 8th January 2011 and not 9th January 2010 as stated in the originating application and that the 9th January 2010 so stated was as a result of typographical error.

In amending an initiating Application, there is need in the interest of justice for a formal motion to be filed and moved not only so as to obtain the consent of the Court, but to give the other party the opportunity to react before such amendment can be made.

The Plaintiffs in the present case did not file any motion to amend their originating Application but rather responded to Defendant's objection by merely stating that there was a typographical error as regards the date. This Court cannot rely on the Plaintiff response to the objection that goes to the root of the 2nd Plaintiffs' case without more to amend an originating process. Moreover, the inconsistency in the dates are too distinct to be overlooked as a mere typographical error in that the dates and the years in issue are completely different to say the least. Indeed the 2nd Plaintiffs' contention of typographical error is an afterthought and cannot stand.

Consequently, this Court is convinced that the action complained of by the 2nd Plaintiff occurred on the 9th of January 2010 and filed on 17th September 2014.

The 2nd Plaintiffs alleged arrest and detention was carried out on the 9th of January 2010 and thereafter she was released after several hours of detention. The said conduct cannot be considered as a continuous violation and time begins to run the moment she was released from police custody.

See **SERAP V. FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/18/12**, UNREPORTED where the Court in its analysis stated that their subjection to the statute of limitation depends on the characterization

of the act as an isolated act or a persistent and continuous omission that lasted until the date the complaint was filed with the Court.

It is necessary to point out that the violation complained of here is a onetime act against the 2nd Plaintiff. Not being a continuing violation as to keep alive the Plaintiffs cause of action, the action filed by the 2nd Plaintiff based on it cannot survive as it is statute barred. The result of an action being statute barred is to leave the offending Party without a right of action despite the existence of a cause of action and thus no remedy.

iii. **Whether the totality of evidence adduced in this case is sufficient to establish the Plaintiffs' allegation of arrest, detention and infliction of physical violence by the officers of AEPB and the Police.**

The Plaintiffs filed this application against the Defendant for the violation of their rights, wherein they alleged that they were abducted and assaulted sexually, physically and verbally, threatened and unlawfully detained by state agents in Abuja working for the Abuja Environmental Protection Board (AEBP), the Nigerian Police and the Nigerian Military at different times. They further contend that these officials did not introduce themselves to them neither did they inform them of the reason for the arrest or charge them to any court in Nigeria.

The Defendant in response denies the allegation and states that the Plaintiffs' belong to the cadre of prostitutes popularly called "Big Aunty" who gather and coordinate other young girls involved in the business of commercial sex work and with their weight of connection always cajole other young girls in need of help into prostitution for their own benefit.

It is a general principle of law that he who asserts must prove.

The rule that proof rests on he who asserts the affirmative and not on he who denies is an ancient rule founded on the consideration of common sense and should not be departed from without strong reasons. This was

stated by Lord Maugham in the case of **CONSTANTINE LINE V. IMPERIAL SMELTING CORPORATION** (1942) A.C 154 at P. 174.

The burden of proving the facts of their allegation rests on the Plaintiffs and they are required to present evidence to support those allegations made in their Originating Application.

In the case of **Falana & anor V. Republic of Benin & 2 Ors** (2012) Unreported, this Court held that ***"as always, the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the court to believe the statement of the claim"***.

Similarly, in **PETROSTAR (NIGERIA) LIMITED V. BLACKBERRY NIGERIA LIMITED & 1 OR CCJELR (2011)**, the court, in its consideration reiterated the cardinal principle of law that "he who alleges must prove". Therefore, where a party asserts a fact, he must produce evidence to substantiate the claim.

Though the burden of proof lies on the party who asserts the affirmative, where there is an admission expressly or impliedly by the Defendant, no further proof is required.

The Defendant in para 2.04 of their statement of defence denied the Plaintiffs' allegation of arrest and detention and further states that there are no records of the said arrest and/or detention by the Nigerian Police, the Nigerian Military or men of the AEPB.

The 1st Plaintiffs case is that on two occasions, she was assaulted and almost arrested AEPB and police officials on the grounds that she was a prostitute.

The 3rd Plaintiff on her part averred that she was on two occasions harassed by about eight men of the AEPB and the police force wherein

they attempted to arrest her while out with her friends but by the intervention of passersby and her friends she escaped being arrested.

The 4th Plaintiff averred that she was arrested by about six uniformed armed police officers on the 8th of march at the Kuramo gardens while about to eat with some friends That after the arrest the officers took her to the Gwarimpa police station and left her sitting on the cold floor of the premises the whole night until the next morning. That she was released the next morning without any charges or given information on the reason for the arrest.

The Plaintiffs further stated that they were neither informed of the reason for their arrest nor were they charged for any offence subsequently.

The Plaintiffs in the bid to establish their case filed a motion supported by an affidavit to which they attached witness depositions on oath in evidence of their averments.

Ugochukwu Njemanze and Eddie Abba in their affidavit stated that they witnessed the 1st Plaintiff's scuffle with the officials of AEPB thus corroborating 1st Plaintiffs' averments. The 4th Plaintiff stated that she was detained at the Gwarimpa police station.

The Defendant did not lead any evidence to controvert or disprove these testimonies neither did it produce document to rebut the 4th Plaintiffs allegation of detention at the Gwarimpa police station despite its contention that the records did not disclose such detention. The Defendant failed or neglected to attach the register of the Gwarimpa police station on the day in question to establish its submission. For the avoidance of doubt in cases in which an Applicant alleges arrest and detention, it is usually difficult for them to have access to the detailed record of the arrest, a fact usually within the knowledge and possession of the arresting officials. How does he prove the facts of arrest other than through an assertion of that fact. Mere denial of lack of arrest on the part of a Defendant cannot suffice. The Court usually presumes the fact of arrest and its unlawfulness

and the Defendant have to rebut it by producing credible evidence of absence of arrest and detention of the Applicant. A general denial by the Defendant as in this case is not sufficient.

In the light of the above the Plaintiffs have established the facts of their allegation of harassment of 1st Plaintiff and arrest of 4th Plaintiff on the preponderance of evidence adduced.

In **FERNANDEZ ORTEGA ET.AL V. MEXICO. INTER.AM CT.HR (SER C)** Nº.215 (Aug 2010), the Court noted that the State had the burden to provide conclusive information to disprove the alleged facts and having provided no evidence in contradiction of the Plaintiff's claim has failed to discharge that burden and so found the state responsible.

Article 6 of the African Charter on human and peoples' rights provides:

> *"Every individual shall have right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"'*

Similarly, Article 9(1) of the International Covenant on Civil and Political rights provides:

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".*

Also, Section 35 (1) (c) of the 1999 Constitution of the Federal Republic of Nigeria provides:

> *"Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law:*
>
> *(c)* ***for the purpose of bringing him before a court in execution of the order of a court or upon reasonable***

suspicion of his having committed a criminal offence. or to such extent as may be reasonably necessary to prevent his committing a criminal offence;

The right to personal liberty is one of the most fundamental human rights as it affects the vital elements of an individual's physical freedom. Unless where legitimate exception is permitted by law, any limitation on a person's liberty to move freely is an infringement on his fundamental right.

Section 14 (1) of the Administration of Criminal Justice Act ACJA (a law of the Defendant) provides:

> *"A suspect who is arrested, whether with or without a warrant, shall be taken immediately to a police station, or other place for the reception of suspect, and shall be promptly informed of the allegation against him in the language he understands".*

With regard to the meaning of arbitrary detention, The Human Rights Committee of the United Nations pointed out that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. (*See* **Sambo Dasuki Vs. Federal Republic of Nigeria**).

Referring to Article 5 of the European Convention on Human Rights which is *pari-materia* with Article 6 of the African Charter on Human and Peoples Rights, the Grand chamber of the European Court of Human Rights underlined the particular importance of the principle of legal certainty as follows:

> *"The Court stressed that where deprivation of liberty is concerned itis particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or International Law be clearly defined and the law itself be foreseeable in its application so that it meets the standard of*

'lawfulness' set by the Convention a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness"

The justification given by the Defendant for the arrest and detention of the Plaintiffs runs contrary to the express provisions of the Law.

See the case of **MAMADOU TANDJA V. REPUBLIC OF NIGER & 1 OR (2010), CCJELR**, where this Court held that the arrest and detention must be premised on legal grounds.

The Plaintiffs alleged that Defendants' Agents physically abused and inflicted injuries on them while trying to abduct/arrest them. This assertion was denied by the Defendant who put the Plaintiff to the strictest proof.

Ugochukwu Njemanze in his deposition on oath stated that when he received the distress call from the first Plaintiff, he went to the police station where the incident occurred and thereafter took the 1st Plaintiff to the hospital as she sustained injuries during her encounter with the Defendants Agents. The 3rd Defendant on her part stated that as a result of injuries inflicted on her by the officials she went to a pharmacy and obtained medication to treat the bruises and pain. *See* paragraph 4.78 of the Application.

However, no medical report was attached in substantiation and no receipt of medication purchased from the pharmacy as alleged by the 3rd Plaintiff was attached. None of the Plaintiffs attached any photograph of the injuries sustained in proof despite the assertions that the 1st and 3rd Plaintiffs were beaten and left with bruises.

This Court has repeatedly stated that it will not act on mere allegation of violation but each allegation must be substantiated with some concrete facts as the case may require.

In **Assima Kokou Innocent & 6 Ors V. Rep. of Togo** (2013) unreported this court held that "before it concludes on the issue of

occurrence of human rights' violation, the concrete proof of the fact upon which the Applicant base their claims must be established with a high degree of certainty, or at least, there must be a high possibility of the claim appearing to be true, upon scrutiny. In this regard mere allegations do not suffice to elicit the conviction of the court.

There is therefore no concrete evidence to support the Plaintiffs allegation of physical injuries sustained which allegation therefore fails.

The Plaintiffs further allege that the AEPB and the Police Officials in the cause of the alleged arrest, verbally abused them by calling them prostitutes. This allegation was admitted in para 2.41 of the Defendant's statement of defence wherein they submit that the Plaintiffs belong to the class of prostitutes (commercial sex workers) that are fully establish.

The Defendant maintains that the Plaintiffs are prostitutes and refers to the mandate given to 1st Plaintiff by the House of Representative Committee as a confirmation of their assertion.

It is trite that facts admitted need no further proof. Plaintiffs have therefore established the fact that Defendant's Agents verbally abused and degraded them by calling them prostitutes.

The issue to be addressed is whether or not the Defendant has shown reasonable ground upon which to base their assertion that the Plaintiff are prostitutes.

The Plaintiffs on their part states that they were out with friends having alighted from the official vehicle. The Defendant has not controverted this fact.

The Defendant placed reliance on Section 406 (d) of the Penal Code LFN 2004 which defines an idle person to include:

> *"Any common prostitute behaving in a disorderly or indecent manner in a particular public place or persistently importuning or soliciting persons for the purpose of prostitution.*"

No evidence was led to suggest that the Plaintiffs were seen conducting themselves in a way suggestive of prostitution as provided in the above section. The only reason proffered by the Defendant is that the Plaintiffs were outside at late hours of the night. There is however no law prohibiting women staying outside at night.

In Wloch V. Poland, 27785/95 19 October 2000 (109), the European Court was of the view that the existence of a **"reasonable suspicion"** within the meaning of 5(1)(c) of the European Convention requires that the facts relied on can be reasonably considered as falling under one of the sections describing criminal behavior in the criminal code. Thus, there could clearly not be a "reasonable suspicion" if the acts or facts held against a detained person did not constitute a crime at the time when they occurred.

The use of the word prostitute or **"Ashawo"** on the Plaintiffs is humiliating, derogatory and degrading to their persons. The Defendant having failed to provide any reasonable justification for its allegation and use of such degrading words on the Plaintiffs is therefore in violation of Plaintiffs rights as provided under Article 5 of the African Charter on Human and Peoples' Rights.

From the totality of evidence offered, it seems that the whole hug of the operation was targeted against women. This systematic sting operation directed against only the female gender furnishes evidence of discrimination. There is an obligation placed on State Parties to Convention on Elimination of All Forms of Discrimination against Women (CEDAW) to adopt laws, administrative and Policy measures to prevent gender-based discrimination. Prostitution is claimed to be a crime in the laws of the Defendant. However, it takes two persons to engage in such criminal activity. There is no law that suggest that when women are seen on the streets at midnight or anytime thereafter, they are necessarily idle persons or prostitutes. If it were so, it ought to apply to all persons irrespective of sex.

Whether from the totality of facts adduced the Defendant is in breach of its obligation as alleged.

The Defendant in this case did not furnish this Court with any evidence to prove the allegation of prostitution and they have not shown that the Plaintiffs were arrested flagrantly committing the offence as a justification for the arrest.

Having arbitrarily arrested, detained and harassed the Plaintiffs, the officials have violated the rights of the Plaintiffs under Articles 5 and 6 of the African Charter on Human and Peoples' Rights and Article 9(1) of the ICCPR.

There is no dispute as to the status of the police and AEPB officials as agents of the Defendant as this has been admitted by the Defendant in its defence. Also, not in issue is the capacity under which the Agents carried out the actions complained of. *See* paragraph 2.26 of the Defence.

The Inter-American Court of Human Rights in **Velasquez Rodriguez V. Honduras, Series C, No. 4, para. 170 (1988)** said:

> ***"Under International Law a State is responsible for the acts of its agents undertaken in their official capacity and for their omission, even when those agents act outside the sphere of their authority or violate intimal law"***

In line with the above therefore the Defendant is responsible for the act of its agents which violated the rights of the Plaintiffs as found above.

The Defendant in its defence led no evidence suggesting that they have conducted an investigation into the allegation of the Plaintiffs case based upon which they reached the conclusion that Plaintiffs averments were false. The state has the responsibility once aware of an incident such as those complained of by the Plaintiffs, to carry out impartial and effective investigation as a means to unravel the truth. This has not been shown to

have been done in this case. Rather the Defendants maintained in their defence that the Plaintiffs are prostitutes with no evidence to substantiate that.

In **Tidjani Konte V. Republic of Ghana**, the Court observed that:

> ***"The State remains the sole obligator to respect, protect and fulfill human rights under the Treaty and placed reliance on Article 6 of the Report of the 53rd Session of International Law Commission which provides "the conduct of an organ of State shall be considered as an act of that State under International Law, whether that organ belongs to the constituent legislative, executive, judicial or other power, whether its functions are of international or subordinate position in the organization of the State"***

There is evidence that the Plaintiffs made formal complaints to the agents and authorities of the Defendant who promised to investigate but never did. International law places a duty on States to investigate alleged infractions of rights of its citizens especially where formal complaints are made. Apart from any other acts or omission alleged on the part of the State or its officials, failure to investigate such allegations itself constitutes a breach of the States duty under international law.

The Defendant having failed to investigate the Plaintiffs allegations in order to decipher the truth and hold accountable those responsible for the alleged act is in violation of its obligation to fulfil its commitment to protect the rights of the Plaintiffs.

DECISIONS

The Court,

Adjudicating in a public sitting after hearing the parties in last resort after deliberating according to law.

AS TO THE MERITS

DECLARES:

i. That the failure on the part of the Defendant State to recognize, promote and protect the rights of the Plaintiffs and the failure to take measures to give effect to the rights of the Plaintiffs constitute multiple violations of Articles 1, 2, 3, 5 and 18 (3) of African Charter on Human and Peoples' Rights, Articles 2, 3, 4(1) and (2), 5, 8 and 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African, Articles 2,3,5 (a), and 15 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, Articles 2(1) and (3), 3, 7 and 26 of the International Covenant on Civil and Political Rights, Articles 10, 11, 12, 13 and 16(1) Covenant Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and Articles 1, 2, 5, 7 and 8 of the Universal Declaration of Human Rights.

ii. That the failure and/or refusal of the Defendant State to investigate, discipline and prosecute the persons responsible for the violations of the Plaintiffs' Rights, amounts to a violation of the States International obligations.

iii. That the treatment meted out to the Plaintiffs by agents of the AEPB, the Nigerian Police and the Nigeria Military constitute gender- based discriminatory treatment contrary to Articles 2, 3 and 18(3) of the African Charter on Human and Peoples' Rights, Articles 2 and 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of Articles 2,3 and 15(1) of the Convention on the Elimination of All Forms of Discrimination Against women, Articles 2(1), 3 and 26 of the International Covenant on Civil and Political Rights and Articles 2 and 7 of the Universal Declaration of Human Rights.

iv. That the treatment meted out to the 1st, 3rd and 4th Plaintiffs by agents of the AEPB, the Nigerian Police and the Nigeria Military

constitutes cruel, inhuman and degrading treatment discriminatory treatment contrary to Articles 5 of the African Charter on Human and Peoples' Rights, Articles 3 and 4(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Articles 2, 3, and 15 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 7 of the International Covenant on Civil and Political Rights and Articles 1 and 5 of the Universal Declaration of Human Rights.

v. **Declares** that claim of the 2nd Plaintiff is statute barred and is hereby dismissed.

vi. **Awards** the sum of N6,000,000.00 (Six Million Naira only) each to the 1st, 3rd and 4th against the Plaintiffs as damages for the violation of their rights.

AS TO COSTS

- **Cost** are awarded against the Defendant as assessed by the Registry of the Court.

DATED AT ABUJA THIS 12TH DAY OF OCTOBER, 2017.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:
Djibo Aboubacar DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THE 16TH DAY OF OCTOBER, 2017

SUIT N°: ECW/CCJ/APP/04/16
JUDGMENT N°: ECW/CCJ/JUD/09/17

BETWEEN
IDRISSA SIDIKI MAIGA - *PLAINTIFF*

VS.
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORE** - *PRESIDING*
2. **HON. JUSTICE YAYA BOIRO** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ABOUBACAR DJIBO DIAKITÉ (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **MODIBO T. DOUMBIA (ESQ.)** - *FOR THE PLAINTIFF*
2. **YOUSSOUF DIARZA, SEYDOU SANOGO** - *FOR THE DEFENDANT*

- Death - Termination of Proceedings

SUMMARY OF THE FACT

By Application dated 28 January 2016, Mr. Idrissa Maiga, a Malian citizen, sued the Republic of Mali to the ECOWAS Court of Justice for violation of his rights, unfortunately in the course of the case he died, the Republic of Mali produced the death certificate and the latter requested the extinction of the proceedings.

ISSUE FOR DETERMINATION

- *Whether the death of the Applicant in the course of the proceedings terminate the proceedings?*

DECISION OF THE COURT

For the Court, the death of the Applicant puts an end to the proceedings, in addition the Court ordered the deletion of the case from the role of the Court.

JUDGMENT OF THE COURT

I. PROCEDURE

1. By Application dated 28 January 2016 and received at the Registry of the Community Court of Justice, ECOWAS on 3 February 2016, Mr. Idrissa Maiga filed a case on human rights violation before the Court, through his Counsel;

2. By a separate pleading, received at the Court Registry the same day, he requested that his case be brought under expedited procedure;

3. On 8 February 2016, the Registry served the Application on the Republic of Mali;

4. On 7 March 2016, the Republic of Mali lodged its Defence at the Registry of the Court;

5. On 27 April 2016, Mr. Idrissa Maiga lodged his Rejoinder at the Registry of the Court;

6. On 31 May 2016, the Judge Rapporteur made Order No. ECW/CCJ/ORD/06/12 by which he adjudged that there was no ground for bringing the Application under expedited procedure;

7. The case was scheduled for 12 October 2016, for the hearing of the Parties;

8. The Applicant did not appear in court and was not represented by his Counsel;

9. The Court sat on the case and adjourned for deliberation, fixing the judgment on 6 December 2016, following the observations made by the Republic of Mali;

10. By mail received at the Office of the President on 28 November 2016, the Directorate of the State Litigation Department of the Republic of Mali requested that deliberation of the Judges be suspended, and arguments in court be re-opened. Annexed to the mail was Order No. 3175/MESRS-SG of 2 September 2016 from the Minister of Higher Education and Scientific Research on Removal of Mr. Idrissa Sidiki Maiga from the Official List. Added to that notification was Certificate of Death No. 264.RG.6 from *Centre Secondaire de Point G*;

11. At the hearing of 6 December 2016, the Court made an order suspending the deliberation of Judges, and re-opening oral arguments in court; and hearing was adjourned to 7 March 2017;

12. The case was once again adjourned to 16 October 2017 for arguments in Court.

13. At that court hearing, the Court, having considered the arguments and observations of the Republic of Mali, adjourned the case for deliberation, for judgment to be delivered on the same day.

II. GROUNDS FOR THE DECISION

1. Regarding automatic termination of the trial

14. Whereas it is trite that an action before court becomes extinguished following the death of one of the parties in the trial;

15. Whereas a trial shall be extinguished upon a decision made in court to that effect;

16. Whereas in the instant case, by way of a mail received at the Registry of the Court on 28 November 2016, the Director-General of the State Litigation Department filed among the court processes, the Certificate of Death N°. 264.RG.6 from *Centre Secondaire de Point G* of Mr. Idrissa Sidiki Maiga dated 10 June 2016;

17. Whereas as a result, it shall be appropriate to draw all the legal consequences thereof, as to the automatic termination of the instant case by reason of the death of the Applicant, and thereby to strike the case off the cause list of the Court;

2. Regarding costs

18. Whereas according to Article 66(12) of the Rules of the Court: "***Where a case does not proceed to judgment the costs shall be in the discretion of the Court***".

19. Whereas in the instant case, the trial proceedings is declared extinguished on grounds of death of the Applicant;

20. Whereas it shall be appropriate to ask the Republic of Mali to bear the costs;

FOR THESE REASONS

21. **The Court,**

In a public sitting, hearing both Parties, in a matter on human rights violation, in first and last resort:

- **Finds** that the Applicant, Mr. Idrissa Maiga, died on 4 June 2016 at Bamako;

- **Declares**, as a result, that the trial is automatically terminated;

- **Orders** that the case be struck off the cause list of the Court;

- **Asks** the Republic of Mali to bear the costs;

Thus made, declared and pronounced in a public sitting at Abuja, by the Community Court of Justice, ECOWAS on the day, month and year stated above.

And the following hereby append their signatures:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Aboubacar Djibo DIAKITÉ (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA,
IN THE FEDERAL REPUBLIC NIGERIA

THIS MONDAY, 16TH DAY OF OCTOBER, 2017

SUIT N°: ECW/CCJ/APP/18/16
JUDGMENT N°: ECW/CCJ/JUD/10/17

BETWEEN
JAMAL OLIVIER KANE - *PLAINTIFF*

VS.
THE REPUBLIC OF MALI - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE JÉRÔME TRAORÉ** - *PRESIDING*
2. **HON. JUSTICE HAMÈYE FOUNÉ MAHALMADANE** - *MEMBER*
3. **HON. JUSTICE MARIA DO CEU SILVA MONTEIRO** - *MEMBER*

ASSISTED BY:

ABOUBACAR DJIBO DIAKITÉ (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **SOYATA MALGA (ESQ.), SIDI HAIDARA (ESQ.), LA SCPA JURIFIS CONSULT, LA SCPBA & TANDIAN** - *FOR THE PLAINTIFF*

2. **DOUMBIA DAOUDA, YOUSSOUF DIARRA, SEYDOU SANOGO** - *FOR THE DEFENDANT*

Violation of human rights - Right to human dignity - Arrest - Detention - Extradition - Stay of execution - Inadmissibility.

SUMMARY OF FACTS

The Applicant submits that following an international arrest warrant issued against him by Mr. Hervé Robert, Vice-President in charge of the investigation at the Tribunal de Grande Instance in Paris, he was arrested by the National Interpol Office of Mali on 19 February 2016, and referred to the prosecutor's office of the High Court of Commune III of Bamako District on 22 February 2016.

The Prosecutor of the said court issued a Warrant against him. The Applicant claims to have been detained in inhuman conditions because he could not communicate with his lawyers, he also maintains that there is a doubt about the identity of the person sought, not being the latter.

That following such actions by the Public Prosecutor, the Respondent State violated its right to respect for human dignity.

ISSUE FOR DETERMINATION

- *Whether there is a violation by the respondent State of the Applicant's right to respect for human dignity in the absence of evidence corroborating the said violation?*

DECISION OF THE COURT

The Court in its decision states that it can only find and punish the violation of human rights if the person alleging such violations reports the evidence. And that, in the absence of any evidence on which the allegations of violations of the Applicant's right to respect for human dignity may be based, it must be rejected, and the respondent State has not violated the right to respect for the human dignity of the Applicant.

JUDGMENT OF THE COURT

I. PROCEDURE

1. On 19 May 2016, Mr. Jamal Olivier Kane, through his Counsel, filed a case before the Court, first, for violation of his rights, and secondly, for stay of execution.

2. On 24 May 2015, the Registry of the Court served the two Applications on the Headquarters of the State Litigations Department of the Republic of Mali.

3. On 22 June 2016, the Republic of Mali lodged its Defence with the Registry of the Court.

4. On 16 December 2016, the President of the Court declared that the Court had no jurisdiction to order a stay of execution of Judgment No. 212 of the Criminal Court of the Bamako Court of Appeal, delivered pursuant to Order No. ECW/CCJ/ORD/05.

5. The case was scheduled for hearing on 3 May 2017. At that hearing, the Applicant did not appear in court. In the course of the same hearing, the Republic of Mali asked that the Applicant be ordered to reimburse the sum of Ten Million CFA Francs (CFA F 10,000,000), representing the legal fees it has incurred.

6. The case was adjourned for deliberation for judgment, to be delivered on 16 October 2017.

II. THE FACTS OF THE CASE - CLAIMS AND PLEAS-IN-LAW OF THE PARTIES

7. By Application dated 6 May 2016, received at the Registry of the Court on 19 May 2015, Mr. Jamal Olivier Kane, through his Counsel, brought his case before the ECOWAS Court, asking the Court to:

- Find that the Republic of Mali violated the rights relating to observance of the inherent dignity of the human person as provided for by the provisions of Article 5 of the African Charter on Human and Peoples' Rights, and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003);

- Order that the violation of those rights cease immediately and that the procedure of extradition concerning Mr. Jamal Olivier Kane be suspended;

- Further ask the Republic of Mali to bear the costs, including the legal fees due the lawyers pleading in the case.

8. In support of his claims. he pleads that following an international arrest warrant issued against him by Honourable Judge Herve Robert, Vice President, in charge of the trial of the case at the *Tribunal de Grande Instance* of Paris, he was arrested by the National Interpol Office of Mali on 19 February 2016, and on 22 February 2016, he was sent before the Public Prosecutor at the *Tribunal de Grande Instance* of Commune Ill, District of Bamako.

9. The Prosecutor of the said court issued a committal order against him.

10. He claims that he was detained under inhuman conditions and that his Counsel encountered serious difficulties to communicate freely with him. That despite a correspondence dated 13 April 2016, drawing the attention of the Public Prosecutor at the *Tribunal de Grande Instance* of Commune III, District of Bamako, to the conditions of detention of their client, no noticeable change occurred in his conditions.

11. He equally avers that there is a serious doubt surrounding the identity of the wanted person, far from being him, Mr. Jamal Olivier Kane.

12. For him, the Republic of Mali, through the acts posed by the Public Prosecutor of Mali, violated his right to respect for human dignity.

13. As a basis for his claims, he invokes violation of Articles 6(a)(b) and 7 of the ***Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*** **(2003)** and Article 5 of the African Charter on Human and Peoples' Rights (ACHPR).

14. The Republic of Mali, in its Defence, requests the Court to:

- **Declare** that it has no jurisdiction to adjudicate on the application for stay of execution of a certain Judgment No. 212 No. 212 of the Criminal Court of the Bamako Court of Appeal, delivered pursuant to Order No. ECW/CCJ/ORD/ 05;

- **Declare** that violation of the said right to human dignity is not established;

- **Dismiss**, therefore, all the claims brought by the Applicant.

15. The Republic of Mali maintains, in regard to the identity of the person indicted, that it is clearly stated in the arrest warrant as follows: ***"Having regard to the offence concerning Joel Soudron ... alias Jamal Olivier Kane..."***, That it follows then that Joel Soudron and Jamal Olivier Kane constitute one and the same person; That it is easy to understand that the Senegalese and Malian identity cards pleaded are nothing but forged documents, fabricated with the obvious intention of misleading the judiciary and evading court action.

16. That as regards the Applicant's claims of human rights violation, he brings no evidence to back them up.

17. That finally, regarding suspension of the procedure of extradition, the Applicant has duly appealed against the said Judgment No. 212

of the Criminal Chamber of the Appeal Court of Bamako; that the Applicant seeks to assign to the Honourable Court, the role of an appeal court, whereas the matter concerning extradition is still pending before the Supreme Court of Mali, in an appeal proceedings.

III. GROUNDS FOR THE DECISION

As to Formality

1. Regarding admissibility

18. Whereas the Application of Mr. Jamal Olivier Kane is in conformity with the prescriptions of Article 33(1) (2) of the Rules of the Court;

19. Whereas it is ripe and appropriate to declare that his Application is admissible.

2. Regarding jurisdiction

20. Whereas in the terms of Article 9(4) of Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 on the Community Court of Justice: ***"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State"****;*

21. Whereas in the instant case, the Application submitted by the Applicant concerns a request to find human rights violation; whereas the facts narrated relate indeed to acts he considers injurious to his rights;

22. Whereas it is well-founded for the Court to uphold its jurisdiction and examine the Application, in accordance with the above-cited provisions.

As to Merits

1. Regarding human rights violation

23. Whereas the Applicant invokes violation of the right to respect of his human dignity;

24. Whereas however, he does not back the purported violation with any point of evidence;

25. Whereas the Court, in several judgments it has delivered, has ruled that it can only find and sanction a violation of human rights where the person alleging such violation brings evidence to back it up;

26. Whereas in Judgement of 17 February 2010 in **Daouda Garba v. Republic of Benin (ECW/CCJ/APP/03/09)**, the Court decided in paragraph 35 that:

> ***"It is a general rule in law that the party that makes allegation must provide the evidence. The onus of constituting and demonstrating evidence is therefore upon the litigating parties. They must use all the legal means available and furnish the points of evidence which go to support their claims. The evidence must be convincing in order to establish a link with the alleged facts..."****;*

27. Whereas in the absence of any point of evidence capable of backing up the allegations of violation of respect for huma n dignity, there are grounds to declare the claim thus made as ill-founded.

2. Regarding suspension of the procedure of extradition

28. Whereas the Applicant requests that the Court order suspension of the procedure of extradition instituted against him by the Republic of Mali;

29. Whereas in the instant case, the Criminal Chamber of the Appeal Court of Bamako has ruled in the aforesaid Judgment No. 212 of 12 April 2016 that the Applicant be extradited; whereas the Applicant has filed an appeal to overturn the said Judgment;

30. Whereas in reality, the Applicant is asking the Court to question a judgment delivered by the Malian courts;

31. Whereas however, in regard to the powers defined under Article 9 of the 2005 Supplementary Protocol A/SP.1/01/05 amending Protocol A/P.1/7/91 on the Court, the latter cannot constitute itself as a body with powers to review decisions made by the domestic courts of ECOWAS Member States;

32. Whereas the Court, in several Judgments it has delivered, has recalled that it is not an appellate court over the decisions of the national courts of Member States (cf. (1) *Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008,* ***Hadijatou Mani Koraou*** **v.** ***Republic of Niger****;* (2) *Judgment No. ECW/CCJ/JUD/ 04/ 13 of 22 February 2013*, ***Abdoulaye Balde and Others v. Republic of Senegal****;* (3) *Judgment No. ECW/CCJ/APP/03/ 07 of 22 March 2007.* ***Moussa Leo Keita v. Republic of Mali****;*

33. Whereas appropriately so, the Court is incompetent to order the measure requested.

3. Regarding reimbursement of the costs of litigation

34. Whereas the Republic of Mali requests the Court to order the Applicant to pay to him the sum of Ten Million CFA Francs (CFA F 10,000,000) for costs incurred by him in relation to the instant procedure;

35. Whereas however, the Republic of Mali does not plead any document which may be constituted a basis for such reimbursement;

36. Whereas it is ripe and appropriate to dismiss the request.

4. Regarding costs

37. Whereas in the terms of Article 66(2) of the Rules of the Community Court of Justice, ECOWAS: ***"The unsuccessful party shall be ordered to pay the costs ..."***:

38. Whereas in the instant case, the Applicant is unsuccessful in the procedure instituted;

39. Whereas it is ripe and appropriate that the Applicant bear all costs.

FOR THESE REASONS

The Court.

Adjudicating in a public hearing, after hearing both Parties, in a matter on application for revision of judgment, in first and last resort;

As to formality.

- **Declares** that the Application of Mr. Jamal Olivier Kane is admissible;

- **Declares** that it has jurisdiction to adjudicate on the case;

As to merits,

- **Adjudges** that the Republic of Mali has not violated Mr. Jamal Olivier Kane's right to respect for dignity;

- Consequently, **dismisses** that claim;

- **Declares** that it has no jurisdiction to order a suspension of the procedure of extradition;

- **Dismisses** the application of the Republic of Mali seeking reimbursement of the litigation costs it has incurred;

- **Orders** the Applicant to bear all costs.

Thus made, declared and pronounced in a public hearing at Abuja in the Federal Republic of Nigeria, by the Community Court of Justice, ECOWAS on the day, month and year stated above.

And the following hereby append their signatures:

- **Hon. Justice Jérôme TRAORE** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Maria Do Ceu Silva MONTEIRO** - *Member.*

Assisted by:
Aboubacar Djibo Diakité (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON TUESDAY, THE 17TH DAY OF OCTOBER, 2017

SUIT N^{O}: ECW/CCJ/APP/06/17
JUDGMENT N^{O}: ECW/CCJ/JUD/11/17

BETWEEN
MR. ATIGAN-AMETI KOSSI - *PLAINTIFF*

VS.
THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:
1.HON. JUSTICE HAMÈYE F. MAHALMADANE - *PRESIDING*
2.HON. JUSTICE YAYA BOIRO- *MEMBER*
3.HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **CLAUDE KOKOU AMEGAN (ESQ.)** *AND* **FERDINAND EKOUEVI AMAZOHOUN (ESQ.)**
- *FOR THE PLAINTIFF*
2. **TCHITCHAO TCHALIM (ESQ.)** - *FOR THE DEFENDANT*

- Torture - Arbitrary detention
- Inadmissibility and withdrawal

SUMMARY OF THE FACTS

By application dated 8 December 2016 Mr. ATTIGAN-AMETI Kossi, TV presenter, domiciled in Lomé, represented by the Collective of Associations against impunity in Togo (CACIT) seised the ECOWAS Court for the violation of his human rights by the state of Togo.

He asks the Court to adjudge and declare that:

- *The acts of officers of the National Intelligence Agency constitute acts of torture and other cruel, inhuman or degrading treatment;*

- *The conditions of his arrest and his incommunicado detention for 18 days, without any legal basis, before being submitted to the Lomé civil prison are in flagrant violation of the provisions invoked;*

- *The decisions of the Togolese courts rendered without taking into account the procedural defects resulting from the unlawful detention prior to its filing in the Lomé civil prison, as well as the denial of a stay of judgment to order a prior investigation, occurred in flagrant violation of the Code of Criminal Procedure of Togo, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR).*

The Applicant requests the Court to order the Republic of Togo to carry out an investigation to arrest the perpetrators of the offences and to proceed to his immediate release on the grounds of procedural flaws and unfair trials.

Lastly, the Applicant asked the Court to order the Republic of Togo to pay him one hundred and fifty million (150,000,000) FCFA in damages.

Togo, in its defence, raised a preliminary objection of inadmissibility of the application of MrAtigan-Ameti on the ground that he has already applied to another international court contrary to the provisions of the Supplementary Protocol of 19 January 2005 in its Article 4: "may appeal to the Court: (...) any person who has been the victim of human rights violations; the request submitted for this purpose:

> *ii) shall not be made whilst the same matter has been instituted before another International Court for adjudication.*

By correspondence No. 1038/FEA/SA/17 of 4 October 2017, Maître Ferdinand EkouéviAmazohoun notified the Court of his client's discontinuance.

ISSUE FOR DETERMINATION

- *Whether the Court can grant the discontinuance of the Applicantion?*

DECISION OF THE COURT

The Court observes that Article 73 of the Rules of Procedure provides: "If the Applicant informs the Court in writing that he wishes to discontinue the proceedings, the President shall order the case to be removed from the register"

The Court noted the Applicant's discontinuance of the proceedings and ordered that the case be struck out of the list.

JUDGMENT OF THE COURT

THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN COMMUNITY, ECOWAS

Has delivered Judgment in the case between ATIGAN-AMETI Kossi Eugene and the REPUBLIC OF TOGO, in a human rights violation matter, as follows:

I - PARTIES

I.1: PLAINTIFF/APPLICANT: broadcaster and TV presenter living in Lome, represented by the Collectif des Association Contrel'Impunite au Togo (CACIT), assisted by:

- Claude Kokou AMEGAN (Esq.), Lawyer registered with the Barr in Lome, with address at 1147 Rue Litime, Bretelle Reue de l'OCAM, face Ministere de la Justice, Von Station TOTAL, Tel.: 22 21 04 00, cel.: 91 91 35 65 ;
  e-mail: claude.amegan@yahoo.fr, Lome - Togo;

- Ferdinand Ekouevi AMAZOHOUN (Esq.), Lawyer registered with the Barr in Togo, with address at 05 Rue Oulita sur l'avenue des hydrocarbures, a cote de la station Shell SOTED, 14 BP 64, Lome 14, Tel.: 00228 22 43 38 38, e -mail: zonouconseil@gmail.com;
  ferdinandzohoun@gmail.com, Lome - Togo;

I.2: **DEFENDANT**

THE REPUBLIC OF TOGO, with address at its Headquarters, Palais de la Presidence sur le Boulevard du Mono, 21, Avenue du General De Gaule, acting through its Legal Representative, the Minister of Justice, and Minister in charge of Relations with State Institutions, in his address for service is at his office. Counsel to Defendant State is Me. Tchitchao TCHALIM, Lawyer registrerd

with the Barr in Togo, with address at 77, Rue N'KOYIYI, 08 BP 80928 Lome 08, Tel: (00228) 22 21 84 93, E-mail: idetcha@gmail.com, Lome, Togo;

II- FACTS AND PROCEDURE

II.1- Mr. ATIGAN-AMETI Kossi Eugene filed the instant case before the ECOWAS Court of Justice, for the violation of his fundamental human rights;

II.2- The initiating Application dated 8 December 2016 was registered under no. ECW/CCJ/APP/06/17, at the Registry of the Court;

The said Application was filed together with another Application seeking the submission of the case to expedited procedure;

The two Applications were registered at the Registry of the Court on 11 January 2017, and were notified on the Defendant State on the 18 January 2017;

II.3- The Republic of Togo produced a Memorial in Defence, *in limine litis*, dated 13 February 2017, which was received at the Registry on 16 March 2017;

II.4- Mr. ATIGAN-AMETI Kossi Eugene reacted, by producing a Reply dated 13 March 2017, which was received at the Registry of the Court on 16 March 2017;

II.5- The Defendant State later reacted through two Rejoinders dated 20 April 2017, which were received at the Registry on 25 April 2017, the first Rejoinder was on preliminary objections as to admissibility, while the second was on the merit of the case;

II.6- On 31 May 2017, Plaintiff/Applicant later filed at the Registry, two processes dated 22 May 2017. One of these processes deals with the pleas-in-law, while the second one deals with the merit of the case;

II.7- The Republic of Togo later reacted, by filing at the Registry of the Court on 11 July 2017, a process dated 7 July 2017;

II.8- Thereafter, the case was enrolled, for oral pleadings at the court hearing of 17 October 2017;

On the said date though Plaintiff/Applicant was neither in Court, nor was he represented, his Counsel, Me. Ferdinand Ekouevi AMAZOHOUN forwarded to the Registry of the Court Correspondence No. 1038/FEA/SA/17 dated 4 October 2017, on his client's withdrawal from the case;

II.9- After registering the oral submissions from Counsel to the Defendant State on Plaintiff/Applicant's withdrawal from the case, the Court took a decision on the withdrawal of Plaintiff/Applicant.

III- PLEAS-IN-LAW AND CLAIMS

III.1- Mr. ATIGAN-AMETI Kossi Eugene claims in his initiating Application that he holds grievances against the Republic of Togo, for violating his fundamental human rights;

III.2- In support of his claims, he cited the provisions of the following Articles: -

1. Article 52 of the Code of Penal Procedure of Togo;
2. Articles 15, 16, 19 and 21 of the Constitution of Togo of 14 October 1992;
3. Articles 3, 4, 5, 6 *in fine* and 7/1d of the African Charter on Human and Peoples' Rights (ACHPR) of 27 June 1981;
4. Article 5 of the Universal Declaration of Human Rights (UDHR) of 10 December 1966;
5. Articles 7, 9/1, 9/3, 9/5, 10/1, and 14/3c of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966;

- The UN Convention against torture and other cruel, inhuman punishments or degrading treatments of 10 December 1984;

- Principles 1, 6, 21/1, 21/2 and 38 of all Principles on the Protection of all Persons under any form whatsoever of detention of 19 December 1988;

- Paragraph 1 of Fundamental Principles on the Treatment of Detainees of 14 December 1990;

- Article 4 of the Declaration of the Fundamental Principles on Victims of Criminality and Abuse of Powers;

III.2- He requests the Court

- To **declare and adjudge** that:

  • The actions of the security officers of the *Agence Nationale de Renseignement (ANR)* on his person constitute acts of torture and other cruel, inhuman treatments or degrading punishments;

  • The circumstances of his arrest and the conditions in which he was kept secretly for 18 days, on no legal basis, before he was transferred to the *Prison Civile de Lomé*, are clear violation of the above-cited provisions;

  • The decisions of the Togolese courts given, without taking into consideration the vice of procedure, following his illegal detention, before he was transferred to the **Prison Civile** in Lomé, as well as the refusal of the request of stay of enforcement of the decision, to order prior investigations all took place in flagrant violation of the Code of Penal Procedure of Togo, of the UN Convention against torture and other cruel, inhuman treatments or punishments, of the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and Peoples' Rights (ACHPR);

Consequently,

- To **order** the Republic of Togo to carry out an investigation, with a view to arresting the perpetrators of the incriminated actions;

- To **order** the Republic of Togo to effect his immediate release, for the vice of procedure and unfair hearing;

- To **order** the Republic of Togo to pay him the sum of one hundred and fifty million cfa in damages;

III.4- In its Memorial in defence, the Republic of Togo raised preliminary objection as to admissibility of the Application filed by Mr. ATIGAN-AMETI;

III.5- The Defendant State avers that under Article 10 new (d) (ii) of the Protocol on the Court as amended by the Supplementary Protocol of 19 January 2005:

"Access to the Court is open (...) to individuals on application for relief for violation of their human rights; the submission of application for which shall:

(ii) be made whilst the same matter has been instituted before another International Court for adjudication";

III.6- Defendant argues that Plaintiff/Applicant had already taken his case before another international Court of competent jurisdiction; that indeed by letter no. ACHPR/COMM/463/14/TOGO/1425/15 dated 10 September 2015, the African Commission of Human and Peoples' Rights forwarded to it on CommunicationNo. 463/4 Eugene ATIGAN-AMETI, represented by the *Collectif des Association Contrel'Impunite au Togo (CACIT)*, against it;

III.7- Defendant points out that Plaintiff/Applicant cannot bring the same case before the Community Court of Justice, ECOWAS;

III.8- Moreover, Defendant demonstrated in its processes filed that pursuant to the settled cased law of the Community Court of Justice, ECOWAS the Court cannot receive an Application seeking a declaration on the arrest and trial of Plaintiff/Applicant as the violation of his right to fair hearing;

III.9- The Republic of Togo solicits from the Honourable Court:

- To **declare and adjudge** that Plaintiff/Applicant had earlier taken his case before another international court of competent jurisdiction, the African Commission on Human and Peoples' Rights, which is still pending;

- To **declare and adjudge** that Plaintiff/Applicant seeks to lead the Court to declare that his arrest and trial constitute a violation of his right to fair hearing, in violation of the settled case law of this Honourable Court, whereas he was arrested, detained and tried by the competent national courts;

In consequence whereof:

- To **declare and adjudge** that the action brought by the named ATIGAN-AMETI Eugene is manifestly to be declared as inadmissible, pursuant to the provisions of Article 10 new (d) (ii) of the Protocol on the Court as amended by the Supplementary Protocol, and the settled case law of the Court;

- To **order** Plaintiff/Applicant to bear all costs;

IV - LEGAL ANALYSIS BY THE COURT

IV.1- Mr. ATIGAN-AMETI Kossi Eugene filed the instant case before the Ecowas Court of Justice, for the violation of his fundamental human rights, by the Republic of Togo;

But, by Correspondence no. 1038/FEA/SA/17 dated 4 October 2017, his Counsel Me. Ferdinand Ekouevi AMAZOHOUN notified the Court on the withdrawal of his client from the case;

Counsel to Defendant acquiesced to the step taken by Plaintiff/ Applicant, in his oral observations at the Court hearing;

IV.2- The Court points out that under Article 73 of its Rules, which provides that:

> "*If the Applicant informs the Court in writing that he wishes to discontinue the proceedings, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 66(8) of these Rules.*"

IV.3- In the light of the above provisions, it is important to give effect to Plaintiff/Applicant's withdrawal from, and order the striking off the case;

IV.4- In his Correspondence on withdrawal from the case, Plaintiff/ Applicant proposes that each party bears his own costs;

The Defendant was not opposed to this request; this position therefore is equivalent to its agreement on this proposal;

IV.5- In these circumstances, the Court must order each party to bear its own costs, pursuant to Article 66.10 of the Rules of Community Court of Justice, ECOWAS;

FOR THESE REASONS

The Court,

Sitting in a public hearing, in a human rights violation matter, in first and last resort, and after hearing both parties,

- Formally **acknowledges** Plaintiff/Applicant resolve to withdraw from the case;

- **Orders** the case to be struck out;

- **Orders** each party to bear its own costs;

Thus made, adjudged and pronounced in a public hearing, by the ECOWAS Court of Justice, in Abuja, on the jour, month and year as stated above.

And the following have appended their signatures:

- **Hon. Justice Hamèye Founé MAHALMADANE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member,*

Assisted by:
Athanase ATANNON (Esq.) - *Registrar*.

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON TUESDAY, THE 18TH DAY OF OCTOBER, 2017

SUIT N^{O}: ECW/CCJ/APP/26/15
JUDGMENT N^{O}: ECW/CCJ/JUD/12/17

BETWEEN
NOSA EHANIRE - *PLAINTIFF*

VS.
EDO STATE GOVERNMENT OF NIGERIA & ANOR. - *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *PRESIDING*
2. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **OKOEDION H. SOPHIA (ESQ.); ISSA H. DIALLO (ESQ.)** - *FOR THE PLAINTIFF*
2. **THE ATTORNEY-GENERAL OF THE FEDERATION, MINISTER OF JUSTICE**, *THE ATTORNEY-GENERAL'S OFFICE, MINISTRY OF JUSTICE.* - *FOR THE DEFENDANTS*

-Lack of diligent prosecution

SUMMARY OF FACTS

Mr. Nosa ENAHIRE-OSAGHAE brought a case, on behalf of himself, and the other victims of the noise pollution in Edo State, against the Government of that federating Unit, and the Federal Republic of Nigeria for the violation of their fundamental human rights, the unsatisfactory conditions of their physical and mental health, which had been impacted negatively by noise pollution. In support of his claims, the Plaintiff/Applicant cited the violations of some provisions of the African Charter on Human & Peoples Rights, The International Covenant on Civil and Political Rights amongst others. The Applicant was seeking amongst other reliefs, an order compelling the Defendant to pay him, the sum of one million ($1,000,000) US Dollars, as adequate compensation, for the continued violation of his fundamental human right to a sane and unpolluted environment.

The Defendant, The Federal Republic of Nigeria filed a preliminary objection and its Defence. The Defendant raised a preliminary objection, as to lack of jurisdiction on the Court, to entertain the case. In its Defence, the Defendant argued that the Plaintiff/Applicant lacked the quality to act and further claimed that it is not responsible for the control, management and regulation of churches, and other places of worship. Therefore, it was not liable, and further claimed that Plaintiff/Applicant did not point out any wrong caused him, either by itself, or any of its agencies, which may justify bringing the instant case before the Court. The Defendant therefore sought the Court, to strike out all claims made by Plaintiff/Applicant.

Subsequently, the Applicants failed to appear before the Court.

ISSUE FOR DETERMINATION

- *The case was struck out for lack of diligent prosecution.*

DECISION OF THE COURT

The Court noting the lack of diligence on the part of the Plaintiff/ Applicant, ordered that the case be struck out from the general list of the Court.

JUDGMENT OF THE COURT

The Court thus constituted delivers the following Judgment:

I - PARTIES

I.1- **APPLICANT: Mr. Nosa ENAHIRE-OSAGHAE**, whose address is at 90, Akpakpava Road, Benin City, Edo State of Nigeria, having as Counsel, OKOEDION H. Sophia (Esq.), H. S. OKOEDION Chambers Issa H. DIALLO, Lawyer whose address is at at 90, Akpakpava Road, Benin City, Edo. Tel: 08039514131; 08091987480.

I.2- **DEFENDANT:**

- **The Government of Edo State**: c/o Attorney – General's Office, Ministry of Justice, Ezoti Street, Benin City;

- **The Federal Republic of Nigeria**: c/o Attorney – General of the Federation, Ministry of Justice, Central Area, Abuja – Nigeria.

II – FACTS AND PROCEDURE

II.1- Mr. Nosa ENAHIRE-OSAGHAE brought a case, on behalf of himself, and the other victims of the noise pollution in Edo State, against the Government of that federating Unit, and the Federal Republic of Nigeria, seeking from the Court to find the violation of their fundamental human rights, the unsatisfactory conditions of their physical and mental health, which has been impacted negatively by noise pollution;

II.2- The initiating Application dated 21 July 2016 was filed on 22 July 2016, at the Registry of the Court, under reference number ECW/

CCJ/APP/26/16, and was notified on the Defendants on 25 July 2016;

II.3- On 27 October 2016, the Plaintiff/Applicant filed a request for an amendment, and proceeded in filing an amended version to his initiating Application;

II.4- The Federal Republic of Nigeria filed a preliminary objection on 29 December 2016;

Thereafter, it filed a Memorial in Defence on 16 January 2017;

II.5- The Plaintiff/Applicant filed a Reply dated 31 January 2017, to the preliminary objection raised, which filed on28 April 2017;

II.6- Then, the case was examined, to come-up for hearing on 18 October 2017;

At this hearing, the Plaintiff/Applicant neither present in Court, nor was he represented;

II.7- After hearing the Counsel to the Defendant, the Court took a decision instantly;

III – PLEAS AND CLAIMS

III.1- In its amended Application, Mr. Nosa ENAHIRE-OSAGHAE claimed that he was suffered from a denial of his right to a standard and satisfying mental and physical health, in an environment devoid of nuisance caused by serious, incessant and unjustified noise pollution in his neighbourhood in particular, and in the community, in general, just as it happens in the federating unit of Edo State;

III.2- In support of his claims, the Plaintiff/Applicant cited the violations of the provisions of the following Articles:

- 14 and 24 of the African Charter on Human and Peoples' Rights (ACHPR);

- 8 and 25 (1) of the Universal Declaration of Human Rights (UDHR);

- 2 (3) and 14 (1) of the International Covenant on Civil and Political Rights (ICCPR), and,

- 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);

III.3- Finally, he sought from the Court

- A declaration upholding that the Environment Laws of the Defendant Edo State, which fix the maximum level of noise pollution to 90 decibels, in industrial, residential and commercial zones in Edo State constitute a clear violation of his fundamental human rights, as well as those of the inhabitants of Edo State to a satisfying environment to their physical and mental health, which is devoid of noise pollution;
- A declaration upholding that the Defendant Federal Republic of Nigeria was negligent in the implementation of its own laws on disturbing noise pollution, which it fixed at between 85 – 90 decibels, in industrial zones, 70 – 75 in commercial zones, and 50 – 60 decibels in residential zones, in all the 36 Federating Units of Nigeria;

- An order compelling the Defendant to pay him, immediately, the sum in the region of one million ($1,000,000) US Dollars, as adequate compensation, for the continued violation of his fundamental human right to a sane and unpolluted environment;

III.4- The Federal Republic of Nigeria raised a preliminary objection, as to lack of jurisdiction on the Court, to entertain the case;

III.5- In its Memorial in Defence, Defendant argued that the Plaintiff/Applicant lacks quality to act; it further claimed that it (Federal Republic) is not responsible for the control, management and regulation of churches, and other places of worship; that it was not liable, either for action or inaction that led to the purportedly caused to Plaintiff/Applicant; moreover, it further claimed that Plaintiff/Applicant did not point out any wrong caused him, either by itself, or any of its agencies, which may justify bringing the instant case before the Court, in seeking redress;

III.6- Finally, Defendant sought from the Court, to strike out all claims made by Plaintiff/Applicant;

IV– LEGAL ANALYSIS BY THE COURT

IV.1- Mr. Nosa ENAHIRE-OSAGHAE brought a case against both the Edo State Government and the Federal Government of Nigeria, before the Court;

Thereafter, he failed to show- up in Court to argue his case;

IV.2- The Court notes that on combined effect of Articles 9.4 and 10. D of the Supplementary Protocol (A/SP.1/01/05) of 19 January 2005, amending Protocol (A/P.1/7/91) on the ECOWAS Court of Justice,

> *"access to the Court is open to individuals for relief for violation of their human rights, which occurs in any Member State*;"

IV.3- But, it points out that, in law, once the Plaintiff/Applicant takes the initiative of the procedure, he must be able to see it through; it further points out that, by failing to see the procedure through, the Court is right to order the striking out of the case from the general list of the Court;

IV.4- Article 82 provides for the possibility for the Court, to note, right away, that such a case has become devoid of any useful purposes, and that there is no need to adjudicate on same;

On the strength of this proviso, it becomes imperative to observe the lack of diligence on the part of the Plaintiff/Applicant, and, on this ground, to order for striking out his case;

FOR THESE REASONS

The Court,

Sitting in a public hearing, in first and last resort, and in a human rights violations case,

- **Notes** the lack of diligence on the part of the Plaintiff/Applicant;

- **Orders** that the case be struck out from the general list of the Court, on this grounds

THUS MADE, ADJUDGED AND PRONOUNCED PUBLICLY BY THE COMMUNITY COURT OF JUSTICE, ECOWAS ON THE DAY, MONTH AND YEAR AS STATED ABOVE.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

- **Hon. Justice Hamèye Founé MAHALMADANE** - *Presiding.*
- **Hon. Justice Friday Chijioke NWOKE** - *Member.*
- **Hon. Justice Yaya BOIRO** - *Member.*

Assisted by
Aboubacar Djibo DIAKITE (Esq.) - *Registrar*.

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON WEDNESDAY, THE 18TH DAY OF OCTOBER, 2017

SUIT N°: ECW/CCJ/APP/24/16
JUDGMENT N°: ECW/CCJ/JUD/13/17

BETWEEN
DANJUMA OLOFU AND 5 ORS. - *PLAINTIFFS*

VS.
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *PRESIDING*
2. **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *MEMBER*
3. **HON. JUSTICE ALIOUNE SALL** - *MEMBER*

ASSISTED BY:

ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. ***NO REPRESENTATION*** - *FOR THE PLAINTIFFS*
2. **C. B OKOLI (MRS),** *OFFICE OF THE ATTORNEY GENERAL* - *FOR THE DEFENDANT*

-Lack of diligent prosecution -

SUMMARY OF FACTS

Plaintiffs/Applicants brought the instant case before the Court, alleging that their fundamental human rights, especially their right to life, right to property, right to human dignity, right to private family life, and their right to equal protection of the law have been violated by the Defendant. Plaintiffs/Applicants claimed that heavily armed Fulani herdsmen surrounded their places of abode, before setting same on fire which led to loss of human lives, properties, other important belongings, as well as the disappearance of their religious and training leader. That they were saved due to the fact that the assailants could not chase and arrest all inhabitants at the same time. They justified their claim on the violations by the inactions of the administrative, police and judicial authorities of the Defendant State, not only in ensuring their protection, but also to arrest and try the Fulani herdsmen.

They avered that the Federal Republic of Nigeria has never taken necessary measures to ensure their protection, how much more of bringing the Fulani herdsmen to book, despite the submission of their report of events to the Police of the Defendant State, as well as other security agencies of State.

The Defendant State in response filed three (03) documents, namely an Application for extension of time, an Application on preliminary objections raised, and a Memorial in Defence. The Defendant argued that the initiating Application relates to a communal confrontation between ethnic groups; that the actions were committed by Fulani herdsmen; that it cannot be held responsible for such actions, which were not committed by its agents. Furthermore, that it has already started an investigation on the subject-matter of the case and concluded that it has not violated any fundamental human rights of Plaintiffs/Applicants, either through commission or omission.

Despite various notifications sent to them, parties failed to appear, neither were they represented in Court.

ISSUE FOR DETERMINATION

- *The case was found wanting for lack of diligent prosecution.*

DECISION OF COURT

The Court, formally noted the failure to appear before it, by parties at cause and ordered the case to be struck out

JUDGMENT OF THE COURT

The Court thus constituted delivers the following Judgment:

THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN COMMUNITY, ECOWAS

Has delivered Judgment in the case between **Danjuma OLOFU, Chief Moru AKWUCHI, Alidu ADAIKU, Yunusa SALEY, Yahaya MOMOH, Maikasuwa Ahmed Ejeme EGA** and **the FEDERAL REPUBLIC OF NIGERIA**, in a human rights violation matter, as follows:

I – PARTIES

I.1: **PLAINTIFFS/APPLICANTS: Messrs. Danjuma OLOFU, Chief Moru AKWUCHI, Alidu ADAIKU, Yunusa SALEY, Yahaya MOMOH, Maikasuwa Ahmed Ejeme EGA** claim they are acting for themselves, and on behalf of the Agatu Peoples in Benue State of Nigeria;

I.2: **DEFENDANT** is the F**EDERAL REPUBLIC OF NIGERIA**.

II – FACTS AND PROCEDURE

II.1- Plaintiffs/Applicants brought the instant case before the Honourable Court, seeking from the Court to find the violation, by the Federal Republic of Nigeria, of their fundamental human rights, especially their right to life, right to property, right to human dignity, right to private family life, and their right to equal protection of the law;

II.2- They formulated these claims through their initiating Application dated 30 June 2016, which was received at the Registry of the Court on18 July 2016;

II.3- On 13 February 2017, the Defendant State produced three (03) documents; they are namely an Application for elongation of time – limit; an Application on preliminary objections raised, and a Memorial in Defence, which were all received on the same date, at the Registry;

II.4- Thereafter, the case was put on cause list, for it to come – up for hearing on 18 October 2017;

At that Court hearing, parties failed to appear in Court. They neither were represented;

III – PLEAS-IN-LAW AND CLAIMS

III.1- Plaintiffs/Applicants claim that in the night of 12 May 2012, heavily armed Fulani herdsmen surrounded their places of abode, before setting same them on fire; that this action led to loss in human lives, properties, other important belongings, as well as the disappearance of their religious and training leader; that they were saved due to the fact that the assailants could not chase and arrest all inhabitants at the same time;

III.2- They aver that the Federal Republic of Nigeria has never taken necessary measures to ensure their protection, how much more of bringing the Fulani herdsmen to book, despite the submission of their report of events to the Police of the Defendant State, as well as other security agencies of State;

III.3- Plaintiffs/Applicants claim that faced with the inertia from the Defendant State, they were again the targets of fresh attacks, in December 2013, then in March 2016;

III.4- Thus, the initiators of the present initiating Application believe that their human rights are violated by the Federal Republic of Nigeria;

They justified their claim on the violations by the inactions of the administrative, police and judicial authorities of the Defendant State, not only in ensuring their protection, but also to arrest and try the Fulani herdsmen;

In support of their claims, Plaintiffs/Applicants cite the provisions of the following instruments: -

- Articles 3, 4, 5, 14, 16, 18, 19, 22, and 25 of the African Charter on Human and Peoples' Rights;

- Articles 3, 17 (1), 5, 8, 12, and 25 (1) of the Universal Declaration of Human Rights;

III.6- Finally, they plead with the court

- To declare and adjudge that the incessant murders, mutilations of the Community Citizens, and the destruction of the Agatu Peoples' properties in Benue State of Nigeria, by persons called Fulani herdsmen, as well as the inactions of the Defendant State constitute a violation of their fundamental human rights, as guaranteed under Articles 3 and 17 of the African Charter on Human and Peoples' Rights;

- To declare and adjudge that the manifest inaction by the Defendant State, through its refusal to recognise and protect rights, the destruction of the Agatu Peoples' properties, by the Fulani herdsmen constitute a violation of their fundamental human rights, as enshrined under Articles 1, 3, 4, 14, 16, 18, 22, and 25 of the African Charter on Human and Peoples' Rights, as well as Articles 2 (3) and 17 of the Universal Declaration of Human Rights;

- To enjoin the Defendant State to take immediate necessary legislative and judicial measures to recognise, promote and

protect their rights against all forms of future violations by the Fulani herdsmen, or by whatever group;

- To enjoin the Defendant State to pay them the sum of ten billion Naira as fair compensation for the actions, especially of deaths, wounds and destructions of their properties as a result of its inaction to prevent the flagrant violations of their fundamental human rights, by the Fulani herdsmen, and other citizens;

- To enjoin the Defendant State to reinstate and rehabilitate Plaintiffs/Applicants and all other victims and survivors in the Agatu Community; to supply basic instruments to the affected Agatu Community, pursuant to the provisions of the African Charter on Human and Peoples' Rights, and relevant international legal instruments;

III.7- The Federal Republic of Nigeria reacted, by claiming that the initiating Application relates to a communal confrontation between ethnic groups; that the actions were committed by Fulani herdsmen; that it could not be held responsible for such actions, which, as it were, are not committed by its agents;

It further claims that it has already started an investigation on the facts, which form the subject-matter of the case;

Defendant concludes by averring that it has not violated any fundamental human rights of Plaintiffs/Applicants, either through commission or omission;

IV– LEGAL ANALYSIS BY THE COURT

IV.1- Messrs. Danjuma OLOFU, Chief Moru AKWUCHI, Alidu ADAIKU, Yunusa SALEY, Yahaya MOMOH, Maikasuwa Ahmed Ejeme EGA brought the instant case before the Honourable Court,

for the violation of their fundamental human rights, by the Federal Republic of Nigeria;

IV.2- The Court recalls that every victim of human rights violation in any ECOWAS Member State can, through an Application, bring a case before it, pursuant to the provisions of Articles 9.4 and 10.d of the Supplementary Protocol (A/SP.1/01/05) of 19 January 2005, amending Protocol (A/P.1/7/91) on the Community Court of justice, ECOWAS;

IV.3- At this juncture, the Court wishes to state that in a judicial procedure, parties at cause are required to refrain from any action that could impact negatively on proceedings;

IV.4- In the instant case, the Court notes that, by their comportment, parties were not diligent enough, for the case to be adjudicated;

Indeed, they failed to appear, and neither were they represented in Court, despite the various notifications done on them;

Hence, the Court strongly believes that there is need to note the failure to appear before it, by parties, and, on this ground, it should order the case to be struck out;

FOR THESE REASONS

The Court,

Sitting in a public hearing, in a human rights violation matter, in first and last resort, and after hearing both parties,

- Formally **notes** the failure to appear before it, by parties at cause;

- **Orders** the case to be struck out;

Thus made, adjudged and pronounced in a public hearing, by the ECOWAS Court of Justice, in Abuja, on the jour, month and year as stated above.

And the following hereby append their signatures:

- **Hon. Justice Hamèye Founé MAHALMADANE** - *Presiding.*
- **Hon. Justice Friday Chijioke NWOKE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Abubacar Djibo DIAKITE (Esq.) - *Registrar.*

[ORIGINAL TEXT IN FRENCH]

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 21ST DAY OF NOVEMBER, 2017

SUIT N^{O}: ECW/CCJ/APP/14/15
JUDGMENT N^{O}: ECW/CCJ/JUD/15/17

BETWEEN
MR. OUSMANE GUIRO - *PLAINTIFF*

VS
BURKINA FASO - *DEFENDANT*

COMPOSITION OF THE COURT:

1. HON. JUSTICE HAMÈYE FOUNÉ MAHALMADANE - *PRESIDING*
2. HON. JUSTICE YAYA BOIRO - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITÉ (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **LA SOCIETE CIVILE PROFESSIONNELLE (SCP) OUATTARA-SORY ET SALAMBERE** - *FOR THE PLAINTIFF.*
2. **YAO LAMOUSSA, OUANDRAOGOPATRICK & SOME A. URBAIN** - *FOR THE DEFENDANT.*

Fair trial -Presumption of innocence
-Proof of allegations made

SUMMARY OF FACTS

Following the discovery of four tin trunks including two containing a sum of one billion, nine hundred and six million, one hundred and ninety thousand, six hundred and four FCFA (1,906,190,604), belonging to Ousmane Guiro Director General of Customs, the latter was charged with passive bribery, illicit enrichment, money laundering and illegal possession of firearms;

The trial judge before which Ousmane Guiro was presented by order declared that there are sufficiently established charges and dismissed the investigation file to the Prosecutor General at the Court of Appeal of Ouagadougou; the Applicant applied to the Indictment Division for the annulment of a number of pleadings; By judgment of 30 April 2014 the Indictment Division dismissed the application for a declaration of invalidity and ordered the Applicant's referral to the Criminal Division for trial;

Having appealed in cassation his appeal was declared inadmissible by the Supreme Court on the grounds that the statement of appeal was not recorded in the register kept for that purpose by the Court of Appeal of Ouagadougou in accordance with the provisions of the Article 583 of the Code of Criminal Procedure of Burkina.

Ousmane Guiro applied to the Court of Justice for the purpose of finding a violation by the Republic of Burkina through its judicial organs of a number of his rights.

The Applicant submits that the Republic of Burkina violated the principle of equality of citizens before the law, the right to a fair trial, since he considers that if his cassation appeal was not filed in

the forms required by the law of Burkina Faso is due to a strike of the judicial staff on the day of filing. That due to this inability of doing otherwise, he was obliged to declare his appeal by simple correspondence. The Applicant also alleged an infringement of the presumption of innocence to the extent that he never ceased to be presented by the Burkinabé authorities, throughout a procedure that was yet to conclude on his guilt as a thief.

The State of Burkina refutes the Applicant's allegations and recalls the provisions of Article 583 of the Criminal Code of Burkina relating to the conditions for filing an appeal on points of law and submitted that there is no alternative procedure to that provided for by law.

The Respondent State had serious doubts about the Applicant's statements, first questioning the fact that no document establishing the reality of the aforementioned strike was produced and secondly, that the Applicant's correspondence was received at the registry of the court on the same day that the strike took place.

On the presumption of innocence, the State emphasised the absence of evidence of the alleged statements mentioned by the Applicant. He added that at one point the Applicant obtained a provisional release which enabled him to campaign and even to be elected counsellor despite the criticism that part of the opinion addressed to the judicial authorities that decided to grant him this provisional freedom.

ISSUES FOR DETERMINATION:

- *Did the complainant suffer a violation of his right to a fair trial?*

- *Was the right to the presumption of innocence of Ousmane Guiro violated?*

DECISION OF THE COURT

The Court declares admissible the application filed by Mr. Ousmane Guiro against the Republic of Burkina Faso;

Held that violations of rights to equality before the law, to a fair trial and to the presumption of innocence are not established;

Accordingly dismiss the Applicant of all his claims.

JUDGMENT OF THE COURT

I - THE PARTIES AND THEIR REPRESENTATIONS

The Application was filed before the Court on 22 April 2015 by **Mr. Ousmane Guiro (Applicant)**, Divisional Inspector of Customs and citizen of Burkina Faso, represented by *la Société Civile Professionnelle* (SCP) *Ouattara-Sory et Salambéré*, Associate Lawyers, registered with the Bar Association of Burkina Faso.

Burkina Faso (**Defendant**) is represented by the State Judicial Officer at the Treasury, located in Ouagadougou, at BP 7015.

II - PRESENTATION OF THE FACTS AND PROCEDURE

Following the discovery of four (4) trunk boxes, two of which contained the sum of One Billion Nine Hundred and Six Million One Hundred and Ninety Thousand Six Hundred and Four CFA Francs (CFA F 1, 906, 190,604), belonging to Mr. Ousmane Guiro, as Director-General of Customs, he was charged with receiving bribe, illicit wealth, money laundering and illegal possession of fire arm.

Subsequently, appearing before an investigative judge who issued an order declaring the charges as sufficiently established and referring the case before the Public Prosecutor at the Ouagadougou Court of Appeal, Mr. Guiro brought the matter before the Indictment Chamber, for the purpose of annulment of certain procedural measures. By Judgment No. 027 of 30 April, 2014, the said Chamber dismissed the application for invalidation and ordered that the Applicant be brought before the Criminal Division, for trial.

Mr. Guiro appealed against the judgment, on points of law, but the appeal was declared inadmissible by the *Cour de Cassation* (French court for overturning judgments) or Court of Cassation, in a judgment of 26

February 2015, on the ground that the application seeking reversal of the judgment was not registered by Mr. Guiro's Counsel on the register specifically made for that purpose at the Registry of the Court of Appeal of Ouagadougou, in accordance with the provisions of Article 583 of the Burkina Faso Code of Criminal Procedure; he rather filed the application but by way of ordinary correspondence, dated 5 May 2014.

It was under these conditions that Mr. Ousmane Guiro brought his case before the ECOWAS Court of Justice, asking the Court to find that Burkina Faso, through its judicial organs, violated some of his rights.

III. ARGUMENTS OF THE PARTIES

The Applicant argued out two complaints against Burkina Faso.

Firstly, that Burkina Faso allegedly disregarded the principle of equality of citizens before the law (provided for notably in Article 3(2) of the African Charter on Human and Peoples' Rights) and the right to fair trial (provided in Article 7(1) of the same Charter), the reason being that the said transgression impaired his right to effective remedy, since he averred that if his right of appeal to overturn the judgment complained of had not been filed through the procedures as required by Burkinabe law, it was as a result of a strike staged by the judicial staff on the same day that he filed his application, and so it was impossible to do otherwise; that he was compelled to file his application by ordinary correspondence. It follows, according to the Applicant, that it was the dysfunction of the State judicial system which prevented him from exercising his right of appeal, and that objectively speaking, the said strike had the effect of violating his right to fair trial.

Secondly, the Applicant invokes violation of the right to presumption of innocence, as set out in Article 7(1) of the African Charter on Human and Peoples' Rights; he claims that he was constantly portrayed as a "thief" by the Burkinabe authorities throughout a trial which had not yet found him guilty; that the term "thief" was repeatedly used by Burkina Faso

itself in its written pleadings. The presumption of guilt thus imposed on him was, also, in his view, a violation of his rights.

For all of these complaints, the Applicant asks the Court to find that the dysfunction of the national judicial system ultimately impeded the exercise of his right to fair trial, that his right to presumption of innocence was violated, that "… in the meantime, the rest of the procedure cannot guarantee him a fair trial," and, consequently, he asks the Court to order Burkina Faso to pay to him the sum of Fifty Million CFA Francs (CFA F 50,000,000) as financial compensation.

Burkina Faso refutes these two allegations. It recalls first of all the provisions of the Burkina Faso Criminal Code regarding the form and conditions under which an appeal for quashing a judgment (Article 583) shall be filed, and clearly suggests that there is no alternative procedure provided for by the law. Again, the Defendant State casts serious doubt on the Applicant's statements, questioning on one hand, the veracity of the strike referred to, that there was no pleading establishing the claim made, and on the other hand, notes that "strangely enough," the Applicant's correspondence was received at the registry of the said court on the same day the strike took place (5 May 2014).

As to presumption of innocence, the Defendant State merely argues that there was no evidence in support of the allegations made by the Applicant. The Defendant State further argued that Mr. Guiro was rather granted bail, to enable him canvass for votes during the campaign for municipal elections (from 2 December 2012), and even enable him to be elected as municipal councillor; that all that was done in defiance of the criticisms of public opinion against the measures taken by the judicial authorities to grant him temporary release.

The Defendant State concludes by asking the Court to declare that no human rights violations were committed against the Applicant, that consequently, the award of any compensation to the Applicant shall be unjustifiable.

IV. ANALYSIS OF THE COURT

As to formality

The Court finds that the conditions for the exercise of its jurisdiction are met in principle: the alleged violations took place on the territory of a Member State of the Community, the international instruments referred to are binding to the Defendant State and, moreover, none of the Parties had challenged the jurisdiction of the Court to adjudicate over the case.

As to the merits of the case

The issues brought before the Court are clearly simple: the Applicant founds his claims on transgression of his right to fair trial, following a strike action by the judicial authorities, and on violation of the presumption of his innocence, arising from public statements declaring him guilty even before the court had resolved the dispute at stake.

Regarding violation of the right to fair trial

The issue here concerns the scope and consequences of the strike action alleged by Mr. Guiro in his Application.

The Court must however examine this point from several angles. Indeed, the Applicant did not, in any pleading of the case-file, formally produce evidence of this dysfunction of the judicial services in Burkina Faso, nor more specifically, of the strike which may have prevented him from filing his appeal under the required form and conditions. The Applicant and his Counsel, in the face of the obstacle thus encountered, could well have made an attempt towards establishing the truth of the strike, albeit by way of a sworn statement of an official, or by other means. This would have stood as a measure of precaution, and one can hardly explain how a legal professional would not remember to take such a precaution in an instance where there is a great deal at stake, more so when there is the risk of having one's case foreclosed on the eve of the date of filing one's

application. The mere fact of the seriousness of the case at hand must have prompted the Applicant and his Counsel to arm themselves with the minimum elements of proof, which would have served to establish evidence of the alleged malfunction of the judicial service. The means available for pursuing such purpose are numerous: a bailiff's report; a written declaration of the Chief Registrar of the Court of Appeal of Ouagadougou, with whom, Mr. Guiro's Counsel claimed to have engaged in a discussion as to the next course of action, following the perceived malfunction; or even, mere clippings, which could have demonstrated at least an intention to provide evidence to the fact that on the day in contention, a strike action had brought the State judicial services to a halt. But, the Court finds that nothing of that nature was established in the proceedings.

The Court is all the more uninspired to consider the argument as a solid, one when the Defendant State itself seems to contest the veracity of the claim in its written pleadings, that it was on the alleged day of the strike (i.e. 5 May 2014) that the correspondence by which the Applicant's Counsel filed his case actually reached the registry (see pages 3 & 4, of the French version of the Defence Statement).

Another crucial aspect of the argumentation must also be emphasised: to convince the Court, the Applicant must not only prove the dysfunction of the judicial services on the day the statement of appeal was allegedly filed, but he must equally demonstrate that he himself was present at the registry of the Court at that material moment. Two facts must thus be proved before the application before this Honourable Court can succeed: the occurrence of the strike action, and the presence of the Applicant's Counsel on the premises of the Secretariat of the Court of Appeal, with the intention to file the appeal for overturning the judgment.

Moreover, it does not appear anywhere in the relevant provisions of the Burkina Faso Code of Criminal Procedure that a "correspondence" may be adopted as a substitute for filing pleadings in a register specifically designed for specific purposes. The procedure adopted by the Applicant's Counsel is thus not based on any text.

In any event, the Court cannot take unproven allegations at their face value. Now, neither the strike complained of by the Applicant, nor his presence on the premises of the Court is proven. And the Court has repeatedly made it clear, as in the following judgments it has delivered, that it is necessary for Applicants to substantiate the complaints they raise before the Court, with evidence:

- In Judgment of 7 October 2015, **Wiayao Gnandakpa and Others v. Republic of Togo** (ECW/CCJ/JUD/18/15*)*:

  "The Court declared that as a general rule, it is up to an Applicant to prove his claims, and that in accordance with that principle, the ECOWAS Court has consistently held that all cases of human rights violation invoked before the Court by an Applicant must be specifically substantiated by sufficient and convincing unequivocal evidence.

  The Court concluded in that judgment, at the end of the proceedings and on the basis of the basis of the pleadings filed, that the Applicants did not produce any evidence to back up their arrest and detention by the Togolese judicial authorities."

- In Judgment of 16 February 2016, **Konso Kokou Parounam v. Republic of Togo** (ECW/CCJ/JUD/02/16), §31:

  "The Court noted in the judgment that Applicant never furnished proof of the acts of torture suffered; that there was no testimony to that effect in the case file, nor, particularly, any scientific or medical findings to support the claims contained in the Application. Whereas, according to the Court, both in the case at hand, and in many other cases, the onus is on the Applicant to submit before the Court the relevant elements of proof which may enable the Court to establish the veracity of the violation alleged.

- Judgment of 16 February 2016, **Ibrahim Sory Touré and IssiagaBangoura v. Republic of Guinea**(ECW/CCJ/JUD/03/16), § 66 & 73:

> §66: "***Whereas in the instant case, the Applicant, Mr. IssiagaBangoura does not produce any points of evidence which may support allegations of violation of his right to defence; whereas indeed he furnishes neither the decision sentencing him to a one-month imprisonment nor any other pleading of another nature which may attest, on one hand, that he was tried for desertion, and on the other hand, that he was a victim of violation of his rights to defence during the said judgment; whereas there is no pleading in the case-file which may attest to the statements made*** (…)"

Regarding violation of the right to presumption of innocence

Mr. Ousmane Guiro also asserts that throughout his trial, the Burkinabe authorities intentionally portrayed him, as "A thief of the Republic" (in his own words), and that this disgraceful designation, attributed to him while his guilt had not yet been established by a court of law, constitutes violation of the right to the presumption of his innocence, notably as prescribed in Article 7(1) of the African Charter of Human and Peoples' Rights.

If such accusations had actually been made within the course of a pending legal procedure, the Court would undoubtedly have considered that it constituted a breach of the Applicant's rights. Still, as always required, evidence must first be produced to support such complaints. The Court regrets to find that regarding this second point in Mr. Guiro's argument, no evidence was produced to back up the criticism made by him. In such circumstances, which the Court has already had to experience before in the past, it is incumbent upon litigants to attempt to enlighten the judges, in their knowledge and wisdom, by filing among the pleadings of the case, statements or averments which corroborate such accusations of bias. This

simple requirement on evidence was not respected by the Applicant. At any rate, this point in the Applicant's argument does not amount to more than three (3) paragraphs, of two (2) lines each (see the penultimate page of the Application, in French).

Again, in its case law, the Court has consistently held that in such circumstances, mere statements, even made by politicians, do not suffice to constitute violation of presumption of innocence. Such violation shall be deduced from concrete facts and real harms suffered, notably as found within the course the proceedings, and not from mere statements.

As such, the Court cannot hold the view that the Application establishes violation of the right to presumption of innocence. That claim must therefore be dismissed as ill-founded.

Regarding costs

In view of all these factors, the Court is of the view that it shall be appropriate to ask the Applicant to bear the costs, in accordance with Article 66 of its Rules of Court.

FOR THESE REASONS

The Court,

Adjudicating in open court, after hearing both Parties, in respect of human rights violation, in first and last resort,

***As to formality*,**

- **Declares** that it is competent to adjudicate on the case;

- **Declares** admissible the Application lodged by Mr. Ousmane Guiro against the Burkina Faso;

***As to the merits of the case*,**

- **Adjudges** that violation of the rights to equality before the law, to fair trial, and to presumption of innocence, are not established;

- **Dismisses**, therefore, all the claims brought by the Applicant;

- **Orders** the Applicant to bear the costs.

Thus made, declared and pronounced publicly by the ECOWAS Court of Justice at Abuja, the day, month and year stated above.

And the following hereby append their signatures:

- **Hon. Justice Hamèye Founé MAHALMADANE** - *Presiding.*
- **Hon. Justice Yaya BOIRO** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:
Aboubacar Djibo DIAKITÉ (Esq.) - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, IN NIGERIA

ON TUESDAY, THE 21ST DAY OF NOVEMBER, 2017

SUIT N°: ECW/CCJ/APP/28/15
JUDGMENT N°: ECW/CCJ/JUD/16/17

BETWEEN
M. AKUNGWANG M. SAMPSON & ANOR - *PLAINTIFFS*

VS.
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT :

1- **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2- **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3- **HON. JUSTICE ALIOUNE SALL** -*MEMBER*

ASSISTED BY:
ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1- **CHINONYE E. OBIAGWU (ESQ.)** - *FOR THE PLAINTIFFS*
2- **MAIMUNA LAMI SHIRU (ESQ.)** *AND*
ABUBAKAR MUSA (ESQ.) - *FOR THE DEFENDANT*

Jurisdiction of the Court -Case statute barred -Admissibility of an application filed by the Nigerian Coalition for the ICC

SUMMARY OF CASE

The Plaintiffs alleged in their initiating Application that they are filing on their behalf and on the behalf of three thousand, one hundred and thirty forty four other persons (3134), who suffered the violation of their human rights during the series of violence that took place in Jos, Plateau State of Nigeria between the years 2009 and 2012, and the period following this time. They alleged that the Defendant disregarded their right to security and protection. They sought for pecuniary award against the Defendant in favour of the 1st Plaintiff; for an order directing the Defendant to investigate the series of violence in Plateau State and prosecute those responsible for such acts; and resettle the displaced population. On the other hand, the Defendant claimed to have carried out its obligations by ensuring the security of goods and persons and sought a rejection of all claims made by the Plaintiff.

ISSUES FOR DETERMINATION

1. *Whether the Court has jurisdiction to hear the case against the Defendant.*

2. *Whether the Plaintiff is statute barred from filing this suit pursuant to Article 9 (3) of the Supplementary Protocol of 2005*

3. *Whether the application of the 2nd Plaintiff as a group of persons is admissible*

DECISION OF THE COURT

1. *The Court held that the alleged violations occurred in the territory of a Member State (the Defendant) and that some of the provisions of international instruments cited by the Plaintiff are binding on the Defendant. It declared that it had jurisdiction over the instant case.*

2. *The Court set aside the objection of the Defendant as irrelevant because the suit was to determine if there was a violation to human rights which is not statute barred. It rejected the preliminary objection raised, as to the statute barred, by the Defendant.*

3. *The Court held that the Nigerian Coalition for the International Criminal Court (the 2nd Plaintiff) did not prove their capacity to sue the Defendant before the Court. It declared the Application in regard to the 2nd Plaintiff inadmissible.*

4. *The Court declared the application in regard to the 1st Plaintiff as admissible. However, rejected all claims made by Mr. AkungwangMangut Sampson, for unproven grievances.*

JUDGMENT OF THE COURT

The Court thus constituted delivers the following Judgment:

I. PARTIES AND THEIR REPRESENTATION

1. The initiating Application brought before the Court was filed at the Regsitry on December 2015 by Mr. Akungwang Mangut Sampson, and the Nigerian Coalition for the International Criminal Court, represented by Chinonye Edmund Obiagwu, with address at 11b Christ avenue, Lekki Phase 1, Lagos and 4 Manzini Street, Wuse Zone 4, Abuja.

2. The Defendant State, the Federal Republic of Nigeria was represented by Maimuna Lami Shiru (Esq.) and Abubakar Musa (Esq.), Lawyers registered with the Bar in Nigeria.

II. FACTS AND PROCEDURE

Plaintiffs/Applicants, Mr. Akungwang Mangut Sampson and the Nigerian Coalition for the International Criminal Court (ICC), claim that they filed the instant case in their own name, and on behalf of three thousand, one hundred and thirty-four other persons (3134), whose goods and properties were destroyed, who were wounded or have become people living with disabilities, or either whose parents or family members were killed, or disappeared, during series of violence that took place in Jos, Plateau State of Nigeria between the years 2009 and 2012, and the period following this time.

Specifically, they claim that the Nigerian Coalition for the ICC was mandated by the victims, to act on their behalf. This Association relied on a certain number of reports that were drafted, at the end of fora that it organised, which relate to the incriminated events that took place, especially in some localities in Plateau State of Nigeria.

The Defendant State, The Federal Republic of Nigeria raised, in its defence writ, a preliminary objection, seeking to point out that the instant case is a prescribed one, which was replicated on its merit, while at the same time denying any failure on the part of the Defendant State, in regard to the violent events, upon which the case was filed before the Court.

III. PLEAS-IN-LAW AND ARGUMENTS BY PARTIES

Plaintiffs/Applicants, Mr. Akungwang Mangut Sampson and the Nigerian Coalition for the International Criminal Court (ICC), averred that the Nigerian Federation failed in its obligation to ensure the security of the properties of peoples, during the sad events in question. Defendant equally neglected, according to Plaintiffs/Applicants, to investigate appropriately, with a view to identifying the authors and sanctioning them accordingly.

Plaintiffs/Applicants cite, in support of their claims, diverse provisions of the Constitution (section 43 notably) and the Nigerian (« Chapter 10 of the Laws of the Nigerian Federation »), as well as the provisions of the African Charter on Human and Peoples' Rights (Articles 4 and 5) and the Universal Declaration of Human Rights of 1948 (Article 17), and other international instruments that are binding on the Defendant State.

Plaintiffs/Applicants seek from the Court, to specifically find that the Federal Republic of Nigeria disregarded the right to security and protection of the citizenry, and sought pecuniary award against it to the tune of ten million Naira to Mr. Akungwang Mangut Sampson in particular. They equally seek from the ECOWAS Court of Justice, to enjoin the Federal Republic of Nigeria, to enforce the various recommendations as contained in the reports of Commission of Enquiry, which was put in place, to investigate the series of violence, which took place during the different conflicts in Plateau State, and at Jos. Finally, it was requested from the Court to order the Federal Republic of Nigeria to « re-settle the whole population of the Plaintiffs/Applicants » and to prosecute the authors of the violence.

On its own part, **the Defendant State, The Federal Republic of Nigeria** claimed that it perfectly carried out its obligations in regard to ensuring the security of goods and persons, by deploying on the concerned territory, as the need arises, security forces, to bring the situation under control, by targeting peace. Better still, the Defendant State averred that it did, not only circumvent access to violence, but it also initiated great pacification effort within the affected zones, by putting in place peace settlement mechanisms, in various Associations with the affected populations. Thus, agencies in charge of Emergency Management were put in place, as well as the National Commission for Migrants, Refugees and Internally Displaced Persons. While dueling for a long time on facts that constitute the notion of negligence, Defendant claimed that the Federal Republic of Nigeria cannot be accused of this charge before the Court. Thus, it seeks from the Court, a rejection of all claims made by Plaintiffs/ Applicants.

IV. LEGAL ANALYSIS BY THE COURT

As to form

At this stage of the procedure, the Court must examine three issues: its jurisdiction, in principle, that of the objection as to the state barred case raised by the Federal Republic of Nigeria and that of admissibility of the Application filed by the Nigerian Coalition for the International Criminal Court.

a) On the principled jurisdiction of the Court

On the one hand, the Court notes that the principle of its jurisdiction was not contested. Indeed, this jurisdiction seems settled, since the alleged violations occurred on the territory of a Member State, and the provisions cited are, at least for some, drawn from international instruments binding on the Nigerian State. Moreover, the jurisdiction of the Court has not, at any time been contested by the Defendant State.

b) On the objection as to the statute barred case raised by the Federal Republic of Nigeria

Secondly, the Court notes that, in *limine litis,* the Federal Republic of Nigeria raised an objection as to prescription, pursuant to Article 9 (3) of the Supplementary Protocol of 2005, which provides that:

> *« Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose. ».*

Drawing from this provisions, the Defendant State claimed that more than three years have passed, since the events referred to in the instant case, and therefore, the case filed by Plaintiffs/Applicants should declared inadmissible.

The Court must expeditiously set aside this objection, as irrelevant. Indeed, the provision cited by the Federal Republic of Nigeria applies to the extra contractual liability of the Community, whereas the instant case deals with finding human violation, which is not strictly statute barred. The Court does not the responsibility to institutionalise distinctions or limitations that the instruments that govern it have not provided for. Therefore, it should be concluded that the statute barred issue raised by the Defendant State shall be rejected.

c) On admissibility of the Application filed by the Nigerian Coalition for the ICC

The initiating Application was jointly filed by Mr. Akungwang Mangut Sampson, and the Nigerian Coalition for the International Criminal Court, in his own name, and on behalf of three thousand, one hundred and thirty-three other persons presented as victims of violence as well as the Nigerian Coalition for the ICC, acting for, and on behalf of the said victims.

The Court must determine the quality of the said Coalition, to see if it can intervene in this case, as a disturbing party, in so many ways. From the

points of view of the instruments on the Court, Article 10 d) of the Supplementary Protocol of 19 January 2005 provides that access to the Court is open, only to *« individuals on application for relief for violation of their human rights»*, and the same instrument, with a view to precisely identifying such victims, further provides that *« the submission of application for which shall not be anonymous*; *»*

The settled case law of the Court agrees with this position. In Judgment *« **Hadijatou Manou Koraou v. Niger Republic** »* of 27 October 2008, the Court held that it has the mandate ***« to ensure the protection of the rights of individuals whenever these individuals are victims of the violations of such rights, which are recognized as theirs* (…) and the Court does so, by examining concrete cases brought before it »** (§60).

The, in Judgment of 18 November 2010, *« **Hissène Habré v. Republic of Senegal** »,* it is stated that ***« for the Plaintiff/Applicant to claim to be a victim, he must produce convincing and reasonable facts of the probability of the occurrence of a violation which concern him personally » (…) »* (§49)**.

Finally, in Judgment of 9 May 2011, in the case of *«**Center for Democracy and Development, and Center for Defence of Human rights and Democracy v. Mamadou Tandja and The Republic of Niger**»*, after citing the provisions of Article 10 of the 2005 Protocol, the Court noted that: ***« it can be deduced from the points of the case, that the Applicants are legal persons incorporated under the laws of the Federal Republic of Nigeria, and the Republic of Benin, as regards, respectively, the Centre for Democracy and Development, and the Centre for the Defence of Human Rights in Africa. Now, in the circumstances of the case, even if one should suppose that the said Associations possess the legal status in their respective countries, they have not evinced their status, as victims, nor justified that they are qualified to act on behalf of the victims, whose mandate they must have received (…) »* (§28).**

In conclusion, and from the foregoing, the Court must set aside, from the present procedure the Nigeria Coalition for the ICC, as not having quality to act. The Application filed by it is deemed inadmissible.

The Court further holds that, even if there exists a list of persons, filed as exhibit by Counsel to Plaintiffs/Applicants, before the Court, the said persons did not append their signatures on the list, and further to this, there was no trace of a formal mandate delivered by them to Counsel, to act on their behalf, as none of these was found in the case file.

As to merit

In support of his claims, Mr. Akungwang Sampson, who alleges that he is victim of the violence that were perpetrated in Plateau State, between 2010 and 2014, declared that he suffered the destruction of his properties, his house and his business. He claimed that this prejudice was sequel to the inaction by the Federal Republic of Nigeria, which must have failed in its obligation to protect the civil population. According to Plaintiff, this passive attitude by the Defendant State constitutes the violation of fundamental rights as enshrined under Section 43 of the Nigerian Constitution, Article 14 of the Law on the ratification, and implementation of the African Charter on Human and Peoples' Rights, Articles 4 and 5 of the said Charter, as well as Article 17 of the Universal Declaration of Human Rights.

Pursuant to its settled case law, the Court must, first, set aside, any reference to the national law of Nigeria, since the ECOWAS Court does not have jurisdiction over the legality of the national laws of Member States, taken in the large meaning of (lack of jurisdiction to make a declaration on the legality or constitutionality of the act.)

Furthermore, The Court observed that an examination of the case file showed that Plaintiff/Applicant did not file any exhibit, which could likely serve as proof, to support the materiality of the alleged facts. He only proceeded from mere affirmations, and does not offer any possibility to

the Court to exercise its control, in regard to the facts that he was denouncing. Yet, this is a minimum exigency that a Plaintiff/Applicant should bring proof for his allegations. In many cases, the Court has rejected an Application for unproven grievances:

- Judgment of 17 February 2010, *« **Daouda Garba v. Republic of Benin**» : « **Human rights violations cases must be proven by facts that allow the Court to find same, and sanction them, when they really exist** »* (§ 34)

- Judgment of 31 October 2012, *« **BadiniSalfo v. Republic Burkina Faso**» : « **The Court observes that Plaintiff/ Applicant did not support his allegations with any proof. He did not even made an edifying description of acts of ill-treatments suffered, the persons that were involved, the circumstances of time and place, in which they were really involved in those acts** »* (§37).

Consequently, the Court rejects all claims made by Mr. Akungwang Sampson.

As to costs

The Court, pursuant to Article 66 of its Rules, orders Plaintiff/Applicant to bear all costs.

FOR THESE REASONS

The Court,

Sitting in a public hearing, after hearing both parties, in a human right violation case, and in last resort,

As to form

- **Declares** that it has jurisdiction over the instant case;

- **Rejects** the preliminary objection raised, as to the statute barred, by the Federal Republic of Nigeria;

- **Declares** as inadmissible the Application, in regard to the Nigerian Coalition for the International Criminal Court, for lack of quality to act;

- **Declares** as admissible the Application, in regard to Mr. Akungwang Sampson

As to merit

- **Rejects** all claims made by Plaintiff/Applicant AkungwangMangut Sampson, for unproven grievances;

- **Orders** him to bear the costs.

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS on the day, month and year as stated above.

And the following have appended their signatures:

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:
Aboubacar Djibo DIAKITE (Esq.) - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 17TH DAY OF MAY 2016

SUIT NO: ECW/CCJ/APP/02/16
JUDGMENT N°: ECW/CCJ/JUD/17/17

BETWEEN

1. **HON. SULE AUDU**
2. **IKELEJI AGADA**
3. **LABARAN ISMAIL DADIO**
4. **ISAKA ISA**
5. **ABDUL AUDU**
6. **ADEMU ABDULLAHI**
7. **SULAIMAN ABDUL**

} *PLAINTIFFS*

VS

THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1- **HON. JUSTICE FRIDAY CHIJIOKE NWOKE** - *PRESIDING*
2- **HON. JUSTICE HAMÈYE F. MAHALMADANE** - *MEMBER*
3- **HON. JUSTICE ALIOUNE SALL** -*MEMBER*

ASSISTED BY:

DJIBO ABOUBACAR DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **FESTUS A. OGWUCHE** - *FOR THE PLAINTIFFS*
2. **MAIMUNA LAMI SHIRU (MRS.); A. A. FOELONG; I. I. HASSAN** - *FOR THE DEFENDANT*

Denial of the right of full - Equal and popular participation of the people of Kogi State in the Gubernatorial Election - The right of citizens to vote and be elected at periodic genuine democratic elections - Denial of the right to electoral justice.

SUMMARY OF FACTS

The Plaintiffs are citizens of the Federal Republic of Nigeria and Community citizens of the ECOWAS. The Defendant is a member State of the Economic Community of West African States (ECOWAS) and a signatory to its Treaties, Protocols, Directives and Regulations as well as the Universal Declaration on Human Rights, African Charter on Human and Peoples' Right, and the International Covenant on Civil and Political Rights. The Plaintiffs filed this application with respect to the governorship election held in Kogi State on the 21st day of November 2015 wherein they contend that the election process occasioned a breach of their right to exercise their franchise. The voters list was compiled, displayed, revised, updated and verified. At the end of the verification, the number of voters billed for the election were ascertained and updated with fresh registrations in accordance with the Defendant's Electoral Act. Primaries were conducted and each political Parties submitted to INEC the proposed party that sponsored in the prescribed form. All the election processes and procedures were supposedly diligently and religiously followed and the elections were conducted on the 21st day of Nov. 2015.

The Plaintiffs aver that while the Polls were on going, INEC noted few discrepancies in some polling units which led to the retuning officer declaring the election inconclusive. Prior to that, the valid votes have been counted and one prince Abubakar Audu of the APC was leading. As the election was on going the death of the leading candidate was announced. INEC allegedly went ahead with the

elections to which the APC choose one Yahaya Bello as its candidate for the said supplementary election amidst protest by the people of the State.

The Plaintiff further contends that the emergence of Yahaya Bello falls short of the minimum standard of a free, fair, transparent, genuine and credible election. They also allege that the said Yahaya Bello did not participate in the campaign, neither did he at any point present his manifesto or agenda, goals and initiative which he would undertake if voted into office to enable the people hold him accountable and ensure the necessary probity, transparent, citizen participation and representation in the affair of governance.

ISSUES FOR DETERMINATION:

- *Whether the application as conceived and constituted can be entertained by this Court.*

- *Whether the Plaintiffs' have established a reasonable cause of action.*

DECISION OF THE COURT

It is presumed that there is no reasonable cause of action before the Court and an application capable of being entertained before a National Court may not pass the test before an international Court where the facts as presented do not point towards a violation of internationally guaranteed human rights.

JUDGMENT OF THE COURT

SUBJECT-MATTER OF THE PROCEEDINGS:

A. Denial of the rights of sufferage and exercise of power of sovereignty which are predicated on the principle that people who bear the burden of Government and governance of Kogi State must exercise franchise of choosing the Governor of the State in accordance with the domestic and legal framework for the elections and Defendant's obligations under international law.

B. Denial of the right of full, equal and popular participation of the people of Kogi State in the election of the Governor of Kogi State through the conduct of free, fair and transparent elections.

C. The right of Citizens to vote and be elected at periodic genuine democratic elections.

D. Denial of the Right to electoral justice.

SUMMARY OF FACTS

The Plaintiffs are citizens of the Federal Republic of Nigeria and Community Citizens of the ECOWAS.

The Defendant is a Member State of the Economic Community of West African States (ECOWAS) and a signatory to its Treaties, Protocols, Directives and Regulations as well as the Universal Declaration on Human Rights, African Charter on Human and Peoples Rights, and the International Covenant on Civil and Political Rights.

The Plaintiffs filed this application with respect to the governorship election held in Kogi State on the 21st day of November, 2015 wherein they contend that the election process occasioned a breach of their right to exercise their franchise.

The voters list was compiled, displayed, revised, updated and verified. At the end of the verification, the number of voters billed for the election were ascertained and updated with fresh registrations in accordance with the Defendant's Electoral Act. Primaries were conducted and each Political Party submitted to INEC the proposed Party they sponsored in the prescribed form. These were accompanied by Affidavits sworn by each Candidate indicating that he has fulfilled the constitutional requirements for election into that office. The personal particulars of each Candidate were also published in the State as required by law.

All the election processes and procedures were supposedly diligently and religiously followed and the elections were conducted on the 21st day of Nov 2015.

The Plaintiffs aver that while the polls were on going, INEC noted a few discrepancies in some polling units which led to the returning officer declaring the election inconclusive. Prior to that, the valid votes had been counted and one Prince Abubakar Audu of the APC was leading.

As the elections were on going, the death of the leading candidate was announced. INEC allegedly went ahead with elections in those areas that were declared inconclusive by carrying out a supplementary election to which the APC choose one Yahaya Bello as its Candidate for the said supplementary election amidst protest by the people of the State.

The APC Candidate was said to have won the overall election on the basis of the supplementary polls which the Plaintiffs contend that his victory included a calculation of their votes and all other votes cast for the late Prince Abubakar Audu.

The Plaintiffs further contend that the emergence of Yahaya Bello falls short of the minimum standard of a free, fair, transparent, genuine and credible election. They also allege that the said Yahaya Bello did not participate in the campaign, neither did He at any point present his manifesto or agenda, goals and initiative which he would undertake if voted into

office to enable the people hold him accountable and ensure the necessary probity, transparency, citizen participation and representation in the affairs of governance.

The Plaintiffs contend that the people of Kogi were never given the opportunity to assess the said Yahaya Bello and that they were completely sidelined in all the processes that saw his emergence both as candidate and as Governor.

Whereupon the Plaintiffs filed this Application seeking for the following orders:

a. A DECLARATION that it is the Plaintiffs entitlement, and indeed that of the entire voters of Kogi State to vote, have their votes represented and counted in the determination of who is to become the Governor of the State in the exercise of their right of sovereignty and their right to franchise in full recognition of their Constitutional, Civil and Political Rights which are inalienable and untransferable.

b. A DECLARATION that the election of the governorship of Kogi State, held on the 5th day of December in which one Alhaji Yahaya Bello emerged winner is not in conformity, and/or consistent with Nigeria's International obligations, and falls short of the internationally recognized standards and core democratic values and principles of a genuine, free and fair franchise as established by existing International Human Rights Instruments, and the Defendants Obligations under International Law.

c. A DECLARATION that it is the Plaintiffs Fundamental Rights and indeed that of other voters to assess, scrutinize, verify, clarify, confirm and do all other things pursuant to the personal particulars of a Candidate for the governorship of Kogi State, as a veritable measure to ascertaining the candidates integrity,

general disposition, capacity, competence, candor, eligibility and character traits; and be free to raise caveat and /or objections and challenge same in accordance with the law and any denial thereof of such right as provided under law impedes against the exercise of both the franchise and the institutionalization of transparency, accountability and popular effective participation and fair hearing in strict adherence to democratic principles and fundamental freedom, is a violation of the fundamental rights of the Plaintiffs under International Human Rights law and the Defendants International obligation.

d. A DECLARATION that the Plaintiffs and indeed the entire people of Kogi State can only hold their Governor to account probity and performance, only if the process the Governor assumes power is by the will of the people expressed through genuine, free and fair elections where equal weights are accorded all votes as the basis of the authority and legitimacy of government, through democratically acceptable franchise in accordance with the Defendants international commitments and obligations under International Law.

e. AN ORDER of Court, compelling the Defendants, their agents, servants and privies to entrench Universal Values and principles of democracy and respect for human rights, as a veritable means to the attainment of respective governance, expressed through the ultimate will of the people, in a genuine, free and fair election to the office of the Governor of Kogi State, as the foundation of the authority and legitimacy of government, and in accordance and consistent with the Defendants commitments and obligations under international law.

f. AN ORDER compelling the Defendant, to invoke all necessary measures to guarantee to the Plaintiffs of the worth and weight of their franchise and to exercise their popular

sovereignty as citizens of the Federal Republic of Nigeria, from Kogi State, by entrenching a wholly representative, Chief Executive for the state through the conduct of genuine, transparent and credible elections, on the basis of universal, equal and secret suffrage by the expression of the will of the people and, in strict adherence to democratic principles and the Defendants commitment and obligations under international law.

g. AN ORDER compelling the Defendant's to take constitutional, legal and other necessary measures including but not restricted to recourse to International Treaties, Declarations, Conventions to remedy and/or redress the aberrations and Fundamental Rights Violations flowing from the governorship elections in Kogi State, within a reasonable time, and to inform the Court of the measures taken.

The Defendant filed a Preliminary Objection and Defense on 11/02/16 wherein it challenged the jurisdiction of this Court to entertain the matter and also contend that the Plaintiffs have not disclosed any cause of action.

The Plaintiffs in opposition to the Defendant's preliminary objection filed a reply on 22nd April 2016. The Plaintiffs argued that their Substantive Application is for the enforcement of their Fundamental Rights which this Court is imbued with the requisite jurisdiction to entertain. That their Application is essentially anchored on their disenfranchisement in the ultimate determination of who emerges winner in the election, after having voted in the election. That the subject matter imposes international obligations on the exercise of fundamental rights of citizens. That the Defendant anchored its objection on erroneous grounds. That even if alienability or transferability of votes is possible, it cannot be automatically effected without the consent, authority and collaboration of the voters. That the issues raised by the Defendant as objections are issues for argument in the substantive Application.

The Plaintiffs further states that there is no feature in their initiating Application seeking the disqualification of any Candidate by the Court rather, they contend that their fundamental right to freedom of choice and franchise under Article 13 of the African Charter, had been violated by alienating and transferring their votes without their concurrence

On the cause of action, the Plaintiffs assert that in construing whether there is a cause of action, the first port of call are the instruments donating those rights on a Plaintiff. That the Defendant is misconceived in this regard and for this issue to be successfully raised, the Defendant must canvass serious facts sufficient to debunk, controvert, and countermand the facts adduced by the Plaintiffs. The Plaintiffs fw1her submit that the authorities relied upon by the Defendant in this regard are completely irrelevant. Even if relevant, they cannot render nugatory the enforcement of the fundamental rights sought pursuant to the international instruments protecting and guaranteeing fundamental freedoms.

The Defendant further filed a reply to the Plaintiffs reply on points of law to its Preliminary Objection. In its reply, the Defendant submits that the admission by the Plaintiffs in paragraph 2.1.9 page 8 of their reply that the Application is an electoral matter robs the Court of jurisdiction. They contend that facts admitted need no further prove. That the Plaintiffs did not specifically name any person, Community or group of people that were refused participation in the said election that will qualify the present action to be predicated on Fundamental Human Rights. And that none of the Plaintiffs proved that they were denied the right to participate or partake in the electioneering process. That the mam claim is anchored on election and the provisions of article 9 relied upon did not envisage electoral actions to be amenable to the jurisdiction of this Court. That article 13 and the authorities cited by the Plaintiffs are not apposite in the circumstance of this case and therefore urged the Court to strike out the suit in its entirety.

An examination of the Preliminary Objection and the reply raises some issues for determination.

Issues (or Determination

1. Whether this Application as conceived and constituted can be entertained by this Court.

2. Whether the Plaintiffs' have established a reasonable cause of action.

i. Whether this Application as conceived and constituted can be entertained by the Court.

Whereas the Plaintiffs allege a violation of their human rights as enshrined in Articles 13 (1) - (3) of the African Charter on Human Peoples Rights (ACHPR), Article 25 (a) - (c) of the International Covenant on Civil and Political Rights (ICCPR), and Articles 21 (1), (2), and (3) of the Universal Declaration of Human Rights (UDHR), the Defendant submits that this Court lacks the requisite jurisdiction to entertain this suit on grounds of incompetence and the Plaintiffs failure to disclose any reasonable cause of action.

In a purported response to the Defendant's objection, the Plaintiffs' submit that the gravamen of their Application is essentially anchored on their disenfranchisement in the ultimate determination of who emerges winner in the Kogi State election, after having voted in the election. That the subject matter imposes international obligations on the exercise of fundamental rights of citizens which this Court is imbued with the requisite jurisdiction to entertain.

The competence of the Court to adjudicate on human right issues is provided for in the Supplementary Protocol (A/SP .1/01/05). Article 9 (4) provides:

> *"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State".*

Article 10(d) of the same Protocol provides that access to the Court is open to the following:

(d) Individuals on application for relief for violation of their human rights; the submission of application of which shall;

not be anonymous; nor be made while the same matter has been instituted before another international Court for adjudication."

In **HISSIEN HABRE V SENEGAL (2010) CCJELR pg.65,** this Court held that:

"to decide whether or not it has jurisdiction to hear a case, it has to examine if the issue submitted deals with the rights enshrined for the benefit of the human person and arising from the international or community obligation of the State as human rights to be observed, promoted, protected and enjoyed and whether the alleged violations was committed by a Member State of the Community."

The right to vote is not a privilege, but a fundamental right. The protocol on Democracy and good governance imposes on States the obligation to apply the African Charter on Human and Peoples Rights, as well as other International Instruments in their respective states.

Article 13 (1) of the African Charter on human and Peoples Rights guarantees the right of every Citizen to participate freely in the Government of his Country, either directly or through freely chosen representatives in accordance with the provisions of the law.

Article 21 of the Universal Declaration of Human Rights ("UDHR") protects the rights of Citizens to participate in the government of their Country directly or through freely chosen representatives, have equal access to public service in its Country and the will of the people should form the basis of the authority of government through periodic and genuine elections which shall be by universal and equal suffrage, and held by secret vote or by equivalent free voting procedures.

Article 25 of the International Covenant on Civil and Political Rights ("ICCPR") requires every Citizen to have the right and the opportunity without unreasonable restrictions in taking part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage held by secret ballot, guaranteeing the free expression of the will of the electors, and to have access, on general terms of equality, to public service in his country.

In **BAKARY SARRE & 28 ORS V. SENEGAL (2011) UNREPORTED Pg 11, Para 25,** the Court held that its competence to adjudicate in a given case depends not only on its texts, but also on the substance of the initiating Application. The Court accords every attention to the claims made by the Applicants, the pleas in law invoked, and in an instance where human right violation is alleged, the Court equally carefully considers how the Parties present such allegations.

A close look at the substance of the Plaintiffs Application disclose that they actually exercised their right to vote but contend that their votes were alienated or transferred to a Candidate who did not contest the election. They further argued that the Defendant is obligated to conform to its International Obligations by ensuring that the exercise of the will of the people as represented in their franchise is preserved and not circumvented unduly or manipulated by the Political Elite.

The Crux of the Application before this Court is thus centered on the alleged transfer of votes cast by the Plaintiffs to some other Candidate who did not contest the election.

In **DEMOCRATIQUE POUR LE PROGRESS C. L'ETAT V. BURKINA FASO ECW/CCJ/JUD/16/15** relied upon by the Plaintiffs, the Court assumed jurisdiction over the case on the grounds of alleged denial of the Plaintiffs right to participate in an election process. There is therefore a distinction between that case and the instant case.

In **HON. DR JERRY UGOKWE V. THE FEDERAL REPUBLIC OF NIGERIA AND 1 OR (2005) ECW/CCJ/APP/02/05,** the Court observed that there is no provision whether general or specific, that gives the Court powers to adjudicate on electoral issues or matters arising therefrom.

The jurisdiction of this court in election matters can only be invoked when the Court is satisfied that the right to participate or some other Human Rights arising therefrom has been violated.

The Plaintiffs have not shown any bearing on other International Human Rights arising from the said election capable of invoking the jurisdiction of the Court. They have failed to show any particular act which constitutes a violation in line with the articles relied upon.

As rightly said by the Defendant, Article 9 of the Protocol relied upon by the Plaintiffs did not envisage electoral actions to be amenable to the jurisdiction of this Court. Suffice to say that electoral matters are governed by the National Laws of Member States and thus matters arising therefrom which do not in any way relate to Human Rights should be resolved at the National level same being internal issues.

In **CDD V. MAMADOU TANDJA & ANOR, (2011) CCJELR,** the Court declared that it had no jurisdiction to examine the constitutionality or legality of acts which come under the Domestic Norm and laws of authorities of Member States (vis-a-vis) violation of the provisions of the African Charter on Human and Peoples Rights as raised by the Plaintiffs.

Assuming jurisdiction therefore in this matter will ·amount to the Court exercising the powers of a Sovereign State. This Court has held that it cannot give itself or expand its jurisdictional horizon by misappropriating or misconstruing statutes.

In any case, the Supreme Court of Nigeria on the 20th September 2016, in a unanimous judgment affirmed Kogi State Governor, Yahaya Bello, as

the validity elected Governor of the State, wherein it declared that votes cast in an election belong to Political Parties, not Candidates fielded by the Parties. The Court in upholding the substitution of the said Yahaya Bello held that in the face of law, Bello obtained a nomination form, took part in the election, and came second. That the Appellants case was held to be lacking in merit.

In its consistently held case law, this Court has reiterated that it lacks the jurisdiction to examine decisions of National Courts. See **Mousa Leo Keita V. Mali (2004 CCJELR) pg 65.** See also **Pte Alimu Akeem ECW/CCJ/JUD/01/14 Pgh 42.**

In view of the foregoing, and in the absence of sufficient facts and evidence disclosing any human right violation arising from the conduct of the election to invoke its jurisdiction, the Court declares that the issues raised by the Plaintiffs are purely anchored on electoral matters. The Court therefore submits that it lacks the jurisdiction to entertain this matter.

ii. ***On whether there is a reasonable cause of action.***

A cause of action determines whether or not a Court is vested with jurisdiction to try a case. It is a set of facts sufficient to justify a right to sue. The Application must contain a clear and concise statement of the material facts upon which the pleader relies for his claim with sufficient particularity. The cause of action has to be in line with the extent of powers conferred on the Court.

The Defendants contend that the Plaintiffs have not disclosed any reasonable cause of action. The set of facts constituting the Substantive Application in this case is the alleged transfer of the votes cast by the Plaintiffs to another Candidate who did not contest the election. This is the main gravamen of the Plaintiffs case. The alleged right to choose a representative is ancillary to the main issue.

It is pertinent to distinguish between the main claim, ancillary claim, and claims bordering on human rights violation in election matters which the Court is vested with competence to entertain.
While the main claim in the instant case is the alleged malpractice by the Defendant's Agents wherein they transferred the Plaintiffs votes to another, the ancillary claim is the denial of their right to choose a Candidate of their choice. There is also need to clarify the disparity between a cause of action generally and a cause of action in line with the Courts Supplementary Protocol (A/SP.1/01/05). A party may approach the Court with a cause but where the Court is not vested with jurisdiction to entertain that cause, it is presumed that there is no reasonable cause of action before the Court. An Application capable of being entertained before a National Court may not pass the test before an International Court where the facts as presented do not point towards a violation of internationally guaranteed human rights.

The jurisdiction of this Court to entertain election matters however only comes into play where there is an alleged denial of the right to vote, or where there is a human right violation arising therefrom. This is not the position in the instant case. The Plaintiffs admitted that they participated in the election process by casting their votes.

Suffice to say that both the main claims and ancillary claims of the Plaintiffs are national issues not subject to the jurisdiction of this Court.

A cause of action will only be actionable if it is in line with the provisions Article 9 (4) of the Supplementary Protocol which provides for the Courts competence in human right violation matters. This provision does not extend to the conduct of an election process.

In **MOUSSA LEO KEITA V. THE REPUBLIC OF MALI SUPRA, Pg** 75, the Court held that since the Applicant did not indicate any proof of a characteristic violation of a fundamental human right, the Application must be declared inadmissible.

The cause of action established by the Plaintiff is one which is solely within the scope of competence of as sovereign Member State. It does not fall within the purview of human right violation.
This Court has consistently stated that it does not interfere with the constitutionality or legality of the laws of Member State but when human rights violation arises, it assumes jurisdiction. See **CDD V. MAMADOU TANDJA & 1 OR.** Supra

In **HON. DR JERRY UGOKWE V. THE FEDERAL REPUBLIC OF NIGERIA AND 1 OR, Supra,** the Court held that a dispute having a bearing on other rights of the parties may be referred to in any internal or related dispute relating to electoral issues like the present one. In such an instance, the Court in accordance with Article 19(1) of the 1991 Protocol and particularly with reference to Article 38(1) (c) of the Statute of the International Court of Justice could apply the general principles of law recognized in civilized nations.

A critical look at the facts before this Court shows that the Plaintiffs have misconceived the meaning and extent of applicability of the international provisions relied upon. In as much as the right to vote and be voted for falls within the internationally guaranteed rights, the Plaintiffs have not established a cause of action within the meaning and purport of article 9. They have not established a cause of action relating to other aspects of Human Right Violation which would invoke the Court's jurisdiction. The Plaintiffs only succeeded in confirming to the Court that they voted in the election.

In the absence of a reasonable cause of action in relation to the above articles, the Court is inclined to end the matter at this preliminary stage without going further into the merits of the case. The application is therefore devoid of purpose.

Accordingly, the Preliminary Objection of the Defendant is hereby upheld.

DECISION:

The Court,

Adjudicating in a public sitting after hearing the patties in the last resort, after deliberating in accordance with law.

- **Upholds** the Defendant's Preliminary objection and declares the Plaintiffs' case inadmissible on account of lack of jurisdiction to entertain the same.

AS TO COSTS.

Each Party should bear its own costs.

Thus, made and Adjudged and pronounced in a public hearing this 22nd day of November, 2017.

THE FOLLOWING JUDGES HAVE SIGNED THE JUDGMENT.

- **Hon. Justice Friday Chijioke NWOKE** - *Presiding.*
- **Hon. Justice Hamèye Founé MAHALMADANE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by
Djibo Aboubacar Diakite (Esq.) - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON THURSDAY, THE 23RD NOVEMBER 2017

SUIT N^{O}: ECW/CCJ/APP/38/15
JUDGMENT N^{O}: ECW/CCJ/JUD/18/17

BETWEEN

1. **MR. THANKGOD LEGBARA DAVID** (MINOR),
2. **MRS. GIFT DAVID LEGBARA;**
3. **MRS. SIRA LEGBARA;**
4. **MRS. BARIEENEE TANEE;**
5. **M. NEYIEBARI MUELE**

} *PLAINTIFFS*

VS.

THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE CHIJIOKE NWOKE**- *PRESIDING*
2. **HON. JUSTICE JÉRÔME TRAORÉ** - *MEMBER*
3. **HON. JUSTICE YAYA BOIRO** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **C. I ENWELUZO (ESQ.)** *&*
   OOSIOLISA (ESQ.) - *FOR THE PLAINTIFFS*
2. **CHIME HABIBATU UDUMA (ESQ.)** *&*
   CHIKA UZOEWULU (ESQ.) - *FOR THE DEFENDANT.*

Human Rights violation - Article 4 of the ACHPR - Jurisdiction - Proper Party

SUMMARY OF FACTS

The deceased was on the 7th of August, 2015 shot and killed for his refusal to pay (kick back) of two hundred naira (200) by a police officer named Mr. James Imhanlu, who was on duty at GRA Port Harcourt, attached to Team 313020 Mobile Police (MOPOL) 19. The deceased was taken to Sonabel Clinic, where preliminary care given became insufficient, and later taken to Memorial Braithwaite Hospital (BMH), where he died. The policeman, Mr. James Imhanlu was arrested, and brought before the Nigeria Judicial Authorities (a Tribunal of First Instance), without opposition to the charges brought against him.

The Applicants alleged that the Defendant and local administrative authorities did not show any sign of compassion or solidarity towards the victims or the heirs to the deceased as no condolence message was sent to them.In the face of this situation, the family of the victim decided to file an action, asking for a declaration that his death was illegal and contrary to the provision of Article 4 of the African Charter on Human and People's Right, and reparation for violation suffered.

ISSUES FOR DETERMINATION:

1. *Whether the Court has jurisdiction to adjudicate on the application filed by the Plaintiffs.*

2. *Whether the defendant is a proper party to this case*

DECISION OF THE COURT

The evidence by the Plaintiffs being uncontroverted stands in proof of the alleged facts that the deceased was unlawfully killed. Article

4(g) of the ECOWAS Revised Treaty allows the Court to apply the African Charter. The action is the violation of the provision of Article 4 of the African Charter. The Plaintiffs were thus awarded damages in the sum of Thirty million naira (N30. 000. 000 .00)

JUDGMENT OF THE COURT

The Court thus constituted delivered the following Judgment.

The Court,

- Having regard to the Revised ECOWAS Treaty of du 24 July 1993;
- Having regard to the Protocol of 6 July 1991, as well as the Supplementary Protocol of 19 January 2005 on the ECOWAS Court of Justice;
- Having regard to the Rules of procedure of the ECOWAS Court of Justice of 3 June 2002;
- Having regard to the Universal Declaration of Human Rights of 10 December 1948;
- Having regard to the African Charter on Human and Peoples' Rights of 27 June 1981;
- Having regard to the initiating Application which was received from the above-mentioned Plaintiffs/Applicants dated 15 December 2015, but filed at the Registry of the Court on 30 June 2016;
- Having regard to the undated replies of the Federal Republic of Nigeria, but which was filed at the Registry on 20 June 2016 and 1st July 2016, respectively;
- Having regard to the exhibits as contained in the case file;

II- FACTS AND PROCEDURE

1. Having regard to the processes filed, where it can be deduced that on 7 August 2015, Mr. LEGBARA David, a passenger bus driver

decided to run Ikwerre Road and other adjoining destinations in Port Harcourt (Nigeria). He was waived down by a police officer named Mr. James Imhanlu, who was on duty at the GRA Port Harcourt. He was attached to Team 313020 Mobile Police (MOPOL) 19.

2. After applying the brakes, and stopping, the Police Officer, Mr. James Imhanlu, in the company of his colleagues on duty (Police check -point), requested and insisted that the said bus driver should give them money (kick - back) worth two hundred (200) Naira. The driver pleaded that they should exonerate him for that trip, and promised that he would pay on subsequent trips, more so, he had just started work, for the day, at that moment.

   As the reply from the driver did not go down well with him, the policeman, Mr. James Imhanlu threatened to shoot at the driver, if he (driver) failed to enforce the payment order given to him, immediately. And, within a twinkling of an eye, he cocked his pistol, before pulling the trigger. The bullet pierced through the driver's fore – arm, then his chest, before going through the right side of his chest and hitting the leg of a passenger named Mr. Boniface, who was on the front seat beside the driver.

3. After this tragedy, the policeman, Mr. James Imhanlu hurriedly jumped into their Patrol van, while shooting sporadically into the air, in order to disperse a crowd that has just assembled on the scene. A moment later, he fled in the said van, in the company of his six colleagues.

4. Another driver named Mr. Godwin, who happened to be on board the same bus rendered first hand assistance, by transporting, in the first place, the victim to Sonabel Clinic, where preliminary care given became insufficient, and, later took the victim to Memorial Braithwaite Hospital (BMH).

But, unfortunately, the victim passed on there, same day, at exactly 16 hours, before the corpse was taken to Kala Police Station, under whose jurisdiction falls the locality where the tragedy occurred. The corpse was immediately deposited, by the said Police State, at Sympthy Mortuary Ozuoba. The corpse remained, for a long period, at another mortuary called Kpaima Mortuary at Elechi Beach, Port Harcourt, before interment was done by the parents of the victim in December 2016, in Rivers Sate of Nigeria.

5. In between all this period of time, the policeman, Mr. James Imhanlu was arrested, and brought before the Nigeria Judicial Authorities (a Tribunal of First Instance), without opposition, before recognizing the charges brought against him.

6. According to Plaintiffs/Applicants, the Defendant and local administrative authorities did not show any sign of compassion, or solidarity towards the victims or the heirs to the deceased, and no condolence message was sent to them.

7. In the face of this situation, the family of the victim decided to file a case, through their Counsels, which was received at the Registry of the Community Court of Justice, ECOWAS on 15 December 2015, and in which the said Court was effectively seized, seeking from it to find the violation, by the Defendant State, the fundamental right to life of the late LEGBARA David.

8. In this regard, the above-mentioned Plaintiffs/Applicants, as family members of the victim, claim that they have suffered certain huge moral and material prejudices. For all these reasons, they seek from the Court, as follows:

   - A DECLARATION that the assassination of David Legbara, by the police officer Mr. James Imhanlu, who is an agent of the Defendant State is illicit, illegal, and likely to have infringed

upon the fundamental right to life, as enshrined under Article 4 of the African Charter on Human and Peoples' Rights;

- An ORDER on the Defendant State to pay them the sum of two billion (2.000.000.000.00) Naira as reparation, following the afore-mentioned assassination;

- A further ORDER on the Defendant State to equally pay them the sum of five million (5.000.000.00) Naira, representing the logistic costs for the interment of victim David Legbara;

- An ORDER on the Defendant State, to tender public apology to Plaintiffs/Applicants, as well as other family members of the victim;

- An ORDER on the Defendant State, to carry out all the injunctions that the Honourable Court would deem fit, as a result of the instant case.

9. On its own part, the Federal Republic of Nigeria raised an objection, as to lack of jurisdiction of the ECOWAS Court of Justice, to examine the instant case, and, on the subsidiary, it sought from the Court, the rejection of all claims made by Plaintiffs/Applicants, as unfounded.

III- ARGUMENTS AND PLEAS-IN-LAW BY PARTIES

10. In support of their initiating Application, Plaintiffs/Applicants cited the violation, by the Defendant State, of Article 3 of the Universal Declaration of Human Rights, Article 4 of the African Charter on Human and Peoples' Rights, as well as the violation of Articles 33 and 34 of the Constitution of the Federal Republic of Nigeria, because there was an infringement, without any reason whatsoever, on the right to life of the afore – mentioned victim; according to Plaintiffs/Applicants, all the cited instruments provide, in substance,

that every individual shall have the right to life, and that no one may be deprived of his right to life, except in the enforcement of a validly made judicial pronouncement;

11. In order to obtain reparation, Plaintiffs/Applicants rely on the principle of «***Ubi Ubi jus remedium***», which signifies that «for every human right violation, there must be a reparation, ordered and effected.» Moresover, Plaintiffs/Applicant averred that the Honourable Court has always held this position, especially in the case of **The Federal Ministry of Internal Affairs v. Shugaba Darman**, as well as that of **Aiyu Tasheku v. The Federal Republic of Nigeria**.

12. Furthermore, Plaintiffs/Applicants objected to the arguments by the Defendant State, which was diverting the attention of the Court from seeing the merit of their case, when Defendant claimed that the police officer was exclusively responsible for the charges brought against him. Plaintiffs/Applicants submitted that such an argument cannot prosper, since the accused police officer is an (Mr. James Imhanlu) was attached to Team 313021 of the Police Mobile Force 19, PME, which is situated within the Government Reservation Area (GRA), in Port Harcourt, Rivers State of the Defendant, and who was armed under the authority of the same Defendant on 7 August 2015.

13. In its defence, The Federal Republic of Nigeria raised an objection, as to lack of jurisdiction of the Court to examine the instant case, because, since the accused, Sergeant James Imhanlu is not an organ of the State, he should be solely held liable for his actions, and not his employer. Defendant further averred that, in general rule in international law, the only behaviour for which the State shall be held responsible is the one committed by its organs, or those from persons acting under the State's direct instruction, unlike in the instant case.

14. Finally, The Federal Republic of Nigeria pointed out that the parties that are directly connected to the present litigation, namely Sergeant James Imhanlu, and the Health Officer who first received and tried to save the life of the afore-mentioned victim were not summoned, and that in their absence, the claims made by Plaintiffs/Applicants cannot be examined by the Court.

IV- LEGAL ANALYSIS BY THE COURT

15. The Court shall analyse the instant case having regard to the preliminary objection raised, as to lack of jurisdiction, by the Defendant State, as well as the latter's request on extension of time-limit, and finally on the merit of the case.

1- On the competence of the Court

16. Pursuant to its settled case law, the Court considers that the preliminary objection raised by the Defendant State lacks grounds; Indeed, Article 10 (d) (i), (ii) of the Supplementary Protocol (A/SP.1/01/05), amending Protocol (A/P.1/7/91) of 1991, on the Community Court of Justice provides that "*access to the Court is open to individuals on application for relief for violation of their human rights, provided that the Application shall not be anonymous; nor be made whilst the same matter has been instituted before another International Court for adjudication.*"

17. In the instant case, arguments have shown that Plaintiffs/Applicants have invoked human right violation, as a result of the homicide dear deceased dear one named David Legbara 7 August 2015, by a police officer (James Imhanlu), who was attached to Team 313021 of the Nigeria Mobile Police Force 19, PME, of the Government Reservation Area (GRA), Police Station in Port Harcourt, Rivers State, who was armed under the authority of the Defendant State.

18. Moreover, it was not contested that Sergeant James Imhanlu has committed the homicide, for which he was accused, in the discharge of his official duty; thus, as a Police Officer belonging to Team 313021 attached to the Nigeria Mobile Police mobile 19;

19. It therefore follows that the issue of lack of jurisdiction raised shall be rejected;

2- On the request for extension of time-limit

20. Considering that through its process filed on 22 February 2017, The Federal Republic of Nigeria sought an extension of time-limit, in order to file further documents; whereas the Court noted that the said Defendant State, apart from its absence at the hearing of 23 January 2017, as well as that of 4 May 2017, failed to justify its absence;

21. It therefore follows that, in the interest a good administration of justice, its request for extension of time-limit should be rejected;

As to merit

1- On the genuineness of the claims made by Plaintiffs/Applicants

22. Considering that Plaintiffs/Applicants have invoked the violation of the right to life, and physical integrity of the late David Legbara, to whom they are heirs. In support of their case they cited the provisions of Article 3 of the Universal Declaration of Human Rights and those of Article 4 of the African Charter on Human and Peoples' Rights, which provide, in substance that every individual shall have the right to life, and that no one may be deprived of his right to life, except in the enforcement of a validly made judicial pronouncement;

23. Whereas, in the instant case, and on the strength of the processes filed during the procedure, there is no iota of doubt that the right to life and physical integrity of Mr. David Legbara was violated, since

the latter was killed instantly, by a police officer, as could be attested to by the Certificate of Death dated 4 September 2015, which was equally filed;

24. Furthermore, it was also revealed that despite referring the issue concerning the instant case to a Tribunal of First Instance, by the said Police, itself, there has not been any follow-up, till date.

25. And again, it is incontrovertible that the accused police officer, author of the murder is an agent of the Federal Republic of Nigeria, whose responsibility it is, to protect the citizenry. It is manifestly clear that, the said police officer has failed in the discharge of his obligation, and thus, it becomes expedient for the Honourable Court to draw all the consequences emanating from such a situation.

2- On reparation

26. From the foregoing, the Court considers that Plaintiffs/Applicants are well-founded in seeking reparation, which must be equitable, and non-symbolic. The Court must take into cognisance the fact that the victim was killed, without any justification, leaving behind a family wherein the is a minor, born few weeks to the tragedy, two wives, an elder sister, as well as a younger brother.

27. It is also established that the Federal Republic of Nigeria did not make any effort, to contribute to burial, talk less of rendering any material assistance, to condole the bereaved family.

28. Consequent upon the above facts, the Court has got sufficient facts in helping it adjudicate properly, to order reparation, in favour of Plaintiffs/Applicants, as stated in the following amounts in Naira:

    - Fourteen (14) million Naira awarded to Mr. Thankgod LEGBARA DAVID, son to the deceased (minor);

- Five (5) million Naira to Mrs. GIFT DAVID LEGBARA (wife to the deceased);

- Five (5) million Naira to Mrs. SIRA LEGBARA (wife to the deceased);

- Three (3) million Naira to Mrs. BARIEENEE TANEE (elder sister to the deceased);

- Three (3) million Naira to Mr. NEYIEBARI MUELE (younger brother to the deceased).

- This gives us the total sum of thirty million (30.000.000.00) Naira;

29. It should be declared that these various sums shall be paid, by the Defendant State, and reject any other claims by Plaintiffs/Applicants.

3- As to costs

30. Having regard to the fact that the Defendant State succumbed in the instant procedure, there is need to order, as to costs, pursuant to the provisions of Article 66 of the Rules of procedure of the Court.

FOR THESE REASONS

The Court,

Sitting in a public hearing, and after hearing both parties on issues of human rights violation, and in last resort;

As to form:

- **Rejects** the preliminary objection raised, by Defendant, as to lack of jurisdiction by the Court, to examine this case, as ill - founded;

- Equally **rejects** the request made by Defendant as to elongation of time-limit, to enable it file processes;

- **Declares** that Plaintiffs/Applicants' claims are genuine, and as such, they are admissible;

As to merit

- **Declare** as admissible the claims made by Plaintiffs/Applicants;

- **Orders** the following sums, as stated for each one of them, as reparation:

  - Fourteen (14) million Naira awarded to Mr. Thankgod LEGBARA DAVID, son to the deceased (minor);

  - Five (5) million Naira to Mrs. GIFT DAVID LEGBARA (wife to the deceased);

  - Five (5) million Naira to Mrs. SIRA LEGBARA (wife to the deceased);

  - Three (3) million Naira to Mrs. BARIEENEE TANEE (elder sister to the deceased);

  - Three (3) million Naira to Mr. NEYIEBARI MUELE (younger brother to the deceased).

  - This gives us the total sum of thirty million (30.000.000.00) Naira;

- **Declares** that the sums, as awarded to Plaintiffs/Applicants, shall be paid by the Defendant State;

- **Rejects** any further claims made by Plaintiffs/Applicants.

- **Orders** the Defendant State to bear all costs.

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS on the day, month and year as stated above.

AND THE FOOLOWING HAVE APPENDED THEIR SIGNATURES:

- **Hon. Justice CHIJIOKE NWOKE** - *Presiding.*
- **Hon. Justice Jérôme TRAORÉ** - *Member;*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by

Athanase ATANNON (Esq.) - *Registrar.*

IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA, NIGERIA

ON MONDAY, THE 27TH DAY OF NOVEMBER, 2017

SUIT NO: ECW/CCJ/APP/38/16
JUDGMENT NO: ECW/CCJ/JUD/19/17

BETWEEN
HIS EXCELLENCY VICE-PRESIDENT ALHAJI SAMUEL SAM-SUMANA - *PLAINTIFF*

VS.
REPUBLIC OF SIERRA LEONE - *DEFENDANT*

COMPOSITION OF THE COURT:
1. HON. JUSTICE HAMÈYE F. MAHALMADANE - *PRESIDING*
2. HON. JUSTICE FRIDAY CHIJIOKE NWOKE - *MEMBER*
3. HON. JUSTICE ALIOUNE SALL - *MEMBER*

ASSISTED BY:
ATHANASE ATANNON (ESQ.) - *DEPUTY CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **FEMI FALANA, (SAN), DR. RAYMOND A. ATUGUBA, SOLA EGBEYINKA (ESQ.), WISDOM ELUM (ESQ.)** - *FOR THE PLAINTIFF*

2. *NO REPRESENTATION FOR THE DEFENDANT*

Human rights -Right to work -Security
-Dignity -Due process of law
-Participation in Government

SUMMARY OF FACTS

The Plaintiff a citizen of the Republic of Sierra Leone brought this action alleging violation of his right to protection, security of law, right to due process of law, right to work, right to participate in government, right to personal safety and security and right to dignity as enshrined in the African Charter on Human and Peoples Rights, International Covenant on Civil and Political Right and the Universal Declaration of Human Right. The Plaintiff claimed he was duly elected as Vice President of the Republic of Sierra Leone in August, 2007 and September, 2012 respectively under the All Peoples Congress (APC). That he was unjustifiably expelled from the Party on 10th of March 2015 by a letter dated 6thMarch, 2015 by the Party's National Secretary General upon a complaint against him by the Party's National Chairman which letter did not disclose any allegation against him nor facts supporting any allegation. That based on the letter and his subsequent expulsion from the Party he was removed from office as Vice President of the Republic of Sierra by the President of Sierra Leone, Ernest Koroma and another appointed by the President in his stead.

That every effort to seek judicial redress failed even up to the Supreme Court of Sierra Leone. He therefore brought this action to challenge his removal and to seek among others a declaration that his removal as Vice President of the Republic of Sierra Leone by President Koroma on 17thMarch, 2015 is illegal, null and void and a violation of relevant sections of the Country's constitution and the African Charter on human and Peoples rights.

The Defendants on the other hand contended that the court lacks jurisdiction to hear and determine the Plaintiffs case on the grounds

that the matter filed before this court is substantially the same with the matter filed before the Supreme Court of Sierra Leone which was rejected and that secondly, hearing this matter will amount to sitting on appeal against the decision of the Supreme Court of Sierra Leone which this court lacks the power to do.

ISSUE FOR DETERMINATION

- *Whether from the totality of the facts put forward by the Applicant, this Court has the competence to adjudicate on this case as presented, as to make the relief claimed by the Applicant grantable.*

DECISION OF THE COURT

1. *The Court held it has jurisdiction to entertain the matter.*

2. *Reliefs (c), (e), (g), (h) and (i) cannot be granted within the ambit of the courts competence as most of them are predicated on the domestic law of the Defendant and their grant is likely to interfere in matters essentially within the domestic jurisdiction of the Defendant and may cause political chaos of unprecedented proportions.*

3. *The removal of the Applicant as Vice President by the Defendant on the 17th of March, 2015, violates Article 7 of the African Charter on Human and Peoples Rights, the Applicant not having exhausted his right to appeal as prescribed by Law before his removal.*

4. *Orders the Defendant to pay over to the Applicant all remuneration, prerequisites of office and other entitlements due to the Applicant from the date he was removed till the date his tenure of office is expected to end.*

5. *Costs awarded against the Defendants.*

JUDGMENT OF THE COURT

3. SUMMARY OF FACTS

The Applicant is a Community Citizen within the meaning of Article 1(1) (a) of the Protocol and the former Vice-President of the Republic of Sierra Leone. The Defendant is the Republic of Sierra Leone, a Member State of the Community and Signatory to the Revised Treaty of ECOWAS.

The Applicant alleges that the Defendant violated his right to protection and security of the law, right to due process of law, right to work, right to participate in government, right to personal safety and security and right to dignity as enshrined in the African Charter, International Covenant on Civil and Political Rights and the Universal Declaration.

The Applicant avers that he was duly elected as Vice-President of the Republic of Sierra Leone in August 2007 and re-elected in September 2012 as a candidate of the All People's Congress Party (APC) and at both times the running mate of Dr. Ernest Bai Koroma. That his appointment into office was done pursuant to section 54 of the 1991 Constitution of the Republic of Sierra Leone and section 45 of the Public Elections Act 2010.

That he was invited to appear before an investigation Committee constituted by the National Advisory Committee of the All Peoples' Congress party (APC) upon a complaint summited against him by the Chairman of the APC Party, wherein he gave his reaction to the Committee.

That on the 10th of March, 2015 the Applicant, while serving as Vice-President received a letter dated 6th March 2015 from the APC Party's National Secretary- General expelling him from the party upon the purported approval of the Party's National Advisory Council with effect from Friday 6th March, 2015 purported to be in accordance with Article 8 of the Party's Constitution. That the letter did not provide details of the

allegations made against the Applicant or the particular actions that amounted to the alleged grounds for his dismissal. Rather, the letter stated that based on the findings of the Investigation Committee, the Applicant had been dismissed as a member of the Party on grounds of behavior amounting to fraud inciting hate, threatening the personal security of key party officials, carrying out anti-party propaganda and engaging in activities inconsistent with the party's objectives.

In further response to his sudden expulsion from the APC, the Applicant invoked his right of appeal under article 8(i) of the Party's Constitution which provides that any member aggrieved by a decision of any of the organs of the party shall have the right of appeal within 30 days of the decision to the immediate higher organ of the party up to the National Delegate Conference. That the Applicant has neither been informed of any proceedings relating to his appeal nor was he called upon to participate in any appellate hearing or proceedings.

On the 14th March, 2015 the Applicant was forced to flee his home with his wife fearing for his life after his security officers were removed and replaced with five unknown armed men. This prompted the Applicant to put a call through to the United States Ambassador to Sierra Leone to convey that his house was under attack. However, the Sierra Leone government claimed that the Applicant was not in any danger and that soldiers only came to rotate his security team.

That in a press release dated 17th March 2015, it was announced on national radio and television that the Republic had relieved the Applicant of his duties and office as Vice-President by reason that the Applicant was no longer a member of a Political party in Sierra Leone and therefore did not have the continuous requirement to hold office as Vice President pursuant to section 41 (b) of the 1991 Constitution and because the Applicant sought protection from a foreign Embassy. The Applicant further states that he did not receive any official communication of his removal from office and same was unconstitutional and unlawful. In response to the press release, the Applicant issued a press release dated 18th March

2015 in which he contended that the President had no power to relieve him of the duties and office of the Vice President as section 55 of the 1991 Constitution makes provisions for the circumstances in which the office of the Vice President could become vacant.

That on the 19th March 2015, the President appointed one Mr. Bockarie Foh as Vice President of Sierra Leone pursuant to section 54(5) of the 1991 Constitution.

On the 20th of March 2015, the Applicant invoked the original jurisdiction of the Supreme Court of Sierra Leone for a determination of the Constitutionality of the President's action against him. Whilst the application was pending, the Applicant filed a motion seeking an interlocutory injunction to restrain the newly appointed Vice President from holding the office pending the determination of the originating application.

On the 15th of July 2015, the Court delivered its ruling refusing the Applicant's application.

The Applicant then approached this Court seeking the following reliefs;

a) A DECLARATION that the purported removal of the Applicant as the Vice President of the Republic of Sierra Leone by President Koroma on 17th March, 2015 is illegal, null and void as it violates sections 50, 51, 54 and 55 of the 1991 Constitution of the Republic of Sierra Leone and Article 7 of the African Charter on Human and Peoples Rights.

b) A DECLARATION that the purported replacement of the Applicant as Vice President of the Republic of Sierra Leone with Mr. Bockaries Foe by the Defendant on 19th March 2015 is illegal, null and void as it violates sections 50, 51, 54 and 55 of the 1991 Constitution of the Republic of Sierra Leone as well as Article 7 of the African Charter on Human and Peoples Rights.

c) A DECLARATION that the decision of the Supreme Court of Sierra Leone of 9th September 2015 to deny the Applicant the opportunity to exhaustively present his case without regard to section 15 (a), 23 (2) and 28 of the 1991 Constitution of the Republic of Sierra Leone and Rule 93 of the Supreme Court Rules of Sierra Leone is illegal. Null and void as it violates his Human Right to Fair Hearing guaranteed by Article 7 of the African Charter on Human and Peoples Rights.

d) A DECLARATION that the purported removal of the Applicant from office as the Vice President of the Republic of Sierra Leone by the Defendant on 17th March 2016 is illegal, null and void as it violates his Human Rights to Dignity, Work and to Participate in the Government of his country guaranteed by Articles 5, 15, 13 and 20 of the African Charter on Human and People Rights.

e) A DECLARATION that the invasion of the Applicant's house by armed soldiers on 14th March 2015 and the withdrawal of his personal security on the orders of the Defendant is illegal, null and void as it violates his human right to personal safety and security guaranteed by Article 6 of the African Charter on Human and Peoples Rights; Article 3 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights.

f) An ORDER directing the Defendant to pay special, general and exemplary Damages of One Hundred and Thirty Million United States Dollars (US$ **130.000,000.00) or** any other amount in the wisdom of this Court, to the Applicant in the Government of his Country.

g) An ORDER directing the Defendant to pay Damages of Anxiety, Psychological Trauma, Deterioration in Health, and Embarrassments due to withdrawal of income and benefits;

and given that the Applicant's life, work and activities were constantly monitored and disrupted, such that the gathering of evidence for this case was extremely arduous, the Applicant prays this Court to award the amount of Seventy Million United States Dollars (US $ **70,000,000.00)** or any other amount in the sound discretion of this Court.

h) An ORDER directed at the unlawfully appointed Vice President of Sierra Leone, Victor Bockarie Foh, to vacate the post of Vice President forthwith and to leave same vacant.

i) An ORDER directed at the Republic of Sierra Leone to allow the Applicant to immediately resume and enjoy his office, duties, remuneration, and perquisites of the office of Vice President of the Republic of Sierra Leone.

j) An ORDER that all remuneration and perquisites of the office of Vice President of the Republic of Sierra Leone be paid to the Applicant from the date of his alleged removal, to the date of his resumption of office, and subsequently thereafter.

k) In ACCORDANCE with Article 69 of the Rules of this Court, we implore this Honourable Court to award costs in favor of the Applicant to cover all the travel and subsistence allowances of the Applicant. Agents, and Counsel in the course of this case, beginning from travels to gather evidence, through those to engage and brief Counsel, to those for the purposes of prosecuting this case (including the cost of his lawyers), and estimated at Ten Million United States Dollars (US $ **10,000,000.00).**

The Defendant wrote a letter to the Court wherein it stated that the Constitution of Sierra Leone 1991, recognizes, guarantees and protects the 'Fundamental Rights and Freedoms of individuals' and confers original jurisdiction on the Supreme Court of Sierra Leone, to hear and determine applications relating to violations of human rights.

That the application filed by the Applicant alleging violations of human rights is essentially the same as the application filed by him in the Supreme Court of Sierra Leone wherein judgment was delivered against the Applicant. Therefore, hearing this application will amount to sitting on appeal over the decision of the Supreme Court of Sierra Leone.

The Defendant further submitted that this court lacks jurisdiction to entertain this action as it is not an appellate court and thus cannot review decisions of the Supreme Court.

4. ANALYSIS BY THE COURT

From the submissions of the Applicant and the Defendant who merely raised objections and took no further steps, the following issues call for determination;

1. **Whether from the totality of facts put forward by the Applicant, this Court has the competence to adjudicate on this case as presented, as to make the relief claimed by the Applicant grantable.**

The application before this Court is premised on alleged violations of the Applicant's rights to fair hearing to participate in Government, right to due process of the law, right to protection, safety and security, and right to dignity under the African Charter on Human and Peoples Rights, Inten1ational Covenant on Civil and Political Rights and Universal Declaration on Human Rights. Furthermore, the Applicant contends that the Supreme Court of Sierra Leone's decision condoned the various violations of his rights as enshrined in its Constitution as well as the above international instruments.

The Defendant while refusing to submit to the Courts jurisdiction maintains that this court lacks the competence to adjudicate on decisions delivered by domestic courts of Member States.

Article 9(4) of the 2005 Supplementary Protocol states that:

> "*The Court has jurisdiction to determine cases of violation of human rights that occur in any member state"*

Article 10(d):

> *Access to the court is open to the following:*
>
> *(d) Individuals on application for relief for violation of their human rights; the submission of application of which shall;*
>
> *not be anonymous; nor*
>
> *be made while the same matter has been instituted before another international court for adjudication.*"

This Court has held in a plethora of cases that for its jurisdiction to arise, the alleged violation must be founded on an International or Community obligation of the State.

In **HISSEIN HABRE V. REPUBLIC OF SENEGAL (2010) CCJELR**, this Court held that in determining whether it has jurisdiction, it shall examine:

- If the issues submitted before it deals with a right which has been enshrined for the benefit of the human person;
- Whether it arises from International or Community obligations of the State complained of, as human rights to be promoted, observed, protected and enjoyed;
- Whether it is the violation of that right which is being alleged without much ado, the objection of the Defendant is unfounded as the Applicants application hinges on his right to participate in the government of his Country granted by the African Charter.

The gravel of the Applicant's application is his alleged wrongful removal as a party member based upon which he was removed as Vice-President. The said removal was as a result of a purported letter from the APC party's National Secretary General expelling him from the party on grounds of behavior amounting to fraud, inciting hate, threatening the personal security of key party officials, carrying out anti-party propaganda and engaging in activities inconsistent with the party's objectives. That the removal was carried out without regard to due process of law, failing to avail him the opportunity to exhaust his right of appeal at the Party level which violates his Civil and Political Rights.

The African Charter on Human and Peoples 'Rights and other international instruments invoked by the Applicant are indeed legal instruments the Court refers to when considering cases of human right violations that occur in any Member State. Through its constant and abundant jurisprudence, the Court has severally declared that once the Plaintiff has raised an element of Human Rights violation, which falls within any human right protection instruments in any ECOWAS Member State, it suffices for the court to establish its jurisdiction which shall not be tied to whether the allegations are true or otherwise.

The right of a person to participate in the government of his or her State is a recognized and enforceable human right. Article 13 of the African Charter on Human and Peoples' Right provides that;

> **"Every citizen shall have the right to participate freely in the government of his Country, either directly or through freely chosen representatives in accordance with the provisions of the law."**

The law includes, but is not limited to the Constitution but also the domestic legislation of a State Party. This Provision suggest that the right to participate in government is not absolute. This right can be encroached upon in accordance with the law. In the instant case, the Plaintiff being a citizen and a member of the APC Party is bound by the Constitution of

the Party as well as the Constitution of Sierra Leone. Where the Constitution of the Party makes provision for procedure for removal of a member from the Party, the executive of the party as well as any me1nber of that Party is bound to comply with its provision.

Section 54 (2) (b) of the Constitution of Sierra Leone provides that:

> **"a person shall not be qualified to be a candidate for the office of Vice-President unless he has the qualifications specified in Section 41."**

Section 41 thus provides:

> No person shall be qualified for election as President unless he:
>
> (a) is a Citizen of Sierra Leone;
>
> (b) is a member of a political party;
>
> (c) has attained the age of forty years; and
>
> (d) is otherwise qualified to be elected as a Member of Parliament.

Indeed, Allegations of violation of human rights by an Applicant is sufficient to invoke the jurisdiction of this Court. This is distinct from the issues of the veracity of the allegation(s).

The Supreme Court of Sierra Leone in interpreting Section 54(2)(b) and 41 of the Constitution above held that the President is empowered to relieve the Vice-President of his office and duties, in circumstances where the Applicant as sitting Vice-President has lost one of the qualifying require1nents for holding his office. The Court further held that the supreme executive authority of the President includes a power to relieve the Vice-President of his office and duties in circumstances where the procedure set out in Section 50 and 51 of the Constitution are inapplicable.

Section 8(i) of the APC Constitution relied upon by the Applicant provides:

> "*any member aggrieved by a decision of any of the organs of the party in pursuance of Article 8 of the Constitution shall have the right of appeal within 30 days of the decision to the i1nmediate higher organ of the party in that successive order up to the National Delegate Conference provided that the decision of the National Delegate Conference shall be final.*"

By virtue of section 8 (i) above, the Applicant has 30 clear days from the date which the decision was reached to exercise his right of appeal.

Also, it has been categorically stated that the decision of the National Delegate Conference shall be final with respect to sanctions imposed on a party member.

From the facts before this Court, the decision to remove the Applicant was reached on the 6th of March 2015. By implication, the Applicant had 30 days within which to exercise his right of appeal being dissatisfied with the decision of the NAC.

Appendix 7 attached to the Applicant's application is a notice of appeal dated the 26th of March 2015 which he served on the NDC. This the Defendant did not deny. It can therefore be inferred that the Applicant's right of appeal was still valid and subsisting as at the 26th of March 2015 when the President allegedly removed him from office as Vice-President. The Defendant has not led any evidence either challenging the validity of the said appendix 7 or to prove that the appeal was duly considered or even attach the final findings of the matter subject to appeal.

Relying on the Provisions of Article 8 (i) of the Party's Constitution, the right of appeal can only be said to have been exhausted, terminated or waived on the 4th of April 2015 or thereabout.

It appears that at the time of the election of the Vice- President as of the Republic of Sierra Leone, he satisfied the require1nent of domestic law as conceived by the African Charter.

Aside from the Constitution, the provisions of the Constitution of the Political Party under which the Applicant contested the election is relevant in the determination of the questions of law and facts raised by the Applicant.

It is obvious that the National Delegates Conference of the Applicants' Party, the platform he contested election is the final appellate authority with respect to challenging the decision of his Political Party.

This Court has held that it does not sit on appeal over decisions of National Courts. The Constitutionality or otherwise of the act of the President in this matter is not in dispute. However, the President's action was as a result of the report by the NAC which by virtue of the Party's Constitution is not final.

The powers of the President to remove and reappoint another person into the office of Vice-president though had arisen from the 6th of March 2015, it did not become exercisable i.e. it was not ripe for execution. This is because the Plaintiff had the right to exhaust his right of appeal before the NDC of which the decision shall be final. In that regard, the action of the President ought to have been carried out after the outcome of the Appeal. Consequently, the act of the President was premature and in violation of the Applicant's right to fair hearing.

There is a thin divide between reviewing the decisions of National Courts and hearing matters that flow from the decisions which allegedly poses questions of human right violation. The Applicants allegation on violations of his right to fair heating, right to work, right to participate in government and right to dignity are inter-twined to his claim on the unconstitutional removal from office by the President of Siena Leone.

On his allegation of fair hearing, the exhibits annexed shows that the Applicant was indeed heard by the National Advisory Council (NAC) of the APC Party, however the Applicant still had his unexhausted right of appeal. Therefore, the allegation of fair hearing in this regard is founded.

On the allegation of deprivation of the right to fair hearing before the Supreme Court in Sierra Leone, the Applicant failed to prove the alleged violation. In appendix 39 dated the 1st of June 2015, which precedes appendix 37, the Supreme Court granted leave to the Applicant pursuant to Rule 39 of the Supreme Court rules 1982 to amend his statement of case, if he so wishes, to reflect the additions he has clearly made to the same by way of his supplemental affidavit. The Court further ordered that the said affidavit **shall** be filed and served not later than Thursday 4thJune 2015. If the Applicant fails to file and serve such amended statement of case, the said supplemental affidavit **shall** not be used by any party in the proceedings.

Court orders are binding on parties in each particular case and should not be treated lightly. In interpreting the word "shall" from the above orders, the Court made it mandatory for the amendments to be filed not later than 4thof June otherwise it shall not be admitted.

Appendix 40 attached by the Applicant shows that, as at the 4thof June 2015, which was the deadline for the Applicant to file his amended affidavit if any, conversations were still ongoing between him and his counsel. A party who seeks to diligently prosecute his case even when his counsel appears to be unreceptive, has every right to immediately debrief and inform the court with the minimum of delay.

The Applicant in the instant case knowing the implication of flouting Court Orders even as he indicated in his letter of 8thJune 2015, debriefing his Counsel treated the whole situation with laxity. Applicant had the right to appear before the Court on the 4th of June to inform the court of his willingness to file an amendment as well as his Counsel's refusal to act in accordance with his wishes and accordingly file his application to debrief

his counsel. This the Applicant failed, refused and or neglected to do until the 8th of June 2015, four (4) days after the time limit had elapsed.

In view of the foregoing, the Applicant's claim on the Supreme Court's refusal to allow the amendment of his case is unsubstantiated as he was accorded reasonable tune within which to sa1nend his case. Also, Applicant was ably represented by counsel of his choice and his failure to timeously debrief and/or inform the court of his willingness to discontinue with the said counsel, amounts to negligence on his part and therefore his claim on fair hearing in this regard is unfounded.

The Applicant alleges that his right to protection, safety and security of the law has been violated by the Defendant's substitution of his security orderlies. The Applicant failed to establish how this action violated his alleged rights especially when theDefendant claims that change of guards is a normal course. In his application, the Applicant admitted that he voluntarily sought an asylum at the US Embassy without proving any threat that warranted the need for an asylum. The said security men were only substituted which does not suggest any threat to his life or his person as alleged.

It is trite law that the burden of proof lies on he who alleges the existence of a claim. See **FALANA & ANOR V. REPUBLIC OF BENIN JUD NO: ECW/CCJ/JUD/02/12.**

The burden of proof therefore lies on the Applicant to prove that he was under fear of his life or any form of threat which would have arisen from the substitution of guards.

This Court has indicated a reluctance to entertain actions of rights abuse which will require its consideration of 1natters not within its competence and has also refused to assume jurisdiction where the Applicant has not defined the exact violation alleged or specified the particular right allegedly violated.

In SIKIRU ALADE V. FEDERAL REP. OF NIGERIA (2012) unreported, this Court reiterated its position in **MUSA LEO KEITA V. MALI (2004-2009) pg. 72 para 26** that it does not compose itself as an appellate court over decisions of National Courts.

On the decision of the Supreme Court of Sierra Leone, this Court lacks the competence to challenge the constitutionality or otherwise of the powers of the president to remove the Applicant from office as Vice-President. This powers, to the mind of the Court has been rightfully exercised as it is evident from the exhibits annexed herein that the Applicant had challenged the constitutional powers vested on the President and the national court in its decision overruling the claim of the Applicant held that by virtue of the Constitution, the President had the powers to remove the Applicant from Office. Consequently, hearing the application in this regard would amount to sitting on appeal on the final decision of the Supreme Court of Sierra Leone.

In **MADAM ISABELLE MANAVI AMENGANVI V. REP. OF TOGO (2012)CCJELR** the Court held that it cannot go beyond its scope of competence to adjudicate on the reinstatel nent of the Applicants as that would amount to annulling the decision made by the Constitutional Court, an act which would be outside the purview of the Community Court of Justice.

On the validity of the act of the President in removing the Applicant from office, this court holds that the act of the President was precipitate without according the Applicant the opportunity to exhaust his right to appeal available under the APC Party Constitution.

5. ON ABUSE OF COURT PROCESS

The Defendant alleges that the process filed by the Applicant amounts to an abuse of court process. The Defendant filed a letter stating that it will not submit itself to the jurisdiction of this Court. Assuming without conceding that it amounts to an abuse of court process, the court would

always at first instance ascertain whether or not it has jurisdiction. Even where the Defendant does not put up a defense at all, the court can exercise its powers to enter judgment in default of appearance. The Court holds fast to the trite position of our judicial system that the Court must eschew technicalities at all times and determine to do substantial justice.

However, one may ask "apart from the conclusions above, is there any other plank to justify this application as to grant some of the remedy sought. In approaching this question based on the facts of the case, there appears to be. The right to fair hearing is a fundamental human right recognized by international law. Apart from the concept of natural justice which encapsulates two principles namely, "*audialterem partem*" (meaning hear the other side) and "*nemo judex impropria causa sua*", (A person cannot be a judge in his own cause). The right also extends the entitlement to exhaust the process of appeal especially where one is provided for by law. Accordingly, it will be a breach of the right to fair hearing where a decision is taken against a person before he exhausts his right of appeal.

From the facts and evidence presented before the Court, one of the basic requirements of the Defendant's constitution for standing election is that the prospective candidate must be a member of a political party. The Applicant satisfied this condition by being a member of the APC on whose platform he contested and won the position of Vice-President, a running mate to the President.

Following his expulsion from the APC, he was removed from office as the Vice- President by the President apparently on the ground that he no longer belongs to any Political Party, an important requirement for vying for political office and apparently for retaining the position.

However, as stated earlier, the constitution of the APC on whose platform he contested the election provides as follows;

> "Any member aggrieved by a decision of the organs of the Party in pursuance of Article 8 of the Constitution shall have the right of appeal within 30 days of the decision to the immediate and higher organ of the Party in that successive order up to the National delegate Conference provided that the National Delegates Conference shall be final".

As earlier noted, from the facts before the Court, the decision to remove the Applicant from 1nembership of APC his political Party was taken on the 6th of March, 2015. It follows that he is entitled to appeal to the National Delegates Conference to contest his removal within 30days. The Applicant filed his notice of Appeal on the 26th of March, 2015 (Appendix 7) the same day that the President removed him from office as Vice-President, apparently following his dismissal from APC. As at that date the Applicant's right of appeal was still subsisting.

Accordingly, this ground alone, without more is sufficient to void the Applicant's removal from office.

In all circumstances, it is always required that the law should be allowed to run its course. The exercise of power of removal or any other exercise of power for that matter should be circumscribed with the requirement of due process, and this has not been satisfied in this particular case. Accordingly, while not denying the right of the President the power to remove the Applicant from office as the Vice-President, this power must be exercised in accordance with the provision of the law. Accordingly, in the instant case, the removal of the Applicant as the Vice-President of the Defendant State at a time he had not exhausted his right of appeal is a violation of his right to participate in the government of his State as well as the right to fair hearing as guaranteed under Article 7 and 13 of the African Charter on Human and Peoples' Rights.

From the reliefs sought by the Applicant, it appears that 1nost of them are stale and cannot be granted especially since they are completed Acts.

6. DECISION

The Court,

Adjudicating in a public sitting after hearing the parties in the last resort and after deliberating in accordance with the law:

7. AS TO JURISDICTION

1. The Court has jurisdiction to entertain the suit

8. AS TO THE MERITS

DECLARES THAT:

1. Reliefs (c), (e), (g), (h), and (i) cannot be granted within the ambit of the Courts competence as most of them are predicated on the domestic law of the Defendant and their grant is likely to interfere in matters essentially within the domestic jurisdiction of the Defendant and may equally cause Political chaos of unprecedented proportions.

2. The removal of the Applicant as the Vice-President of the Defendant by the President on the 17th of March, 2015, violates Article 7 of the African Charter on Human and Peoples' Right, the Applicant not having exhausted his right of appeal as prescribed by law before his removal.

3. Orders the Defendant to pay over to the Applicant all remuneration, prerequisites of office and other entitlement due to the Applicant from the date he was re1noved till the date his tenure of office is expected to end.

9. AS TO COSTS

- **Costs** are hereby awarded against the Defendants.

DATED AT ABUJA THIS 27TH DAY OF NOVEMBER, 2017.

THE FOLLOWING JUDGES HAVE SIGNED THE JUDGMENT:

- **Hon. Justice Hamèye Founé MAHALMADANE** - *Presiding.*
- **Hon. Justice Friday Chijioke NWOKE** - *Member.*
- **Hon. Justice Alioune SALL** - *Member.*

Assisted by:
Athanase ATANNON (Esq.) - *Deputy Chief Registrar.*

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