COMMUNITY COURT OF JUSTICE, ECOWAS

(2014)

LAW REPORT

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

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

HOLDEN AT ABUJA, NIGERIA

THIS 28TH DAY OF JANUARY, 2014

SUIT NO: ECW/CCJ/APP/03/09
JUDGMENT NO: ECW/CCJ/JUD/01/14

BETWEEN
PTE ALIMU AKEEM - *PLAINTIFF*

AND
FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE MEDEGAN NOUGBODE** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES

1. **OLUSOLA EGBEYINKA (ESQ.)** - *FOR THE PLAINTIFF*
2. **MUHAMMED IBRAHIM SANNI** *AND*
   MUSA YAKUBU (SAN) - *FOR THE DEFENDANT*

Jurisdiction - Admissibility of application - Human rights violation - Arbitrary arrest and detention - Right to dignity - Personal liberty - Torture - Local remedies - Res judicata - Burden of proof

SUMMARY OF FACTS

By an Application dated 6th of February 2009, PTE Alimu filed an action against the Federal Republic of Nigeria on arbitrary detention which constitutes a violation of his fundamental human rights as guaranteed under Article 5 and 6 of the African Charter on Human and People's Rights.

The Plaintiff states that he was arrested alongside four other persons upon an allegation of a missing rifle in one General Malu's house in Gboko, Benue State. Upon further investigation, reports revealed that he was not involved in the case. He was however detained from the 15th of May 2009, being the date of the arrest, for a period of 2 years and 6 months after which he was brought before the Court Martial.

The Plaintiff challenged his detention before trial and further alleged that his right to personal liberty had been violated. That the physical torture inflicted on him while he was in military custody caused him psychological trauma and long lasting agony resulting in the deterioration of his health and violation of his right to human dignity.

The Defendant challenged the jurisdiction of the Court to entertain the suit. That the Applicant failed to use other channels of redress available to him and the ECOWAS Court cannot act as an Appellate Court to interfere with the decision of the domestic Court. That the charges against Alimu are criminal in nature thus only subject to the jurisdiction of a domestic Court.

***On the merit**, the Defendant states that the Applicant was accused of negligence in the performance of his duties and theft of an official rifle belonging to the Army while he was on guard duty around 13th November 2006. That he was arraigned before the Court Martial and sentenced to a term of imprisonment, which was awaiting confirmation by the appropriate authority when he brought the case before this Court.*

The Defendant states further that by virtue of the Section 148 of the Armed Forces Act, a member of the armed forces accused of a crime may be detained in military custody while awaiting a confirmation of the sentence imposed on him.

LEGAL ISSUES:

1. *Whether the Court has the competence to entertain this suit as constituted and conceived?*

2. *Whether the exhaustion of local remedies is a bar to the jurisdiction of this Court?*

3. *Whether from the facts presented, the Defendant has violated the Plaintiff's rights as alleged?*

DECISION OF THE COURT

The Court held:

1. *That it has jurisdiction to adjudicate on a matter once a case brought before it substantially seeks to ask the Court to find whether or not there is an occurrence of human right violation.*

2. *That the Application brought before this Court is quite different from the proceedings before the Court Martial. The present action is admissible.*

3. *That the exhaustion of local remedies is not a condition for admissibility of Applications of human rights violations before this Court.*

4. *That the Plaintiff's detention was arbitrary and violates Article 6 of the African Charter on Human and Peoples' Rights having served his sentence beyond the number of years imposed on him.*

5. *That it cannot uphold a blame against a Member State for acts of torture on the basis of mere allegation in the absence of convincing proof.*

6. *The Court awarded the sum of N5,000,000.00 (Five Million Naira) Only to the Plaintiff as compensation for said violations.*

JUDGMENT OF THE COURT

THE PARTIES

1. The Applicant, Alimu Akeem, is a soldier in the Nigerian Army. He is a member of the 72 Para Battalion of the Nigerian Army, Makurdi, in Benue State. At the time the proceedings were instituted, he was attached to General Victor Malu (rtd.), as a security detail. He is represented by Sola Egbeyinka as Lawyer and by Falana & Falana's Chambers as Counsel.

2. The Defendant is the Federal Government of Nigeria, represented by Mr. G. F. Zi.

PROCEDURE

3. By Application registered at the Registry of the Court on 6 February 2009, Alimu Akeem, through his Counsel, Sola Egbeyinka Esq., lawyer registered with the Nigerian Bar Association, brought his case before the Court complaining against the Republic of Nigeria, for arbitrary arrest since 13 November 2006, constituting violation of Articles 5 and 6 of the African Charter on Human and Peoples' Rights.

4. He sought the following orders from the Court:

   - A **declaration** that the detention of the Plaintiff since 13 November 2006 is illegal and inconsistent with the Constitution of the Federal Republic of Nigeria, in that it violates the Plaintiff's fundamental rights to human dignity and personal liberty guaranteed by Section 35 of the Constitution of the Federal Republic of Nigeria and Article 6 of the African Charter on Human and Peoples' Rights;

   - A **declaration** that the physical torture inflicted on the Plaintiff in the military custody of 72 Para Battalion of the Nigerian Army, Makurdi, Benue State, Nigeria by the agents of the Defendant

is illegal and inconsistent with the Constitution of the Federal Republic of Nigeria in that it violates the Plaintiff's fundamental right to personal liberty guaranteed by Section 34 of the Constitution of the Federal Republic of Nigeria and Article 5 of the African Charter on Human and Peoples' Rights;

- **Payment** of Ten Million Naira (N10,000,000) by the Federal Republic of Nigeria as compensation for violation of the Plaintiff's rights to human dignity and personal liberty.

5. The originating application was served on the Federal Republic of Nigeria on 11 February 2009, at the Office of the Attorney General and Minister of Justice, at Abuja.

6. The Federal Republic of Nigeria did not appear in court on 23 September 2009 and has not filed a Defence till date. Plaintiff Counsel, therefore applied for judgment by default and asked for time to formalise his application to that effect in accordance with Article 90(1) of the Rules of the Court.

7. On 24 September 2009, upon application by Mr. Muhamed Ibrahim Sanni, lawyer to the Army of the Federal Republic of Nigeria, the Court Registry served the said Army with the initiating application.

8. On 28 September 2009, on behalf of the Applicant, Mr. Samuel Ogala, lawyer to Falana & Falana Chambers, lodged at the Registry, an application dated the same day asking for a judgment by default. The Application was served on Counsel for the Nigerian Army on 29 September 2009.

9. On 2 October 2009, Counsel for the Army lodged at the Court Registry applications requesting (1) that the Army of the Federal Republic of Nigeria be allowed to join as an interested party, and (2) that their Defence be admitted.

10. On 10 November 2009, the Court Registry received an application from Mr. G. F. Zi, Counsel for the Federal Republic of Nigeria, from the Department of Civil Litigation and Public Law at the Federal

Ministry of Justice asking the Court to extend the time for lodgement of the Defence, and to declare the Defence accompanying the Application as duly filed, and also adopt any other decision it may consider appropriate. In the Defence accompanying the application for extension of time, the Army raised the issue of lack of jurisdiction of the Court and prayed the Court to dismiss the initiating application as ill founded.

11. The Court heard the Parties on 11 November 2009 and on 12 May, 29 September and 1 December 2010, on the various Applications brought by them.

12. On 1 June 2011, the Court made an order declaring inadmissible the Application for joinder filed by the Army, admitted the Statement of Defence by the Federal Republic of Nigeria and fixed 1 July 2011 for lodgment of the Reply, and 1 August 2011 as the date for lodging the Rejoinder.

13. On 1 July 2011, the Federal Republic of Nigeria filed additional pleadings amending its Statement of Defence.

14. On 10 November 2011, Plaintiff Counsel filed at the Court Registry his response to the amended Statement of Defence.

15. Upon leave of the Court, granted at the hearing of 24 January 2012, the Federal Republic of Nigeria lodged on 16 February 2012, the final orders it sought from the Court and Plaintiff Applicant responded thereto by way of final written submissions lodged on 9 March 2012.

16. The Court heard the Parties on the merits of the case on 20 March 2012.

AS TO FACTS AND LAW

- **Regarding the Applicant**

17. The Applicant contended that on 13 November 2006, he was arrested along with four (4) other persons on the allegation that a rifle was

missing in General Malu's house in Gboko, Benue State. He affirmed that following the investigations conducted for the purposes of shedding more light on the matter, there was no trace of evidence as to his involvement in case, and yet in spite of that, he was detained from the date of his arrest to 15 May 2009, when he was brought before the Court Martial on two charges: theft of property belonging to the Army, and for abandoning his duty post during official working hours. He alleged having been detained without trial for two (2) years and six (6) months, upon the mere fact that he was indicted by a native doctor. From these facts, he alleged violation of Articles 9, and 6 African Charter on Human and Peoples' Rights.

18. He relied on the new Articles 9(4) and l0(d) of the Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, and contended that the Court has jurisdiction to adjudicate on the case,and also that his Application is admissible. He notably maintained that exhaustion of local remedies is not a condition for admissibility of applications for human rights violation before this Honourable Court. In support of these arguments, he cited several judgments, notably the judgments on the following cases: **Olajide Afolabi *v.* Federal Republic of Nigeria**, 27 April 2004; **Alhaji Hamman Tidjani *v.* Federal Republic of Nigeria and Others,** 28 June 2007, **Chief Franck Ukor *v.* Rachad Laleye and Another**, 2 November 2007, **Etim Mosses Essien *v.* Republic of Gambia**, 29 October 2007. He affirmed that the *raison d'etre* and ultimate objective of the procedure initiated before the Honourable Court is different from that of the proceedings instituted against him on the basis of the charges made against him. The Applicant further argued that the action before the ECOWAS Court of Justice concerns violation of his human rights, as arising from his arrest, detention and torture before and after his trial by the Court Martial. He made reference to the decision of the Supreme Court of Nigeria in the case concerning **Federal Republic of Nigeria and Another *v.* Lord Chief Udensi Idowu** (2003) 45 WRN 27 in support of his affirmation.

19. The Applicant further alleged violation of his right to personal liberty as guaranteed by Article 6 of the African Charter on Human and Peoples' Rights, for, according to him, his detention before trial is in disregard for Article 35(4)(5) of the 1999 Constitution of the Federal Republic of Nigeria as amended. He averred that the fact that he was manhandled when in military custody constitutes physical torture, which brought upon him psychological trauma and long-lasting agony, resulting in the deterioration of his health and violation of his right to human dignity.

Regarding the Federal Republic of Nigeria

20. Counsel for Federal Republic of Nigeria averred that the Applicant was accused of negligence in the performance of his duties and theft of property belonging to the Army, notably, theft of an official rifle while he was on guard duty around 13 November 2006 and was attached to General S. V. L. Malu (Rtd.) as a security detail at Makurdi. As a result, he was arraigned before the 82 Division Enugu General Court Martial and sentenced to a term of imprisonment.

21. Counsel for the Defendant State (Federal Republic of Nigeria) further averred that the sentence of the Applicant was awaiting confirmation by the appropriate authority when he brough this case before the Honourable Court. That indeed, Article 35(1) of the 1999 Constitution of the Federal Republic of Nigeria as amended allows preventive detention in execution of a sentence or Order of Court in respect of a criminal offence for which an individual has been found guilty. Moreover, in regard to Section 148 of the Armed Forces Act *[Armed Forces Act Cap A20, Laws of the Federation of Nigeria (LFN)]*, a member of the Armed Forces accused of a crime may be detained in military custody while awaiting confirmation of the sentence imposed on him. He therefore concluded that Mr. Alimu Akeem was detained in accordance with the Law in force in the Federal Republic of Nigeria. He affirmed that Alimu Akeem should have made the best use of the channels of redress provided by the said Law if he deemed the Army of the Federal Republic of Nigeria had caused him any prejudice.

22. Counsel for Federal Republic of Nigeria contended further that the Law in force in the Federal Republic of Nigeria and the terms and conditions obtaining in the Army are incumbent upon the Applicant as a member of the Armed Forces. He maintained that Alimu Akeem, as a public officer of the Federal Republic of Nigeria, is subject to the Law on the protection of public officers [Public Officers Protection Act, Cap. P41, LFN] and that in regard to Section 2(a) supra, he should have filed his case within three (3) months after the accrual of cause of action. That the Applicant is therefore bound to observe the condition precedent required by Section 148 of the Armed Forces Act before instituting the suit before the Honourable Court.

23. The Defendant State argued that in exercising its jurisdiction provided for in the new Article 9 of the Supplementary Protocol on the Court as amended by the 19 January 2005 Supplementary Protocol, the Honourable Court must expressly take account of the domestic Laws of Nigeria, notably the ones cited above.

24. Counsel for the Federal Republic of Nigeria alleged that since the Applicant was sentenced by a competent Nigerian court for the offences brought against him, the ECOWAS Court cannot act as an Appeal Court and thus interfere with the decision made by the domestic court of a Member State. He cited the case law of the Court in relation to the judgment on the case concerning **El-Hadji Mame Abdou Gaye *v.* Republic of Senegal**, 26 January 2012. He further asserted that because the charges brought against Alimu Akeem are criminal in nature, only a national criminal court or tribunal has jurisdiction to adjudicate on the matter. He referred to the case law of the Court in connection with the judgment relating to **Starcrest Investment Ltd. *v.* President of the Commission and 3 Others**, 8 July 2011.

25. Besides, as regards violation of Article 12(1) of the African Charter on Human and Peoples' Rights, which provides that *"Every individual shall have the right to freedom of movement and*

residence within the borders of ***a State provided he abides by the law*** *(emphasis was made by said Counsel)"*, he alleged that by committing the offences brought against him, for which his guilt is established, the Applicant did not respect the laws of Nigeria and therefore his Application must be deemed inadmissible.

26. Moreover, he argued that the burden of proof lies with the Applicant and that he did not bring a single piece of evidence in support of his allegations.

27. He concluded that the Court has no jurisdiction to adjudicate on the Application brought by Alimu Akeem and prayed the Court to dismiss his requests together with his Application, for lack of jurisdiction of the instant Court and on the ground that his applications are ill founded.

ANALYSIS OF THE COURT

28. The Court notes that the Applicant was arrested on 13 November 2006 with four other persons on the ground that he was on guard duty at the home of the retired General Victor Malu, and that a rifle had disappeared in the home of the said General. The Court notes also that the Applicant was detained till 15 May 2009, the date on which he was finally brought before a court martial at Enugu on two charges: (i) theft of property belonging to the Army, and (ii) vacation of duty post during official working hours. The said court martial sentenced him to eighteen (18) months imprisonment on the first charge and three (3) months imprisonment on the second charge. The report of the court martial dated 3 September 2009 made mention of sentencing procedures which are subject to confirmation by the Chief of Army Staff.

29. The Court notes that on the day on which it is delivering its judgment, the Federal Republic of Nigeria has not yet produced the decision for confirmation of the sentence and the Applicant still remains in prison.

30. The Court notes that Alimu Akeem alleges violation of Articles 5 and 6 of the African Charter on Human and Peoples' Rights, on one hand, and seeks a Ten Million Naira reparation, on the other hand, and he also asks the Court to order the Federal Republic of Nigeria to terminate the "oppressive, uncivilized and barbaric" attitude.

31. On the other hand, the Federal Republic of Nigeria avers lack of jurisdiction of the Court on the grounds that the Applicant, by virtue of his status as a soldier of the Nigerian Army, is bound to follow the procedure provided under Sections 148, 178 and 183 of the Armed Forces Act. The Federal Republic of Nigeria further contends that Alimu Akeem must exhaust the remedies provided for by the said law before taking any other step, and that as a public officer he had three months at his disposal to appeal the decision, under Section 2(a) of the Public Officers Protection Act.

32. The Federal Republic of Nigeria maintains moreover that the Application is inadmissible on the ground that the arrest and detention of the Applicant are lawful. It asserts notably that the Applicant was arrested and tried in line with a criminal procedure. Besides, the Federal Republic of Nigeria argues that the Honourable Court cannot adjudicate as an appeal court on a judgment delivered by a domestic court of a Member State.

Jurisdiction of the Court

33. In line with its consistently held case law, the Court has jurisdiction in a matter, once the case brought before it substantially seeks to ask the Court to find that there is an occurrence of human rights violation. To that end, it suffices that a human rights violation be contained in the application. Now, in the instant case, the Applicant Alimu Akeem cites violation of human rights as enshrined in Articles 5 and 6 of the African Charter on Human and Peoples' Rights, an instrument the Federal Republic of Nigeria is party to. Consequently, the Court declares that it has jurisdiction to adjudicate on the Application of Mr. Alimu Akeem.

Admissibility of the Application

34. Evidently, all the arguments brought forth by the Federal Republic of Nigeria on their merits aim at contesting the admissibility of the Application filed by Alimu Akeem. The Court will now examine each of these arguments, namely (i) that the Applicant is under obligation to have recourse to the preliminary procedures made available to him under the domestic law of Nigeria (ii) that the proceedings instituted against him is of a criminal nature, and (iii) that the Court has no jurisdiction to re-examine decisions made by the national courts.

(i) As to obligation to have recourse to preliminary procedures made available by the domestic law of Nigeria

35. The Federal Republic of Nigeria relies essentially on the provisions of Sections 148, 178 and 183 of the Armed Forces Act. Section 148 sanctions a criminal procedure before the military courts. Section 183 complements it and provides for appeal mechanisms. As for Section 178, it provides for the Armed Forces personnel, administrative channels of redress against decisions of superior officers. Evidently, the procedures provided for in Sections 148 and 178 are not of the same nature.

36. The Court will therefore examine this point of law regarding inadmissibility in the light of the provisions of Sections 148 and 183 and other relevant Sections of the Armed Forces Act, as applicable to criminal proceedings before Nigerian martial courts.

37. In that regard, the Court notes that in line with Article 148 (3), the findings of the Court Martial shall become final only when they are confirmed by the competent authority. Thus, in as far as that confirmation was not made, the accused could not appeal his case or apply for review. Now, the Court finds that if the details provided by the Parties indicate that the matter was brought before the authority that is competent to confirm the findings, those same details do not

indicate however that the required confirmation which would render the Court Martial's decision as final, was made; and this vacuum persisted for more than three years. The Court therefore holds that the Applicant was not availed the opportunity for seeking redress, as referred to above.

38. Under such circumstances, the Court adjudges that Alimu Akeem was not in a position to have recourse to or to exhaust the preliminary procedures made available to him by the domestic laws of Nigeria. Consequently, the plea-in-law regarding non utilisation of the national avenues for redress, is inoperative. That plea-in-law is thus dismissed.

39. Furthermore, it is consistently held that exhaustion of local remedies is not a condition for the admissibility of applications for human rights violation before the instant Court (see Ruling on case concerning **Professor Etim Moses *v.* Republic of Gambia and University of Gambia**, 14 March 2007, §27; and Judgment on case concerning **Hadijatou Mani Koraou *v.* Republic Niger**, 27 October 2008, §49-53).

(ii) As to the criminal nature of the proceedings instituted against Alimu Akeem

40. The Court notes that it is within the jurisdiction of the criminal martial court before which Alimu Akeem appeared, to determine whether he is guilty or not for the incidents which occurred in the performance of his functions. The instant Court is not seised with the same facts. The Court is rather seised in regard to the detention imposed on him in the course of the procedure for the determination of that case, which he considers long, illegal, a violation of human dignity, and notably a violation of Article 6 of the African Charter on Human and Peoples' Rights. On the other hand, he brings his Application in regard to alleged physical torture amounting to violation of Article 5 of the said Charter. Indeed, the said Articles provide as follows:

- Article 6: ***"Every individual shall have the 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: ***"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"***.

Thus, the Application brought before the instant Court is not the same as the proceedings instituted against the Applicant by the criminal martial court of Nigeria.

41. Similarly, it is the view of the instant Court that under such circumstances, the findings or conclusions established or yet to be established by the martial courts of Nigeria seised to determine whether Alimu Akeem is guilty or not, and to sentence him, do not have any determining effect on the Court's adjudication upon the grievances and requests brought by the Applicant. At any rate, the Application before the instant Court has no criminal connotation. As such the criminal nature of the action instituted against Alimu Akeem in Nigeria cannot be admitted as a ground for declaring the Application which the instant Court is seised with as inadmissible. Therefore, that plea-in-law fails.

(iii) That the Court has no jurisdiction to re-examine decisions made by the national courts

42. It is trite that in those cases where the subject-matter of the dispute essentially had to do with a re-examining of judgments already delivered by the domestic courts, the Honourable Court held that they be dismissed (*see in this regard*: Judgment on **Jerry Ugokwe *v.* Nigeria and Christian Okeke**, 7 October 2005, §32; Judgment on **Moussa Leo Keita *v.* Mali**, 22 March 2007, §26; Judgment on **Sa'adatu Umar *v.* Federal Republic of Nigeria**, 14 December

2012, §). Now, in the instant case, the Court is not asked to re-examine the judgments of the General Court Martial which determined the culpability of Alimu Akeem; the Court is rather seised with a case on the human rights violations which allegedly occurred in the course of the procedure at the domestic court. The instant Court is therefore not asked to re-examine the decisions of the martial courts of Nigeria. Consequently, this plea-in-law must equally be set aside.

Regarding the merits of the case

43. The Court now examines whether in the instant case there is violation of Articles 5 and 6 of the Charter and whether the reliefs sought by the Applicant may be granted.

(a) In terms of violation Article 6 of the Charter

44. The Court notes that the Applicant was arrested on 13 November 2006; that he was not brought before the Court Martial until 15 May 2009; that the Minutes of Court Proceedings for the trial conducted before the court Martial bears the date of 3 September 2009.

45. The Court therefore finds that between the date of arrest of the Applicant and the date the Court Martial imposed its sentence, almost 3 years elapsed. That besides, the Federal Republic of Nigeria did not file among the processes of the case a crucial element for assessing the circumstances of the case, namely the date on which the Minutes of Court Proceedings was transmitted to the authority responsible for confirming the sentence made by the Court Martial; and that whatever the case may be, till today, the decision for confirming the sentence has still not been made. It is therefore manifest that the Applicant Alimu Akeem has been under detention for almost 6 years without seeing his trial coming to a conclusion, whereas in the terms of the provisional sentence pronounced against him, he was to serve a maximum term of 3 years.

46. The Court concludes thereby that the detention of Alimu Akeem; from the date of his arrest till today, under the prevailing conditions, is inconsistent with the laws of Nigeria, since the Applicant has served his sentence beyond the number of years imposed on him, whereas the authority charged with confirming or reversing the sentence of the Court Martial has not delivered its judgment. Consequently, the Court declares that the said detention is arbitrary and violates Article 6 of the African Charter on Human and Peoples' Rights.

47. The Court is consequently of the view that, by acting in the manner they did, the authorities of the Federal Republic of Nigeria deprived Alimu Akeem of his right to trial within reasonable time, in violation of Article 7(1)-d of the African Charter on Human and Peoples' Rights, which provides***: "Every individual shall have the right to have his cause heard. This comprises ... the right to be tried within a reasonable time by an impartial court or tribunal".***

48. Pursuant to Article 9(3) of the International Pact on Civil and Political Rights, which provides that ***"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release..."***, it shall be appropriate to order the immediate release of Mr. Alimu Akeem.

(b) Regarding violation of Article 5 of the Charter

49. The Applicant alleges that during his detention, he was physically tortured at the military prison of 72 Para Battalion of the Nigerian Army, Makurdi.

50. The Court notes that torture is strictly forbidden pursuant to the Charter (Article 5), the International Covenant on Civil and Political Rights (Article 7), the Universal Declaration of Human Rights (Article 5), and other regional and international instruments relating to human rights. The prohibition of torture forms part of the binding norms of international law which must not be transgressed by the State.

51. The Court adjudges that for a State to be blamed for an illicit conduct, the incriminating acts alleged against that State must be manifest, or sufficiently established, within the particular circumstances of the case, or have a high degree of probability.

52. The Court cannot therefore uphold a blame against a Member State for acts of torture on the basis of mere allegations, especially in the absence of convincing proofs. Whereas, in the instant case, the Applicant does not bring any evidence in support of allegations as to torture. The Court thus adjudges that it is unable to adjudicate on that issue, within the given circumstances of the case.

53. The Court notes however that the 10 December 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which the Federal Republic of Nigeria is party to since 28 June 2001 (the date Nigeria ratified the Convention), provides respectively in its Article 11 and 12 as follows:

- ***Article 11:*** *"Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture".*

- ***Article 12:*** *"Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".*

54. The Court adjudges that in the instant case, in respect of the allegations of torture made by the Applicant, the Federal Republic of Nigeria must adhere to the provisions of Article 12 of the above-cited Convention, by proceeding to conduct an impartial inquiry within reasonable time.

(c) Regarding reliefs sought

55. Paragraph 5, Article 9 of the International Covenant on Civil and Political Rights provides: **"Anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation"**. Thus, the Applicant asks for Ten Million Naira in reparation for the violations suffered, the psychological trauma, loss of esteem before his military colleagues, and break-ups in his family relations. Besides, his detention beyond the period for the confirmation of his sentence has been declared arbitrary, and he was unable to seek redress before a national court because of the absence of confirmation for his sentence. Given those conditions, the Court awards him an all-inclusive reparation of Five Million Naira (N 5,000,000) for all causes of harm done him.

DECISION

For These Reasons,

56. **THE COURT**, adjudicating in a public hearing, after hearing both Parties, and after deliberating:

- **Adjudges** that it has jurisdiction to adjudicate on the case;

- **Adjudges** that the Application by Alimu Akeem is admissible;

- **Adjudges** that Alimu Akeem was not tried in reasonable time, in violation of Article 7(1)-d of the African Charter on Human and Peoples' Rights;

- **Adjudges** that Alimu Akeem's detention, served beyond the duration of the prison term imposed on him, and with the decision for the confirmation of his sentence not having been made, is arbitrary and unlawful, and constitutes a violation of Article 6 of the African Charter on Human and Peoples' Rights;

- **Orders** the immediate release of Alimu Akeem;

- **Orders** the Federal Republic of Nigeria to pay to Alimu Akeem an all-inclusive reparation of Five Million Naira (N5,000,000) for the harms done him as a result of the said violations.

- **Adjudges** that the allegation of torture is not established, within the given circumstances of the case;

- **Adjudges** however, that the Federal Republic of Nigeria must adhere to Article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and conduct investigations on the allegations of torture made by Mr. Alimu Akeem; that the conduct of such investigations must be done in reasonable time.

- **COSTS**

57. **Asks** the Federal Republic of Nigeria to bear the costs.

Thus made, declared and pronounced in English, the language of procedure, in a public hearing at Abuja, by the Court of Justice of the Economic Community of West African States, on the day, month and year stated above.

58. **AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:**

- **Hon. Justice Hansine DONLI -** *Presiding*
- **Hon. Justice Clotilde Medegan-NOUGBODE -** *Member*
- **Hon. Justice Eliam POTEY -** *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 WEDNESDAY, THE 31ST DAY OF JANUARY, 2014

SUIT N°: ECW/CCJ/APP/10/12
RULING N°: ECW/CCJ/RUL/01/14

BETWEEN
MRS. STELLA IFEOMA NNALUE
& 20 ORS. - *PLAINTIFFS/RESPONDENTS*

AND
FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT/APPLICANT*

COMPOSITION OF THE COURT
1. **HON. JUSTICE M. BENFEITO RAMOS -** *PRESIDING*
2. **HON. JUSTICE C. NOUGBODE MEDEGAN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY -** *MEMBER*

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

REPRESENTATION TO PARTIES:
1. **IJEOMA OKWOR -** *FOR THE PLAINTIFFS/RESPONDENTS*
2. **ELISHA KURAH** *&*
   J. B. AMOS - *FOR THE DEFENDANT/APPLICANT*

Jurisdiction - Abuse of Court process
- Exhaustion of local remedies

SUMMARY OF FACTS

The Plaintiffs are Citizens of Nigeria, a Member State of ECOWAS. They brought an Application before this Court on the 7th September, 2013, alleging the violation of their fundamental rights to life and integrity of person, right to liberty and fair hearing amongst others. The Plaintiffs were seeking amongst other reliefs, an order of the Court directing the Defendant to set up an independent panel of inquiry to look into extra judicial killing of the deceased persons and provide credible report on same.

The Defendants raised a Preliminary Objection seeking the order of the Court to strike out the suit alleging that it is an abuse of court process.

LEGAL ISSUE

- *Whether or not Plaintiff's suit amounts to a violation of court process.*

DECISION OF THE COURT

The Court held that the Plaintiff's suit does not amount to an abuse of court process. Consequently, the Preliminary Objection is inadmissible and thereby dismissed it accordingly.

RULING OF THE COURT

1. The Plaintiffs filed an Application initiating action at the Registry of the Court on the 7th day of September, 2013, alleging that the Defendant has violated Articles 1, 4, 5, 6, 7(1) (a) and (b) and 18 (1) of the African Charter on Human and Peoples Rights which guarantees the following: (a) Respect to life and integrity of the person; (b) Protection from degradation or any degrading punishment; (c) Right to liberty and fair hearing of causes and matters; and (d) Protection of life.

2. The Plaintiff sought the following reliefs from this Court; (a) A Declaration that the Defendant has failed to recognize, promote and protect the rights of the deceased persons as provided under Articles 4, 5, 6 & 7 of the African Charter on Human & Peoples: Rights; (b) A Declaration that the failure and/or refusal of the Defendant to investigate, discipline and prosecute the police officers involved in the arbitrary arrest, torture and unlawful killing of the deceased persons since 2010, constitute a violation of Article 1 of the African Charter on Human & Peoples' Rights; (c) An Order directing the Defendant to set up an independent panel of inquiry to look into the extra judicial killing of the deceased persons and provide credible repot1 on measures taken to discipline, dismiss and prosecute the police officers involved; (d) An order directing the Defendant to tender an apology to the Plaintiffs by publishing the said letter of apology in five national dailies.

Preliminary Procedure - ***Defendant/Applicant's Objection***

3. By an Application filed at the Registry of the Court on the 7th of December, 2012, the Defendant raised objection to the action brought by the Plaintiff. The Application which was brought pursuant to Articles 87 and 88 of the Rules of Court, sought an order striking out this suit on four grounds: that it is an abuse of Court process; that the claim does not fall within the ambit of Article 9(4) of the Supplementary Protocol A/SP.1/1/05; that this Court cannot enforce

an unenforceable right; that the Plaintiffs are not alleging that any of their rights, as guaranteed by the African Charter on Human and Peoples Rights, have been violated.

4. The Defendant's Preliminary Objection was supported by a Written Address attached therewith and the grounds for the relief sought were set forth in the objections itself as follows;

5. Firstly, that this Court has jurisdiction under Article 9(4) of the Supplementary Protocol A/SP.1/01/05 amending Protocol A/P.1/7/91 to adjudicate on the violation of human rights in member countries. That under Article 10(d) of the Supplementary Protocol A/SP.1/01/05, individuals can only approach the Court "on application for relief for violation of their human rights". Counsel referred to the case of **Tidjani *v.* FRN (2008) CCJLR (Pt 1) 171 at 184 lines 34-35** where this Honourable Court held thus:

> ***"By this provision, individuals can only have access to the jurisdiction of the Court when their human rights are violated"***.

6. Counsel stated further that the Plaintiffs have not demonstrated that any of their human rights guaranteed by Articles 1, 4, 5, 6, 7(1)(a) and (b) and 18(1) have been violated. He contended that since the Plaintiffs did not allege a violation of their rights, the Honourable Court will have no jurisdiction to entertain the suit. By way of adumbration, Counsel to the Defendant contended that the Plaintiffs have reiterated in their opposition to the Preliminary Objection that this suit is to challenge the failure of the Defendant to investigate and prosecute the alleged killers of the Plaintiffs' relations. He therefore submitted that the Plaintiffs' claim does not relate to fundamental human rights because none of them is alleging that his own rights were violated.

7. Secondly, that none of the reliefs claimed by the Plaintiffs in this case has any bearing on the enforcement of their human rights under the African Charter. That the mere reference to human rights violation

and referring to various Articles of the African Charter on Human and Peoples' Rights is an attempt by the Plaintiffs to give the suit the coloration of a human right case. That this Court has held in a number of cases that where the issue of violation of human rights is ancillary to the substantive complaints, it will have no jurisdiction to adjudicate in the matter. Defendant Counsel referred to this Court's Judgment in **Frank Ukor *v.* Rached Laleye (2009) CCJLR (Pt 2) 30; Odafe Oserada *v.* ECOWAS Council of Ministers & Ors (2009) CCJLR (Pt 2)144** and **Mrs. Alice Chukwudolue & Ors *v.* The Republic of Senegal (2009) CCJLR (Pt 2)75.** He further referred the Court to the case of **WAEC *v.* Adenyanju (2008) 6 MJSC 1 at 23** and submitted that this case does not amount to a violation of the Plaintiffs' right as guaranteed by the African Charter on Human and Peoples' Rights.

8. While referring the Court to the case of **Edoh Kokou *v.* ECOWAS Commission,** the Defendant also submitted that since this Court does not have criminal jurisdiction, it cannot inquire into the complaints of the Plaintiffs. While referring this Court to the case of **Boniface Ezechukwu *v.* Peter Maduka (1997) 4 NWLR (Pt 518) 635 at 660,** the Counsel further submitted that Plaintiffs having acknowledged the fact that the deceased persons were murdered, their (deceased) rights to life were thus extinguished and are unenforceable by the Plaintiffs or any other persons.

9. However, Counsel contended that the alleged killing of the deceased persons by the Police is an actionable wrong that is covered by the Tort Laws of various States, that the act is actionable before National Courts at the instance of the Plaintiffs and referred this Court to the case of **Bello *v.* Attorney General of Oyo State (1986) 5 NWLR (Pt 45) 828 at 855** and submitted that this Court has not been conferred with jurisdiction to entertain matters relating to tortuous liabilities.

10. Thirdly, the Defendant Counsel submitted, as another ground for striking out this suit, that the Plaintiffs had earlier filed Suit

N°: FHC/B/CS/19/2011 Mrs. **Ifeoma Nnalue & 22 Ors *v.* Inspector General of Police & 11 Ors**, before the Federal High Court sitting in Benin, Edo State, Nigeria. He argued that the 151 Plaintiff in the aforementioned case before a National Court in Nigeria is the first Plaintiff in this suit. While referring to Annexure 8 attached to the Plaintiffs' Application, Counsel to the Defendant submitted that if the matter was decided by the Federal High Court against the Plaintiffs, they cannot come before this Court, as this Court has held that it does not have the competence to sit on appeal or revise the decision of domestic courts. Counsel referred the Court to its Judgment in **Moussa Leo Keita *v.* State of Mali (2009) CCJLR (Pt 2) 58**. The Defendant Counsel therefore urged the Court to strike out the Plaintiffs' suit on the ground that it lacks the jurisdiction to adjudicate on same.

Plaintiffs/Respondent's Reply

11. Pursuant to Article 87 (3) of the Rules, the Plaintiff/Respondent filed Statement of Fact and Pleas in Law in Opposition to the Preliminary Objection by the Defendant dated 1st February, 2013. In the Reply, the Plaintiffs/Respondents raised two issues for determination, firstly;

    a. Whether this suit amounts to re-litigating issues and claims which have been settled or pending before competent courts in Nigeria.

12. The Plaintiffs/Respondents contended that the earlier suit filed against the officers of the Defendant before the Federal High Court, Benin Judicial Division in Suit N°: FHC/B/CS/19/2011 was struck out and the Plaintiffs refiled same at the Edo State High Court, Benin City in Suit N°: B/223/2012. The Plaintiffs/Respondents therefore submitted that the issues, subject matter, claims and parties in the aborted suit at the Federal High Court Benin and in this Com1are substantially different. He submitted further that based on the same set of facts, the Plaintiffs can maintain separate and different suit against different Defendants and for different reliefs in different courts, such does not amount to abuse of process or *estoppel res judicata*.

13. Counsel to the Plaintiffs/Respondents reiterated that this suit is to challenge the failure of the Defendant to investigate and prosecute the alleged killers of the Plaintiffs relations, while the suit at the Edo State High Court was for compensation of the Plaintiffs for the loss of their breadwinners. He therefore submitted that these are two distinct legal obligations and claims and are not overlapping.

14. The Plaintiff/Respondent's Counsel raised the second issue for determination to wit: ***Whether the right to life is an enforceable right under the African Charter on Human and Peoples' Rights and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment***. The Plaintiff/Respondent argued that their claim in this Court is clear on its surface, namely the legal enforcement of obligation to recognize, protect and promote the rights to life of the Plaintiffs' relations and contended that the Plaintiffs have the right to seek redress on unlawful death of their relations. He referred the Court to the judgment of the Supreme Court of Nigeria in the case of **Aliu Bello & 13 Ors *v.* Attorney General of Oyo State (1986) 5 NWLR 828 S.C.** and Borno State High Court decision in the case of **Fugu *v.* The President, Federal Republic of Nigeria & 3 Ors (2009 - 10) CHR 1.**

15. Plaintiff/Respondents Counsel further argued that Article 14 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides that:

> ***"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation".***

16. The Counsel contended that the Plaintiffs herein, as the deceased persons' dependents, have the right to sue the defendant and submitted therefore, that the rights violated by the Defendant are

enforceable under the African Charter on Human and Peoples' Rights and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment at the instance of the Plaintiffs and that the Honourable Court has the jurisdiction to grant the reliefs sought in this suit. The Plaintiffs therefore urged this Court to dismiss the preliminary objection of the Defendant in its entirety.

Defendant/Applicant's Rejoinder

17. By an Oral Reply, the Defendant/Applicant's Counsel argued that it is a concession by the Plaintiffs that they are seeking declaration that the death of the deceased persons is unlawful. He stated that the Supplementary Protocol A/SP.1/01/05, under Article 10, is the only Protocol under which individuals can come before this Court and is restricted to individuals on application for relief of violation of their human rights. He therefore submitted that, since the Plaintiffs have confirmed that they are here just for a declaration that the death of the deceased persons is unlawful and not for the violation of human rights, it has therefore taken off the matter from the jurisdiction of this Court. Counsel therefore urged this Court to dismiss this matter in its entirety

Consideration by the Court

18. The Court proceeds to consider the argument in the same pattern that they were presented before it. The Court also remarks that it will not repeat the arguments of Counsel in considering the various issues, except when it is absolutely necessary.

19. In considering whether this suit amounts to an abuse of Court process, this Court observed the Defendant's objection, essentially contending that in event that the suit before the Federal High Court Benin is still pending, the present suit before this Court will amount to an abuse of cout1 process, as the Plaintiffs cannot maintain the same matter based on the same facts before two different jurisdiction. This Court also took note of the Plaintiff response, that the issues, subject matter, claims and parties in the aborted suit at the Federal

High Court Benin, at Edo State High Court and in this Court are substantially different. The Plaintiff went further to submit that based on same set of facts, the Plaintiffs can maintain separate and different suits against different reliefs in different cout1s and such does not amount to abuse of process or *estoppel res judicata*.

20. From the above submissions of parties, it is important to state that there is no exhaustion of remedies before this Court. Article 10 (d) of the Protocol as amended, provides that access to the Court is open to individuals on application for relief for violation of their human rights on the condition that ***the Application is not anonymous nor be made whilst the same matter has been instituted before another International Court for adjudication.*** The Court has therefore decided emphatically in a long line of cases, that exhaustion of local remedies is not a requirement under ECOWAS Community texts for human rights litigation. See the Court's Decisions in **Professor Etim Moses Essien *v.* Republic of the Gambia ECW/CCJ/APP/04/07** Ruling of 14th March 2007; **Hadijatou Mani Koraou *v.* Republic of Niger ECW/CCJ/APP/08/08; Musa Saidykhan *v.* Republic of the Gambia ECW/CCJ/APP/11/07.**

21. The effect of this is far reaching because victims of human rights violations may choose to directly approach this Court without exhausting local remedies at the national courts. Although the exhaustion of local remedies is a well-recognized principle of customary international law, this Court has held that it can be waived or legislated away, this is decided in **Musa Saidykhan *v.* Republic of The Gambia (Supra); Ocean King Nigeria Limited *v.* Republic of Senegal (Supra); Femi Falana *v.* Republic of Benin ECW/CCJ/APP/10/07**.

22. As to the lack of victim status by the Plaintiffs, it is true that if we restrict ourselves to a strictly literal interpretation of Article 10 (d) of Protocol A/SP.l/01/05, we would be tempted to conclude that only direct victims whose rights have been violated could have access to the Come, to seek international accountability for the concerned Member State on alleged violation of their rights.

23. However, it is quite clear that such a restricting interpretation would not fulfil the purpose and intentions of the drafters, since it would leave absolutely unpunished situations where, as a result of its seriousness or irreversibility of the violation, the victim is placed in a situation where he/she is unable to exercise his/her rights by him/herself. More seriously, it leaves out the cases in which, as a result of the violation, the victim ends up dying.

24. Accepting that in such cases, there cannot be a complaint for the violation of human rights because the victim is deceased, and thus his/her right became extinct, and if no one else can trigger mechanisms to seek accountability and redress for the violations of that right, it would mean closing the doors to the mechanism of accountability of Member States for human rights violations. This will frustrate all the philosophy that underpins the international protection of human rights that aims towards putting an end to impunity and making Member States accountable for their acts or omissions.

25. It is to avoid such situation and facilitate access to justice that a broader concept of victim is considered, than that resulting from the strictly literal interpretation. This has been under consideration within International Law, to include close relatives among those who can enjoy victim status.

26. In this respect, we quote the decision of the European Court of Human Rights handed down in Case 41488/98 between **A. V. and Bulgaria** delivered in 1999 thus:

> ***"The Convention organs have always and unconditionally considered in their case-law that a parent, sibling or nephew of a person whose death is alleged to engage the responsibility of the respondent Government could claim to be the victim of an alleged violation of Article 2 of the Convention even where closer relatives, such as the deceased person's children, have not submitted applications ..."***

> ***"... The Court finds, therefore, that the Applicant has standing to bring an Application under Article 34 of the Convention in respect of the death of Mr. T and the ensuing investigation."***

27. In the instant case, the Plaintiffs want to enforce accountability on the Federal Republic of Nigeria, alleging failure of the State to conduct any investigation to determine responsibility for the death of a family member, allegedly killed while under police custody, and to also bring to justice the perpetrators of the said crime.

28. If what is alleged by the Plaintiffs is true, which however can only be determined after consideration of the merits of the case, then the Federal Republic of Nigeria would have violated its international obligations under Article 1 of the African Charter on Human and People's Rights.

29. It is obvious that as relatives of the alleged victims, they have every right *(locus standi)* under Article 10(d) of Protocol A/SP.1/01/05, to consider themselves victims, although indirect victims, and seek to enforce the international accountability of the Federal Republic of Nigeria, on this alleged violation of human rights which occurred on its territory.

30. The fact that they have lodged a complaint with the national courts to obtain redress for the loss of this family member, who was the breadwinner of the family, does not preclude that they also demand criminal liability of the direct perpetrators of this violation. In fact, the proposed action in national courts seeks civil redress, while the action instituted at the ECOWAS Community Court seeks the accountability of the Federal Republic of Nigeria for not conducting an investigation into the demise. Also, for failure to institute criminal proceedings against the alleged perpetrators of the violation.

31. The Applications in each of the complaints complement one another, but are different in their substance; therefore, there is no impediment for them to follow their normal course simultaneously.

Conclusion

32. **Whereas** the Court has jurisdiction to adjudicate on human right violations within Member States.

33. **Whereas** a broader interpretation shall be given to Article 10(d) to cover the close relations of the deceased as indirect victims.

34. **Whereas** the Plaintiffs' relief, according to the Application, is premised on the Defendant's refusal to carryout investigation and bring the alleged perpetrators of the human right violation to justice.

35. **Whereas** the reliefs sought by the Plaintiffs are within the jurisdiction of this Court to adjudicate upon.

DECISION

36. The Court, sitting and adjudicating in public at its seat in Abuja, decides that in view of the foregoing reasons the preliminary objection is inadmissible and thereby dismissed accordingly.

COST

37. Whereas the parties made no specific application for cost in the Preliminary Application and whereas the award of cost is made in the final judgment or in the order of the Court which closes the proceedings, with the unsuccessful party ordering to pay cost if applied for; In the circumstance, no order as to cost made herein.

THE RULING IS READ IN PUBLIC IN ACCORDANCE WITH THE RULES OF THIS COURT DATED 31ST JANUARY 2014.

CORAM:

1. **Hon. Justice M. Benfeito RAMOS -** *Presiding*
2. **Hon. Justice C. Nougbode MEDEGAN** - *Member*
3. **Hon. Justice Eliam M. POTEY** - *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 LOME, TOGO

ON THURSDAY, THE 13TH DAY OF FEBRUARY, 2014

SUIT NO: ECW/CCJ/APP/09/11
RULING NO: ECW/CCJ/RUL/03/14

BETWEEN
THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS & ACCOUNTABILITY PROJECT (SERAP) } *PLAINTIFFS*

AND
1. **FEDERAL REPUBLIC OF NIGERIA**
2. **ATTORNEY GENERAL OF THE FEDERATION & MINISTER OF JUSTICE** } *DEFENDANTS*

COMPOSITION OF THE COURT
1. **HON. JUSTICE BENFEITO M. RAMOS** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **SHOLA EGBEYINKA (ESQ.)** - *FOR THE PLAINTIFF*
2. **MATHEW ECHO** *&*
JUSTINA FATUHIDE - *FOR THE DEFENDANTS*

Violation of human rights - Locus standi - Cause of action - Exhausting internal appeal measures

SUMMARY OF CASE

The Plaintiff initiated an action on 17th May, 2011 against the Defendant based on allegations of human rights violations suffered by some members of the National Youth Service Corps (NYSC). The Plaintiff alleged that due to the Defendants failure of upholding their international obligations to provide security and welfare to its citizens, the said members of the NYSC suffered the violation of their rights to life; to sanctity and integrity of human person; to equal protection of the law; and violation of their families right to basic enjoyment of economic and social rights. The Defendant filed a Preliminary Objection dated 20th January 2012, wherein they sought for an order of the Court to dismiss the Plaintiff's Application based on its lack of locus standi. However, the Plaintiff claimed to have a justiciable cause of action pursuant to Article 27 (2) and 29 (2) of the African Charter on Human and Peoples' Rights.

LEGAL ISSUES

1. *Whether the Plaintiff lacks locus standi to institute the suit as a Non-Governmental Organisation (NGO) without any consanguinity or affinity relation relationship with the members of the NYSC*

2. *Whether the Defendants are in breach of international conventions and law by not providing national security*

3. *Whether there is a cause of action in the Application*

DECISION OF THE COURT

The Court held that concerning violations of human rights only the victims may have access to the Court; that aside from cases of collective interests, NGO's cannot substitute the victims; that the complainant SERAP is not the victim of any violation and has not received prior authorization to act on behalf of the victims or their closest relatives. The Court decided to uphold the Preliminary Objection of the Defendants, on the lack of locus standi of the Plaintiff and therefore dismisses the case accordingly.

RULING OF THE COURT

1. The Plaintiff herein, The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) filed an Application initiating action, at the Registry of the Court on the 17th day of May 2011, against the Federal Republic of Nigeria and the Attorney General and Minister of Justice.

2. The Plaintiffs Application is brought pursuant to Articles 1, 2, 3, 4 and 5 of the African Charter on Human and Peoples' Rights, Articles 2, 3, 8, 12 and 25 of the Universal Declaration of Human Rights (1948), Articles 2, 3, 6, and 26 of the International Covenant on Civil and Political Rights, Article 33 of the Rules of this Court, Article 10 of the Supplementary Protocol A/SP.1/01/05 and Articles 2, 3, 5, 10, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

3. The Plaintiffs action is premised on the alleged violation of the human rights of members of the National Youth Service Corps (NYSC), to life; to sanctity and integrity of human person; to equal protection of the law; and violation of their families' right to basic enjoyment of economic and social rights.

Defendants' Preliminary Objection

4. Upon receipt of the Plaintiffs Application, the Defendants, through their Counsel, filed a Preliminary Objection dated 20th January, 2012 at the Registry of the Court praying for an order of this Court dismissing the Plaintiffs Application and for such further orders as this Court may deem fit to make in the circumstance.

5. The Defendants' Preliminary Objection is based on the following grounds:

   a. That the Plaintiff lacks the *locus standi* to bring the Application since it has not suffered any harm as a result of the act or omission of the Defendant.

b. That the Plaintiff's Application does not disclose any cause of action against the 1st and 2nd Defendants; and

c. That the Plaintiff did not first appeal against the alleged grievance it may have against the NYSC to the President of the Federal Republic of Nigeria as required by the NYSC Act and the suit is premature.

Plaintiffs Reply on the issues formulated by the Defendants

6. Counsel to the Plaintiff filed a response dated 18th January 2013, in opposition to the Defendants' Preliminary Objection addressing the issues for determination raised by the Defendants.

7. On the Defendants' contention that the Plaintiff lacks the *locus standi* to institute this action, Counsel to the Plaintiff argued that Article 27 (2) and 29 (2) of the African Charter is rather in support of the Plaintiff's *locus standi* to institute this action. He submitted that the Plaintiff, a non-governmental organization which is human rights driven has professionals who are progressively minded to champion noble cause on human, social and economic rights. He stated that they are bringing to bear, their intellectual capacity in this direction to fight the cause of the masses and down trodden and submitted therefore, that there is justiciable cause of action in this case and as such, the Plaintiff has the *locus standi* to institute this action.

8. On whether the Defendants are in breach of International Conventions and law. Plaintiff's Counsel argued that Article 23 of the African Charter on Human and Peoples' Rights guarantees the right to national and international peace and security, while Article 9 of the International Covenant on Economic, Social and Cultural Rights stipulates that *"the State Parties to the present Covenant recognize the right of everyone to social security, including social insurance"*. He therefore contended that every citizen of the Federal Republic of Nigeria, regardless of status, has an inalienable fundamental right to national security from the government of Nigeria.

9. On the Defendants' contention that there is no cause of action, Counsel to the Plaintiff argued that their cause of action is predicated on Articles 1, 2, 3, 4 and 5 of the African Charter on Human and Peoples' Rights, Articles 2, 3, 8, 12 and 25 of the Universal Declaration of Human Rights 1948, Articles 2, 3, 6 and 26 of the International Covenant on Civil and Political Rights, Articles 2, 3, 5, 10, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. He therefore submitted that the rights of the victims of the electoral crisis is being invoked by the Plaintiff. He further submitted that, that alone constitutes sufficient cause of action against the Defendants in this case.

10. Plaintiff's Counsel, whilst referring the Court to Section 42 (2) (b) of the 1999 Constitution of Nigeria, contended further that the government of Nigeria has a constitutional duty to provide security and welfare to the people. He also referred this Court to its judgment **in ECW/CCJ/APP/12/07 SERAP *v.* The Federal Republic of Nigeria & UBEC** and submitted that in so far as the subject matter of this suit is predicated on the fundamental human rights to life, dignity of human persons as well as other fundamental rights cognizable under the African Charter, the Court should assume jurisdiction.

CONSIDERATION OF THE ARGUMENTS

Whether the Plaintiff has the *Locus Standi* to initiate or maintain this action

11. At the Court session of 7th November, 2013, this Court raised some questions with respect to *locus standi* of the Plaintiff to institute this action on behalf of the selected youths who were killed. Why SERAP as an NGO thinks it can bring a case on their behalf? The Defendants herein, referring this Court to Articles 27 (2) and 29 (2) of the African Charter, contends that the Plaintiff lacks the requisite *locus standi* to initiate the present proceedings because Plaintiff has failed to show that he has suffered any damage, loss or personal injury in respect

of the acts alleged in this suit. Plaintiff, however, contended that, on the issue of *locus standi,* there is no need to show consanguinity or affinity relationship with the deceased youths before bringing an action on their behalf, as anybody, any association, any group or individual can bring an action for enforcement of fundamental rights in any Court of law.

12. It is true that this Court has jurisdiction to entertain cases of human rights violations occurring in any of the ECOWAS Member States. This clearly results from the terms of Article 9 (4) of Supplementary Protocol A/SP.1/01/05. The text is reproduced hereafter:

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

13. There is also no doubt that people who have been victims of acts of human rights violations, have the right to access the Community Court, to submit a complaint against the perpetrators of such violations and obtain the necessary redress. Indeed, Article 10 (d) of the said Protocol provides that access to the Court is open to:

"Individuals on application for relief for violation of their human rights..."

14. In view of the jurisdiction of the Court and eligibility of litigants to access this Court in cases of human rights violation, the question, which needs to be addressed, is whether a non-governmental organization (NGO) which suffered no human right violation, can access the Court on behalf of alleged victims, without any authorization from the victims or their close relatives. The answer can only be a negative one.

15. This Court is quite aware that in some cases, particularly when it is the collective interest of the community that is being violated, an NGO can have access to this Court with respect to public interest litigation. It is in view of this reason that ECOWAS Community Court has allowed, in some cases, the NGOs to institute actions on behalf of collective interests, as in the case of **ECW/CCJ/APP/08/09**

SERAP *v.* Federal Republic of Nigeria and UBECand ECW/CCJ/APP/12/07 SERAP *v.* Federal Republic of Nigeria & 4 Ors.

16. But when the alleged victims are well determined, as in this case, they are expected to access the Court by themselves, in defence of their interests. If for any reason, the direct victim of the violation cannot exercise his/her rights, in particular, for being irreversibly incapacitated or having died as a result of the violation, the closest family members can do so, while assuming the status of indirect victims. In this regard, a more comprehensive concept of victim laid down in Article 10 (d) of the Protocol on the Court is required to facilitate access to justice and prevent impunity and unaccountability of States for more serious cases of human rights violation.

17. In any event, in spite of the flexibility that can be given to the concept of a victim under Article 10 (d) of the Protocol as amended, it can never reach the point of allowing an NGO to present itself to the Court, outside the framework of the public interests mentioned above, to litigate as a complainant, without the NGO itself having been the victim of violation of its rights or having previously obtained any authorization from the person who is presented as a direct or indirect victim of the alleged violation.

18. Since the Plaintiff has no *locus standi* to bring the case to this Court on behalf of the youths whose rights were allegedly violated, there is no need to go further in analysing other issues raised in the preliminary objection.

DECISION

19. **Whereas** the Court has jurisdiction to hear cases of human rights violation that occur in ECOWAS Member States;

20. **Whereas** concerning violations of human rights, only the victims may have access to the Court;

21. **Whereas**, aside from cases of collective interests, NGOs cannot substitute the victims;

22. **Whereas** in this case, the complainant SERAP is not the victim of any violation and has not received any prior authorization to act on behalf of the victims or their closest relatives.

23. The Court **decides** to uphold the preliminary objection of the Defendants, on the lack of *locus standi* of the Plaintiff and therefore dismisses the case accordingly.

COST

24. Since the Applicant failed to equip itself with prior authorization from the alleged victims, it shall bear the cost of these proceedings in line with Article 66 (5) of the Rules of this Court.

THUS MADE, ADJUDGED AND PRONOUNCED PUBLICLY BY THE COMMUNITY COURT OF JUSTICE, ECOWAS, AT LOME, TOGO, ON THE DAY, MONTH AND YEAR ABOVE.

1. **Hon. Justice Benfeito M. RAMOS** - *Presiding;*
2. **Hon. Justice Anthony A. BENIN** - *Member;*
3. **Hon. Justice Eliam M. POTEY** - *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 LOME, TOGO

THIS 13TH DAY OF FEBRUARY, 2014

SUIT NO: ECW/CCJ/APP/13/13
RULING NO: ECW/CCJ/RUL/05/14

BETWEEN
FELICIA AUGUSTINE SALA - *PLAINTIFF*

AND
1. **THE FEDERAL REPUBLIC OF NIGERIA -** *1ST DEFENDANT*
2. **NIGERIA POLICE FORCE -** *2ND DEFENDANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **A. A MUMUNI** - *FOR THE PLAINTIFF*
2. **F. A. O. LONGE** - *FOR 2ND DEFENDANT*

- Applicant's Application for withdrawal of the Suit

SUMMARY OF FACTS

The issue herein is based on the application of the Applicant to withdraw the suit filed and lodged in this Court due to some considerations. The 2nd Defendant did not oppose the application except that they asked for $3000 as cost. In justifying the need for the said cost, Counsel mentioned the appearances the 2nd Defendant made before the Court at the seat of the Court in Abuja, and now in Togo which made them to expend some cost. They then applied for a modest cost of $3000. Learned Counsel for the Plaintiff opposed the award of $3000 as cost.

LEGAL ISSUES:

Whether the 2nd the Defendant is entitled to cost.

DECISION OF THE COURT

Having considered the factors put forward before us, by Counsel to the 2nd Defendant and the opposition by the Plaintiff's Counsel, we hold that there is need to grant cost in order to be fair to both parties in accordance with our Rules of the Court. In the circumstance, the case is hereby struck out with $2000 for the 2nd Defendant against the Plaintiff as cost.

RULING OF THE COURT

The issue herein is based on the Application of the Applicant to withdraw the suit filed and lodged in this Court due to some considerations. The 2nd Defendant did not oppose the Application except that they asked for $3,000 (dollars) as cost. In justifying the need for the said cost, Counsel mentioned the appearances the 2nd Defendant made before the Court at the seat of Court in Abuja, and now in Togo which made them to expend some cost. They then applied for a modest cost of $3,000 (dollars). Learned Counsel for the Plaintiff opposed the award of $3,000 (dollars) as cost. Having considered the factors put forward before us, by Counsel to the 2nd Defendant and the opposition by the Plaintiff's Counsel, we hold that there is need to grant cost in order to be fair to both parties in accordance with our Rules of Court. In the circumstance, the case is hereby struck out with $2,000 (dollars) for the 2nd Defendant against the Plaintiff as cost.

This Ruling is read in public in accordance to the Rules of this Court this 13th day of February 2014.

Hon. Justice Hansine N. DONLI - *Presiding;*

Hon. Justice Anthony A. BENIN - *Member;*

Hon. Justice Eliam M. POTEY - *Member.*

Assisted by **Tony ANENE-MAIDOH (Esq.)** - *Chief Registrar.*

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

SITTING AT THE SUPREME COURT OF TOGO, IN LOME,

HOLDEN ON FRIDAY 14TH FEBRUARY 2014.

SUIT NO: ECW/CCJ/APP/18/12
JUDGMENT NO: ECW/CCJ/JUD/05/14

BETWEEN
LINDA GOMEZ & 7 ORS. - *PLAINTIFFS*

AND
REPUBLIC OF THE GAMBIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

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

REPRESENTATION TO THE PARTIES:

1. **MAMADOU ISMAILA KONATE** *&*
   FRANCOIS SERRES - *FOR THE PLAINTIFFS*
2. **AMIIE JOOF,** ATTORNEY-GENERAL *&*
   D. O. KULO, DIRECTOR FOR
   SPECIAL LITIGATION - *FOR THE DEFENDANT*

Human rights violation - Right to life - Fair hearing - Non-exhaustion of appeal process - Constitutionality of death penalty - Burden of proof

SUMMARY OF FACTS

The Plaintiffs Linda Gomez and seven (7) others brought an action against the Republic of Gambia alleging that the death penalty imposed on about forty-eight (48) persons who were detained at the detention center in Mile two Central prison in the Gambia is contrary to the provisions of the African Charter on Human and Peoples' Rights as well as the International Covenant on Civil and Political Rights. That some of those death row inmates have been detained for about twenty-seven (27) years and many of them never received family visits and have lived in total isolation for years.

The Plaintiffs averred that many of the death sentences appear to have been imposed as a result of legal proceedings that did not meet the requirements of fair hearing and were politically motivated by the government to stifle press freedom and political opponents.

The Plaintiffs averred that some of the executed inmates had not exhausted their appeal processes.

The Defendant in denying the allegations states that the executed inmates had exhausted their appeals and that all trials observed due process. That the condition and treatment of the death row inmates were fair and met international standard.

Amnesty International filed an Amicus brief and submitted that though the African Charter does not specifically abolish the death penalty, the constitutionality of the death penalty have been addressed by several countries and the right to life being the primary right upon which most other rights are hinged should not be taken away except in very serious offences and after a totally fair and impartial trial.

LEGAL ISSUES:

- ***Whether the African Charter and ICCPR categorically abolished death penalty?***

- ***Whether the death penalty abolitionist theory has received the expected degree of acceptance and notoriety to pass as a jus cogens rule of international law?***

- ***Whether the trials before the Defendant's domestic courts met the requirements of a fair trial?***

- ***Whether the imposition death penalty is consistent with the protection right to life?***

DECISIONS OF THE COURT

The Court held:

1. *That though the ECHR categorically provides for the abolition of the death penalty, the ICCPR and ACHPR do not have similar mandatory provisions abolishing the death penalty and as such, the Defendant cannot be found in violation of her international obligations.*

2. *That there is no universally accepted norm in favor of the abolition of the death penalty as yet. Since a considerable amount of countries still have the death penalty in their constitutions, it is unrealistic to state that there is a Jus Cogens rule of international law in favor of the abolition of the death penalty.*

3. *That since the Plaintiffs assert the affirmative, they bear the burden of proving that the Defendant is guilty of executing death row inmates who have not exhausted their appeals.*

4. *That the Plaintiff did not lead evidence to establish that families of inmates who are lawfully executed have the right to their*

corpses and in the absence of compelling legal justification, the Court is unable to order the defendant to surrender the corpses of the inmates executed to their families.

5. *That States whose constitutions have provisions on the respect of human life and forbids cruel and inhumane punishments clearly recognizes the incompatibility of the death penalty with the principles of human rights in their constitution.*

6. *The Court expressed the view that the death penalty is inconsistent with the right to life and is a cruel and inhuman punishment.*

JUDGMENT OF THE COURT

PARTIES AND REPRESENTATION

1. The 1st Plaintiff is a citizen of The Gambia and wife of Bakary Demba, who was sentenced to death on 30th May 2011 whilst the second Plaintiff is of Danish nationality and wife of Batch Samba Faye, who was sentenced to death for murder in 2004. The 3rd Plaintiff is of Gambian nationality and brother of Modou Colley who was sentenced to death on 30th May 2011 whilst the 4th Plaintiff is of Gambian nationality and brother of Alieu Bah, sentenced to death for treason on 27th October 1998 and is alleged to have been executed on 26th August 2012. The 5th Plaintiff is a coalition of civil society organizations in The Gambia and domiciled at Georgia, United States of America whilst the 6th Plaintiff is a political and humanitarian association, also domiciled at Georgia in the United States of America. The Defendant is a Member State of the Economic Community of West African States (ECOWAS). The Plaintiffs were represented by Mamadou Ismaila Konate and Francois Serres whilst the Honourable Attorney General of The Gambia, Arnie Joof and D.O. Kulo, Director for Special Litigation in the Attorney General's Chambers represented the Defendant.

PLAINTIFFS' CASE

2. The Plaintiffs averred that forty-eight (48) persons were detained at a detention center in Mile Two Central Prison in the Republic of The Gambia, as a result of death sentences imposed on them. The Plaintiffs averred that at least forty-seven (47) persons have been executed in The Gambia. The Plaintiffs continued that some of those sentenced to death and detained are very old whilst some are suffering from mental disorders. Further, some of them are political prisoners whilst others are foreign nationals. The Plaintiffs alleged that some of those death row inmates have been detained for about twenty-seven (27) years.

The Plaintiffs pleaded further that the conditions of detention and treatment of those sentenced to death were regularly denounced by many non-governmental organizations, international organizations and foreign governments. Many of these detained prisoners never received family visits and have lived in total isolation for years. The Plaintiffs also averred that many of the death sentences appear to have been imposed as a result of legal proceedings that did not meet the requirements of fair hearing and were politically motivated by the government to stifle press freedom and silence political opponents.

3. The Plaintiffs stated that on 19th August 2012, President Yahya Jammeh declared that those sentenced to death could be executed in September 2012, causing serious concern among Gambians, the detainees and their families. Plaintiffs averred that this statement was strongly condemned by the international and domestic community, particularly by the Amnesty International, CSAG and RADDHO. Plaintiffs continued that on 24th August 2012, CSAG stated that nine (9) death row inmates were executed on the night of 23/24 of August 2012. The government of The Gambia stated that these executions were legitimately carried out in strict compliance with existing legal framework. These executions were condemned by the Amnesty International.

4. The Plaintiffs' averments continued that some of the inmates were executed even though they had not exhausted their appeal processes, including Mr. B. G. Mbeye and Mr. Batch. The Plaintiffs commenced this action asking the court to hold that the Defendant had violated the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, Customary International Law, the right to life and the prohibition of the death penalty, the right to fair trial, et cetera and to make among others, the following declarations and orders:

   a) **Adjudge** and **declare** that the keeping of all the inmates condemned to death on death row perpetrates the violations listed above;

b) **Adjudge** and **declare** that the execution of these inmates constitutes a violation of the above-mentioned texts;

c) **Order** the Republic of The Gambia to comply with the rights and principles recalled above and to stop pronouncing the death sentence and consequently, the executions;

d) **Order** the Republic of The Gambia to comply with the rights and principles recalled above and take necessary measures to repeal its criminal law on the death penalty;

e) **Order** the Republic of The Gambia to comply with the rights and principles recalled above and amend its Constitution so as to abolish the death penalty;

f) **Order** the Republic of The Gambia to respect the free access of lawyers to the prison(s) where death row inmates are detained;

g) **Order** the Republic of The Gambia to respect the right of families to visit inmates sentenced to death;

h) **Order** the Republic of The Gambia to give back to the families the corpse of the inmates executed, specifically Mr. Alieu Bah and the others;

i) **Condemn** the Republic of The Gambia for the violations against Mr. Alieu Bah, an inmate who was executed in violation of the rights and principles recalled above, and to pay Mr. Bamba Alagie Bah, the sum of 500 million Francs CFA for non-pecuniary damages suffered;

j) **Order** the Republic of The Gambia to pay the sum of 150 million Francs CFA in settlement of attorneys' fees;

k) **Order** the Republic of The Gambia to bear the cost of the proceedings.

5. Upon service of the originating application on the Defendant, she raised a preliminary objection to the suit, predicated on the following grounds:

   A. This Court lacks jurisdiction to entertain this matter as the Court has no appellate jurisdiction over the decisions of the national courts of ECOWAS Member States.

   B. This Court lacks the jurisdiction to annul a national law or statute of ECOWAS Member States.

   C. The Applicants' case is an abuse of the process of this Court.

6. In a Ruling dated 6th November 2013, the Court rejected the preliminary objection and held that there is a *prima facie* case of human rights violations which confers jurisdiction on it to hear and determine the case on merits.

DEFENDANT'S CASE

7. The Defendant denied every allegation of fact contained in the Applicant's Application except those expressly admitted. In particular, the Defendant averred that it is untrue that from 2013 to date, The Gambian Government has executed 47 persons as alleged by the Applicants. The Defendant stated that it has 47 persons on death row but in August 2012 executed nine persons who had exhausted their appeals. Further, the Defendant stated that all the trials resulting in convictions for which death sentences were imposed were carried out with due process and that there are no inmates with mental disorders. Further, she stated that no inmate has been on death row for twenty-seven years as alleged by the Applicants and that there are just three persons who have been on death row since 1998 as their appeals are still pending.

8. Further, the Defendant averred that the condition of detention and treatment of persons on the death row at Mile 2 prisons are fair and meets international standards and that lawyers and family members

have unhindered access to the inmates. She also stated that The Gambia legal system, particularly its judiciary is well developed and the rule of law is widely respected. She also alleged that the comments by the Civil Society Association of The Gambia after the lawful execution of nine inmates show that there is press freedom within the country. She further stated that the purported condemnation of the lawful execution of prisoners by the African Union, the French government and international organisations such as the Amnesty International and Human Rights coalition are either mere eye service to the international press or that they failed to take cognizance of the peculiar circumstances of each country.

9. The Defendant affirmed the press release issued by her Secretary of State and Minister of Justice in respect of the executions of the nine prisoners in August 2012 and pleaded that their execution was lawful because their appeals had been exhausted. She also averred that the moratorium on death penalty announced by the President was conditional and dependent on the crime wave in the country as there was an upsurge in horrendous murder cases.

ISSUES OF LAW

10. The Defendant contended that the case of the Applicants is not admissible and urged the Court to decline jurisdiction and strike out the Application on the following grounds:

    A. That the Civil Society Association of The Gambia (CSAG) and Save The Gambia Democracy Project (STGDP) cannot maintain a joint action for the abolition of the death penalty with persons already convicted and sentenced to death. The Defendant argues that this amounts to the Applicants appealing against the decisions of the national courts of The Gambia. Learned Counsel referred to the Court's decisions in the following cases: **Jerry Ugokwe *v* Federal Republic of Nigeria & Anor.** (2004-2009) CCJELR 37 at 51, **Leo Keita *v* Mali** (2004-2009) CCJELR 63 at 73; **Alhaji Tidjani *v* Federal Republic**

of Nigeria & 4 Ors. (2004-2009) CCJELR 77 at 84 and **Frank Ukor v Richard Laleye & Anor**. (2004-2009) CCJELR 131 at 147. Learned counsel contended that in all these cases this Court refused to act as an appellate court to the domestic courts of ECOWAS Member States. Learned counsel to the Defendant also contended that the jurisdiction of courts of law, including this Court, is determined by statute. Further, Counsel contended that Article 9(1-4) of the Protocol on the Court of Justice (A/P.1/7/91) and Article 76 of the ECOWAS Revised Treaty clearly spells out the jurisdiction of this Court, which excludes acting as appellate courts over domestic courts of ECOWAS Member States.

B. The Defendant also argued that a strict construction of the provisions of the African Charter and the International Covenant on Civil and Political Rights as well as other regional charters will show that there are no conflicts between their provisions and the laws of The Gambia. Further, learned counsel contended that the Defendant has not violated or breached any of her obligations under the international conventions, particularly the African Charter on Human and Peoples' Rights. Counsel contended that the provisions of these international conventions and the African Charter show that the rights created thereunder are not absolute but subject to such reasonable restrictions as are required in a democratic state. Learned counsel referred to Article 15(1) of the International Covenant on Civil and Political Rights, Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9 of the American Convention on Human Rights, Article 6 of the Arab Charter on Human Rights as well as Articles 7(2) and 9(1) of the African Charter on Human and Peoples' Rights. Counsel submitted that all these instruments provide for the punishment of offenders as long as they are in accord with laid down laws which were in force before the offences were committed and only forbid imposing a higher sentence on an offender after he has committed the offence.

11. Counsel further submitted that none of these instruments in fact abolishes the death sentence in the way and manner the Applicants postulate. Learned Counsel also submitted that in the Republic of The Gambia, there are minimum restrictions on human rights which can be found in Section 25 (4) and 209 of the 1997 Constitution as well as Sections 35 and 188 of the Criminal Code Cap 10 Volume III Laws of The Gambia 2009. Counsel contended that the law clearly empowers the courts in appropriate cases to impose the death penalty as it is in force, having been restored in 1995 after its repeal in 1993. Specifically, Section 18(2) of the 1997 Constitution of The Gambia permits the imposition of the death sentence if the offence for which the accused was tried, carries a death sentence and the offence involves violence or the administration of any toxic substance which results in the death of somebody. Thus, counsel concluded that there is no doubt that the death penalty is prescribed by law in the Republic of The Gambia, as punishment for the offences of treason and murder. Above all, counsel submitted that the restrictions are in conformity with Article 9, Principle II of the African Charter on Human and Peoples' Rights which require that such restrictions are provided by law, serve a legitimate interest and are necessary in a democratic society.

C. Learned Counsel to the Defendants further submitted that even if there is a conflict between the laws of The Gambia and the provisions of the African Charter and the International Covenant on Civil and Political Rights, this Court is not the proper forum to address the conflict as it has no jurisdiction to annul any national statute which appears to be in conflict with any regional or international conventions. Counsel also submitted that these international instruments do not abolish the death penalty entirely but gives states time to take the necessary measures to abolish it within their jurisdictions. For instance, the second Protocol to the International Covenant on Civil and Political Rights provides that ***"... Each state party shall take all necessary measures to abolish the death penalty within its jurisdiction"***. Counsel urged the Court to hold that it lacks

the powers to annul any state legislation or statute as that is the exclusive preserve of national courts and national assemblies of the ECOWAS Member States.

D. Counsel to the Defendant contended that contrary to unverified reports and submissions. The Gambia judiciary is independent and not subject to the dictates of the President. Counsel submitted that Section 120(3) of the 1997 Constitution of The Gambia guarantees the independence of the judiciary by clearly stating that they shall be independent and not subject to the control of any other person or authority. Similarly, Section 138(2) of the Constitution provides that Judges of the superior courts shall be appointed by the President on the recommendation of the Judicial Service Commission whilst Section 141 (2) (c) provides that a Judge of the superior court may have his appointment terminated by the President in consultation with the Judicial Service Commission. Therefore, judicial independence is guaranteed in The Gambia and there is no known case of the President interfering with the work of the judiciary.

E. Learned Counsel to the Defendant submitted that the Applicants presented isolated cases and instances where the imposition of the death penalty was criticized and concluded that ***"we can now say without hesitation that the abolition of the death penalty has become a norm of international law"***. Counsel contended that this is contrary to the reality of current trends and thinking about the philosophy, usefulness and acceptability of the death penalty as a deterrent and corrective measure in the criminal justice system. Learned Counsel contended that abolition of the death penalty is far from becoming a norm of international law and gave a list, which he stated that he extracted from Wikipedia online website on the current application of the death penalty. The list showed that some federating states of the United States of America and some other countries have been using the death penalty recently. Counsel also submitted

that Amnesty International reports (published by ***Wikipedia Encyclopedia*** on the internet) showed that over fifty-eight countries still retained the death penalty and that there are a lot more prisoners on death row in the Federal Republic of Nigeria, India and the state of California in the United States of America.

F. Counsel to the Defendant contended that the case of the Applicants is based on unconfirmed and unverified reports of human rights organisations which are largely not credible. Reputable human rights organizations such as the United Nations Human Rights Commission and Amnesty International are sometimes fed with information from self-seeking opposition groups in the country and as expected, such information tends to be untrue. Counsel submitted that the human rights reports referred to by the Applicants were not independently verified before publication and the human rights groups took these publications without conducting an independent investigation into the allegations or referring them to The Gambian government for verification. Counsel submitted that as a Court of law, this Court should resist the temptation of acting on speculative evidence and unverified reports.

AMNESTY INTERNATIONAL'S AMICUS CURIAE BRIEF

12. The Amnesty International, an independent and worldwide movement of people working for the respect and protection of internationally recognized human rights principles presented an *amicus curiae* brief pursuant to the inherent jurisdiction of the Court. The brief sought to throw light on the legal and human rights issues involved in the case and centered on the following main points.

A. CLEAR TREND EXISTS INTERNATIONALLY AND IN AFRICA TO ABOLISH THE DEATH PENALTY

13. In the international realm, there is an increasing trend toward abolishing the death penalty. The brief stated that the International Covenant on Civil and Political Rights (ICCPR) was adopted by the

United Nations in 1966 and The Gambia acceded to it on 22 March 1979. The ICCPR by Article 6(2) lays down the notion that the death penalty should be imposed for the most serious crimes. The Second Optional Protocol to the ICCPR adopted in 1989 requires state parties to take measures to abolish the death penalty. The Gambia has not ratified the Protocol but the growing number of state parties to the Protocol shows that the international community is moving away from the death penalty.

14. The brief continued that the United Nations has for many years adopted a series of resolutions calling on states to abolish the death penalty. In 1997, the UN Commission on Human Rights (now replaced by the Human Rights Council) at its 53rd Section passed a resolution calling on states to consider abolishing the death penalty altogether. In December 2007 and 2008, the United Nations General Assembly adopted resolutions 62/149 and 63/168 calling for a moratorium on the use of the death penalty with a view to abolishing same. However, these moratoriums are not legally binding. The Rome Statute of the International Criminal Court contains no provisions for the imposition of the death penalty and it is same with the International Criminal Tribunal for the Fonner Yugoslavia and the International Criminal Tribunal for Rwanda in 1993 and 1994 respectively. Further, Article 2 of the European Union Charter of Fundamental Rights provides that no one shall be condemned to the death penalty or executed.

15. The brief continued that the African Commission on Human and Peoples Rights has taken a stronger stand against imposition of the death penalty. The Commission in November 1999 passed a resolution urging states to consider a moratorium on the death penalty and in 2008, passed a resolution calling for a moratorium on the death penalty by all state parties to the African Charter on Human and Peoples' Rights (ACHPR) that still retained the death penalty and urged them to move towards abolishing it altogether.

EVOLVING LEGAL AND JUDICIAL NORMS OF RIGHT TO LIFE AND FREEDOM FROM HUMANE TREATMENT. THE IMPOSITION OF THE DEATH PENALTY MAY CONSTITUTE ARBITRARY DEPRIVATION OF LIFE

16. The brief of the amicus stated that the African Charter on Hunan and Peoples' Rights has been ratified by all 54 African Union Member States including The Gambia though the Charter does not explicitly address the abolition of the death penalty. Nonetheless, Article 4 of the Charter prohibits "arbitrary deprivation of life" which could be interpreted as limiting the use of the death penalty.

17. The constitutions of many countries guarantee a right to life and also prohibit cruel, inhuman and degrading treatment or punishment. The Gambia Constitution lists fundamental rights, including "protection of right to life" under Section 18.

18. The courts in many countries with similar constitutional provisions on the right to life and freedom from inhumane and degrading punishment have addressed the constitutionality of the death penalty. The Uganda Supreme Court in the case of **Attorney General *v.* Susan Kigula & 417 Ors.**, (Constitutional Appeal No. 3 of 2006, [2009] UGSC 6) restricted the application of the death penalty by invalidating mandatory death sentences and also found that more than three years on death row was unconstitutional. The Court also called on the Ugandan legislature to reconsider whether to retain the death penalty or not. Several decisions of national courts have also declared the death penalty as unconstitutional.

STRICT OBSERVANCE OF FAIR TRIAL STANDARDS AND DUE PROCESS REQUIRED IN DEATH PENALTY CASES

18. Article 4 of the African Charter provides that ***"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."*** The African Commission in

communications 279/03 - 296/05 **C.O.H.R.E *v.* Sudan (2009)** described the right to life as:

> ***"the supreme right of the human being. It is basic to all human beings and without it all other rights are without meaning"***.

Thus, since the right to life is the primary right upon which all other rights are dependent, it cannot be taken away except in the most serious offences and in trials which are totally fair and impartial.

19. Article 14 of the ICCPR enumerates the due process rights relating to criminal proceedings. It provides the following rights:

    1. *Right to equality before the courts and tribunals;*
    2. *Right to a fair and public hearing by a competent, independent and impartial tribunal;*
    3. *Presumption of innocence;*
    4. *Right to be informed promptly and in a language the Defendant understands of the nature and cause of the charge against him;*
    5. *Right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choice;*
    6. *Right to be tried without undue delay;*
    7. *Right to be present during the trial;*
    8. *Right to defend himself in person or through legal assistance of his own choosing, and to have legal assistance assigned to him without payment in any case where the interest of justice so require;*
    9. *Right to confront the witnesses against him and obtain the attendance of witnesses on his behalf;*

10. Right to review of the conviction and sentence by a higher tribunal;

11. Right to compensation for wrongful convictions;

12. Right not to be prosecuted twice for the same crime.

The ICCPR provides that the death penalty may only be imposed when these standards are observed.

DEFENDANT'S REPLY TO THE BRIEF OF THE AMICUS CURIAE

20. Learned Counsel to the Defendant argued that Amnesty International is not an amicus in the true sense of the word because it has a vested interest in the case and thus should have applied to be joined as a party to the proceedings. Further, that the Applicants' narration is based to a great extent on unsubstantiated and uninvestigated reports of Amnesty International to the extent that the organization would have been a key witness to the Applicants in oral proceedings if the parties elected that choice. Counsel also contended that the entire case of the Applicants is built around the unsubstantiated reports and adverse reports of Amnesty International, the 5th and the 6th Applicants in this case.

21. Counsel to the Defendant also submitted that the Court is neither bound to admit the brief of an amicus nor to follow the opinion expressed in the brief. Counsel contended that the brief of the amicus is biased and by and large based on the manipulative publications of the same organization. Thus, the concept of an *Amicus Curiae* is thus greatly abused and used by an organization which could easily be behind the litigation in the first place. Counsel submitted that the United States Supreme Court laid down rules for the filing and admission of Amicus' briefs in order to prevent its abuse such as Amnesty International is trying to do in this case. Counsel submitted that rule 37(2) (a) of the US Supreme Court rule states that the parties must consent to the *amicus* brief without which the Court

will not entertain same and that the Court will not allow the concept of *Amicus*' brief to be turned into a legal ambush as Amnesty International seeks to do in this case.

22. In **Allen *v.* Sir Alfred McAlpine & Sons Ltd.** (1968) 2 QB 229 at 266, Lord Justice Salmon held thus:

> ***"I have always understood that the role of the Amicus curiae was to help the court by expounding the law impartially, or if one of the parties were unrepresented, by advancing the Legal arguments on its behalf…the situation often noted is when an advocacy group files a brief in a case before an Appellate court to which it is not a litigant. Appellate cases are normally limited to the factual records and arguments coming from the lower courts"***.

23. Thus, Counsel contended that an *Amicus*' brief is always intended to provide a clear and unbiased legal reasoning on legal issues based on established facts. Counsel submitted that the facts in dispute are hotly contested so there is not established facts upon which Amnesty international could be heard to provide the Court with an impartial legal opinion, especially when it has vested interest in the outcome of the case. Counsel urged the Court to reject the brief of Amnesty International as it is clearly the biased opinion of an organization highly interested in the outcome of the case.

24. However, if this Court is minded to entertain the brief of Amnesty International, then the Defendant humbly urged the same to be dismissed upon a dispassionate consideration of the issues arising therefrom.

WHETHER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR) AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) PROHIBIT THE APPLICATION OF THE DEATH PENALTY

25. It is pertinent to state at this point that the Defendant's defence answered most of the issues arising from the Amicus' brief, we will avoid unnecessary duplication and highlight the essential additions made hereunder.

26. Learned Counsel to the Defendant reiterates his earlier arguments and contends that the defendant has not breached any of her obligations under the ICCPR and the ACHPR, the very basis of the case of the Applicants as well as the Amicus. Counsel submitted that the ICCPR and the ACHPR do no abolish the death penalty. Counsel submitted that the Second Protocol to the ICCPR provides that *"each state party shall take all necessary measures to abolish the death penalty within its jurisdiction"* whilst the ACHPR on the other hand provides that *"the application of the death penalty shall not be extended to crimes to which it does not presently apply"*. Thus, Defendant has not violated any of her international obligations under both statutes.

27. Counsel also submitted that it is necessary to contrast the clear, unambiguous provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with the provisions of the ICCPR and the ACHPR. Counsel submitted that Protocol 6 of the ECHR states that **"The death penalty shall be abolished. No one shall be condemned to such penalty or executed".** The Council of Europe adopted Protocol 13 to the ECHR in 2002 and provided for the abolition of the death penalty "in all circumstances, including time of war or imminent threat of war." Counsel submitted that the combined effect of Protocols No. 6 and 13 is that the death penalty is abolished in all circumstances in European countries. However, there are no such clear, unambiguous and mandatory provisions abolishing the death penalty in the ICCPR and the ACHPR of which The Gambia is a state party.

WHETHER THE RIGHT TO LIFE AS CONTAINED IN THE ACHPR AND ICCPR IS LIMITED TO THE PROTECTON OF THE LIFE OF THE FELONS ALONE TO THE EXCLUSION OF THE VICTIMS OF HEINOUS CRIMES

28. Learned Counsel submitted that a true and· proper construction of all regional and international conventions on the protection of life, prevention of inhuman and degrading treatment will reveal · that the life of everyone is the focal point and offers the same degree of protection to the slain victims of heinous crimes in society. Counsel further submitted that justice is a three-way system and the proponents of the abolition of the death sentence have failed to look at it in that light.

29. The courts should be equally concerned about the relations of the deceased victims of heinous crimes and the agony or inhumane and degrading treatment they are subjected to in the hands of the felons before the victims eventually die. Thus, justice can only be attained when the felon gets the same measure of treatment which he dished out to his victim, and in a murder or treason case, it is only the death sentence that will suffice. The removal of the death sentence demeans and reduces to naught the right to life of the victims of heinous crimes who need equal protection from the same legal system that seeks to protect the felons.

WHETHER THE ABOLITIONIST THEORY HAS RECEIVED THE EXPECTED DEGREE OF ACCEPTANCE AND NOTORIETY TO ENABLE TI PASS AS A JUS COGENS RULE OF INTERNATIONAL LAW

30. The Defendant contends that the abolitionist theory is yet to attain that degree of world-wide acceptance to enable it pass as Jus Cogens rule of international law. Counsel submitted that there are 196 countries in the world today. The records of Amnesty International show that only 77 states have acceded to the Second Optional Protocol to the ICCPR which aims at abolishing the death penalty. Thus, it is without doubt that the abolition of the death sentence has

not achieved universal acceptance for it to qualify as a *Jus Cogens* rule of international law.

CONSIDERATIONS BY THE COURT

31. The Amicus brief filed by the Amnesty International, though it appeared to support the case of the Plaintiffs, the Court, nonetheless accepted it because the Amnesty International is widely recognized and accepted as an independent worldwide body that seeks to promote and protect fundamental human rights. It is also known to have proven knowledge about human rights instruments and human rights in general. The Rules of the Court mandates it to solicit information from experts fit considers it expedient in order to arrive at a just decision.

32. From the averments contained in the pleadings of the parties as well as the legal arguments by their learned counsels and the brief of the Amicus, the Amnesty International, the main issue in this case is the legality of the death sentence as exists in the domestic laws of the Defendant *vis-a-vis* her obligations under international law as gleaned from the provisions of various international covenants of which the Defendant is a state party and customary law rules. In the main, the Plaintiffs contend that the death penalty is contrary to the provisions of the African Charter on Human and Peoples' Rights as well as the International Covenant on Civil and Political Rights as well as customary international law. The Defendant contends that it has not violated any of her international obligations and that she has the right to impose the death sentence in appropriate circumstances.

33. Thus, we will look at the legality of the death sentence in international law from two main perspectives:

    A. Treaty Law

    B. Customary International Law.

Thereafter the court will state its own opinion in respect of the debate about the legality of the death penalty.

A. TREATY LAW

34. We will look at the two main international instruments relied on by the parties in contesting this case.

I. The International Covenant on Civil and Political Rights

35. We will examine the key provisions with respect to the death sentence in order to arrive at its legal status and how it affects the imposition of the death sentence by the Defendant herein. The following Articles are very relevant to the discussion:

ARTICLE 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

36. The Second Optional Protocol to the ICCPR adopted in 1989 requires state parties to take measures to abolish the death penalty. The question is whether these provisions put any binding obligation on the Defendant to abolish the death penalty which she has violated.

37. Article 6 (2) recognizes that some countries might still retain the death sentence but that it should be imposed only for the most serious crimes according to the law in force at the time of the commission of

the crime and can only be carried out by the judgment of a competent court. Thus, there is no binding obligation on member states to abolish the death penalty within their domestic jurisdictions; on the contrary this provision recognizes that the death penalty could be imposed on the limited grounds stated therein. The Second Optional Protocol requires state parties to take measures to abolish the death penalty within their respective jurisdictions but as the name indicates, it is optional and the Defendant herein has exercised her right not to be bound by that Protocol by not acceding to it. It is thus not binding on her. Be that as it may, even if the Defendant has acceded to the Second Optional Protocol to the ICCPR, it only imposes the obligation on state parties to take measures to abolish the death penalty within their jurisdictions but it falls short of abolishing the death penalty within the jurisdictions of state parties.

II. African Charter of Human and Peoples' Rights

38. The African Charter does not expressly abolish the death penalty as admitted by both the Applicants and the Amicus, Amnesty International. The relevant portion of the African Charter is Article 4 and it states that:

> ***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.***

39. The African Commission on Human and Peoples' Rights in November 1999 passed a resolution urging states to consider a moratorium on the death penalty and in 2008 it passed a resolution calling for a moratorium on the death penalty by all state parties to the African Charter on Human and Peoples' Rights (ACHPR) that still retained the death penalty and urged them to move towards abolishing it altogether. The African Charter acknowledges that the right to life may be encroached upon except that it cannot be done arbitrarily. It does not impose any binding obligation on state parties to abolish the death penalty. Similarly, the Resolutions of 1999 and 2008, though they urge state parties to the African Charter to take measures

culminating in the abolition of the death sentence, yet they stop short of abolition of same.

40. There is a clear distinction between conventions, covenants and charters that abolish the death sentence and others that express a desire or encourage state parties to abolish same. The submissions of learned counsel to the Defendant with respect to the distinction between the clear and unambiguous provisions of the European Convention for the Protection of Human Rights and Fundamental Rights (ECHR) which categorically abolishes the death penalty and the provisions of the ICCPR and the ACHPR are apt. Whilst the ECHR categorically provides for the abolition of the death penalty by stating that **"The death penalty shall be abolished"**, the ICCPR and the ACHPR do not have similar mandatory provisions abolishing the death penalty. In the absence of a clear mandatory provision in the ICCPR and the ACHPR abolishing the death penalty, the Defendant cannot be held to have violated her international obligations under those instruments simply because other state parties have abolished the death penalty or have refused to execute those sentenced to death.

CUSTOMARY INTERNATIONAL LAW

41. The Applicants contend that there is a clear trend in customary international law which leans towards the abolition of the death sentence. The brief of Amnesty International also supports this view. However, that view is totally rejected by the Defendant who contends that there is no such clear trend and that in fact, a greater number of countries in the world still have the death sentence in their statute books. The Amicus' brief highlighted various resolutions passed by the United Nations and other regional bodies with a view to encouraging states to abolish the death penalty. The Defendant on the other hand provided statistics to indicate that despite all the efforts by the United Nations and other regional bodies towards the abolition of the death sentence, they are yet to reach the required international acceptance for it to be considered as a *Jus Cogens* rule of international law and thus, binding on the Defendant.

42. It is clear from the record before the Court that the United Nations and other regional bodies, including the African Commission on Human and Peoples' Rights are making concerted efforts towards the abolition of the death penalty. The key question is whether these efforts have yielded the needed acceptance for it to be considered as a *Jus Cogens* rule of international law. It is significant to note that the Defendant submitted that from Amnesty International's record, only 77 states out of the 196 states of the world have endorsed the Second Optional Protocol to the ICCPR which aims to abolish the death penalty. This submission was not controverted by the Amnesty International or the Applicants herein. The Defendant also submitted evidence of the use of the death penalty is several other countries recently and although the Applicants' contended that the source of the information, Wikipedia was unreliable, they nevertheless provided evidence of their own to controvert that evidence.

43. From the record, it is clear that there is no universally accepted norm in favour of the abolition of the death penalty as yet. A considerable number of countries still have the death penalty in their statute books whilst death row inmates are still being executed by a sizeable number of countries. Under the prevailing world order, it is unrealistic to state that there is a Jus Cogens rule of international law in favour of the abolition of the death penalty. The Defendant thus cannot be held to have violated her international obligations under customary international law rules abolishing the death penalty.

OTHER ISSUES:

A. WHETHER THE TRIALS BEFORE THE DEFENDANT'S DOMESTIC COURTS MEET THE REQUIREMENTS OF FAIR TRIAL

44. The Applicants contend that the trials before the domestic courts of the Defendant which have resulted in the imposition of the death sentence have often fallen short of fair trial standards required for the imposition of the capital punishment. The Applicants argue that

the judiciary is not independent and that judges are appointed and removed from office by the President at his pleasure. They submitted that most of the trials resulting in the imposition of the death sentence are political trials meant to stifle press freedom. The Amnesty International submitted that or the imposition of the death penalty to be lawful, the fair trial standards provided under Article 14 of the ICCPR should have been satisfied. For their part, the Defendant contended that these are baseless allegations and submitted that Sections 120 (3) and 138 (2) of the 1997 Constitution of The Gambia guarantee the independence of the judiciary and there is no evidence of the President ever interfering with the judicial process. Further, the Defendant pleaded and attached copies of judgments in trials which have resulted in the imposition of the death penalty to augment her argument that these trials are free from any political interferences. The Defendant also submitted that the trials within her jurisdiction are carried out in compliance with Article 14 of the ICCPR as her 1997 Constitution and criminal laws have provisions that are similar to those of the ICCPR.

45. It is trite learning that a party who asserts the affirmative on an issue bears the burden of proof on same. The Applicants backed by the Amicus' brief from the Amnesty International sought to establish that the trials by the Defendant's domestic courts fall far short of the dictates of Article 14 of the ICCPR. The Applicants bore the evidential burden on this issue. Though there are countless number of allegations against the Defendant on the issue of fair trial, there is no concrete evidence to find that the Defendant is guilty of violating the provisions of Article 14 of the ICCPR. The Applicants were not able to prove that there was executive interference in the trials that led to the imposition of the death penalty. The Applicants failed to fault any of the judgments submitted by the Defendant as valid grounds for the imposition of the death penalty.

46. Further, whilst the Applicants contend that the Defendant has executed and threatened to execute prisoners on death row who have not exhausted their appeals, the Defendants have vehemently

denied that. Instead, the Defendant contends that she has only executed prisoners who have exhausted their rights of appeal and do not intend to execute prisoners who are still pursuing their appeals. Since the Applicants assert the affirmative, they bear the burden of establishing that the Defendant is guilty of executing death row inmates who have not exhausted their appeals. From the record before us, we find that the Applicants have not led evidence to prove that, it was a bare assertion which will not suffice as proof. We are therefore unable to find that the Defendant has in fact executed death row inmates who have not exhausted their appeals.

B. ANNULMENT OF EXISTING STATUTE LEGISLATION OF THE DEFENDANT AND APPELLATE JURISDICTION OVER HER DOMESTIC COURTS

47. It is trite learning that jurisdiction is the creature of statute. The jurisdiction of this Court is clearly spelt out in Article 9 of the Protocol on the Court of Justice (A/P.1/7/91) as amended by Article 3 of the Supplementary Protocol (A/SP.1/01/05). These twin issues were extensively discussed during the hearing of the preliminary objection filed by the Defendant and the Court held that it has neither the jurisdiction to annul existing statute laws of ECOWAS Member States nor the jurisdiction to act as an appellate court over their domestic courts. Therefore, we will not go into those arguments all over again.

See: Ruling Dated 6th November 2013 between the parties herein.

C. SOME SPECIFIC RELIEFS SOUGHT BY THE PLAINTIFFS

48. The Plaintiffs sought for an order of this Court directing the Defendant to give back to the families the corpses of the inmates executed, specifically Mr. Alieu Bah. The Plaintiffs did not lead evidence to establish that families of inmates who are lawfully executed have the right to their corpses. We also have not found any international law rule which provides that families are entitled to the corpses of their executed members. It remains largely an issue governed by domestic law of each country. In the absence of compelling legal justification,

the Court is unable to order the Defendant to give back the corpses of the inmates executed to their families. As pointed out, the appropriate relief may lie in the domestic legislation.

49. Various countries and jurisdictions have national or domestic legislation or other laws to regulate what happens to the corpse of a person who has been executed under a sentence of death. A few examples will be cited here to buttress the point that the issue is largely governed by domestic legislation in the USA those States which still retain the death penalty have made laws as regards persons who may be allowed to receive the corpse of persons executed.

    In the State of Texas, Article 43.25 of the Code of Criminal Procedure permits a relative or bona fide friend of the executed prisoner to request for the corpse on certain terms. The State of Ohio has provisions with similar effect, under Chapter 2949.26 of the Revised Code. And in the State of New York, Section 622 of the Corrections Code provides that prior to the execution, the convicted person shall be given the opportunity to decide in writing to whom his or her shall be delivered after the execution. Before Canada abolished the death penalty in 1976, her 1869 Regulations on execution mandated that the body be buried within the grounds of the jail, unless the provincial government permitted other arrangements, which enabled families and friends to ask for the corpse to give them befitting burial.

50. The Applicant herein did not refer to any domestic legislation that entitles the family of an executed prisoner to be given back the body, if at all any such law exists in The Gambia. If such a law exists, have the Plaintiffs made a request or demand for a return of the corpses which the Defendant has refused? If an issue is solely governed by domestic law, recourse to an international forum will not arise unless the complainant has been denied a hearing or the right to fair hearing of his rights in the domestic arena. When recourse is made to an international court the Plaintiff must necessarily establish his claim by the texts governing the Court. In this case the Plaintiffs have not

helped the Court by citing any law, international or domestic, that enables this Court to come to their aid. And we have found none either: Much as their plea is sympathetic and humanitarian, yet the court does not decide on such factors; it decides on law and facts proven before it. We do not arrive at this conclusion with any relish, since we all know how families cherish their members even in death.

51. The Plaintiffs also sought for a declaration condemning the Defendant for executing Mr. Alieu Bah, an inmate, in violation of the rights and principles guaranteed by international law and to pay Mr. Bamba Bah the sum of 500 million Francs CFA for non-pecuniary damages suffered. The Defendant denied executing Mr. Alieu Bah and insisted that he was still alive. The Plaintiffs did not lead evidence to establish that Mr. Alieu Bah has indeed been executed. Thus, the Court is unable to grant the Plaintiffs the declaration they sought in that regard.

52. Further, the Plaintiffs sought for a declaration to the effect that the keeping of all inmates condemned to death on death row is a violation of their rights. These inmates have been tried, convicted and sentenced to death. They are lawfully held in custody until such time that they would be executed or released under a presidential pardon or amnesty. Thus, if the Defendant is castigated for keeping them in custody, it would amount to asking the Defendant to execute them and that is an order this Court cannot make, for want of jurisdiction, and will not make as it is not in the interest of the death row inmates. Therefore, that declaration cannot be granted.

53. The Plaintiffs also sought for an order directing the Defendant to respect the free access of lawyers and family members to the prison(s) where death row inmates are kept. The Defendant denied this allegation vehemently. The Plaintiffs' did not adduce evidence to prove that indeed the Defendant has been preventing Lawyers and families from accessing death row inmates. In the absence of evidence, the Court cannot make that order against the Defendant. We, however, state the right of death row inmates to visitation by family members, friends and lawyers, which right must be respected.

D. LEGALITY OF THE DEATH PENALTY: THE COURT'S OPINION

54. This case brings to the fore the controversial and now topical debate as regards the death sentence as a form of punishment. Indeed, as mentioned earlier in these proceedings a number of countries have abolished the death penalty. And yet many more countries still retain it and some countries feel reluctant to let go. In the ECOWAS region the vast majority of States still keep the death penalty, either in the Constitution or in the penal code. At the same time the constitution, like the one of the respondents herein, guarantees the right to life. Let us refer to legislation that is germane to our jurisdiction that is the African Charter on Human and Peoples' Rights. The material provisions are these:

> ***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.*
>
> ***Article 5***- *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.*** *(The emphasis is ours.)*

55. These two provisions give a clear indication yet that any form of punishment that qualifies as cruel, inhuman or degrading defiles the human person and cannot be supported. Yet what appears to be a proviso to Article 4 namely **'no one may be arbitrarily deprived of this right'** seems to justify the actions of member states who still desire to keep the death penalty as long as they try offenders under due process. Thus, the rights which are beautifully couched in Articles 4 and 5, supra, are taken away by the proviso referred to. Nonetheless states whose Constitution has provision on the respect for human life and also forbids the imposition of cruel, inhuman or degrading punishment have clearly recognized that death penalty

offends against these very principles of human rights enshrined in their constitution. It is in this regard that we are of the view that the death penalty is ***inconsistent with*** (a violation of) the right to life and is a cruel and inhuman punishment. We therefore agree with the decisions of courts that have held that position.

56. In the case of **MAKWANYANE and MCBUNU *v.* THE STATE**, the South African Constitutional Court declared the death penalty for murder as provided under the country's laws to be incompatible with the prohibition of ***"cruel, inhuman or degrading treatment or punishment, under the country's interim constitution."*** The Court also held that the death penalty violates the right to life. That decision was given on 6 June 1995. In the same vein the Constitutional Court of Ukraine on 29 December 1999 in the case of **IN RE UKRAINE**, Citation UKR-2000-1-003 declared the death penalty illegal, holding that it was incompatible with the constitutional provisions on the right to life and which also prohibits torture, and cruel, inhuman and degrading treatment or punishment. It is pertinent to note that following the decisions of their Constitutional Courts, the Parliaments of South Africa and Ukraine took steps to abolish the death penalty in 1998 and 2000 respectively.

57. Other notable countries whose Courts have declared the death penalty illegal in view of existing laws expressing the right to life and prohibiting cruel, inhuman and degrading treatment or punishment are, the Hungarian Constitutional Court Decision N°: 23/1990 (X 31) AB, on 24 October 1990; the Lithuanian Constitutional Court in case N°: 2/98 decided on 9 December 1998; the Albanian Constitutional Court in Decision N°: 65 on 11 November 1999, Citation ALB-199-3-008.

58. The Parliamentary Assembly of the Council of Europe adopted Resolution 1253 on 25 June 2001 stating that the application of the death penalty **"constitutes torture and inhuman or degrading punishment within the meaning of Article 3 of the European Convention on Human Rights."**

59. The above cited Decisions and Resolution, though not binding on this Court, are persuasive enough in view of the opinion we hold that the death penalty is a cruel and inhuman punishment and is inconsistent with the right to life. However, this Court is constrained to make a definite pronouncement on its illegality in view of Article 4 of the African Charter which permits States to carry out the death penalty if due process is observed. We are bound to give effect to the provisions of the African Charter, in view of Article 4(g) of the Revised Treaty. Thus, it is to be left to the courts and more particularly the national assemblies or parliaments of individual member states, like those of South Africa and the European countries cited above, to decide to declare the death penalty illegal in the light of existing domestic legislation, specially the Constitution and abolish it altogether.

DECISION

60. From the foregoing analysis of the facts and law, the Court decides that there is no factual evidence to support the allegations made against the Defendant and the law also does not also support the Plaintiffs' case. We accordingly dismiss the action. We make no order as to costs.

This Judgment has been read in public sitting of the Court in Lomé, Togo, on 14th February 2014.

BEFORE THEIR LORDSHIPS:

- **Hon. Justice Awa Nana Daboya** - *Presiding;*
- **Hon. Justice Anthony A. Benin** - *Member;*
- **Hon. Justice Eliam M. Potey** - *Member.*

Assisted by: **Tony Aneni-Maidoh (Esq.)** - *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 NIGERIA

ON THURSDAY, 6TH DAY OF MARCH, 2014

SUIT N°: ECW/CCJ/APP/21/12
JUDGMENT N°: ECW/CCJ/JUD/06/14

BETWEEN
BELLO AMINU BALA KALTO - *PLAINTIFF*

AND
THE REPUBLIC OF NIGER - *DEFENDANT*

COMPOSITION OF THE COURT

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDENT*
2. **HON. JUSTICE HANSINE N. DONLI** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **NASIR MAHAMADOU (ESQ.)** - *FOR THE PLAINTIFF*
2. **SECRETARY TO THE GOVERNMENT**
DOMICILED AT THE *PALAIS DE LA PRÉSIDENTIEL* (STATE HOUSE) - *FOR THE DEFENDANT.*

- Jurisdiction of the Court - Legal Standing

SUMMARY OF FACTS

On 17 December 2012, Madam Amina Balla Kalto brought an Application before the Court for violation of the fundamental principles governing a fair trial and violation of Article 4 (g) of the ECOWAS Treaty and consequently, the African Charter on Human and Peoples' Rights against the Republic of Niger.

The Applicant inherited a building from her father, which subsequently, became the subject of litigation. Indeed, at the time when the Applicant undertook renovation work on the said building, the police ordered her to stop work on the grounds that Lamoudi Amadou was the owner of the title deed. Subsequently, Mrs. Amina Balla Kalto applied to the competent courts of Niger to assert her rights over the building.

The building, before being sold to the late father of Amina Balla Kalto, was the subject of a sale between the original owner Abdallah and Mr Lamoudi Amadou.

LEGAL ISSUES

- *Is the Application by Amina Balla Kalto for violation of the right to a fair trial at national level admissible?*

- *Is the Order made to Amina Balla to stop the renovation work on the building she inherited from her father a violation of human rights?*

DECISION OF THE COURT

The Applications for violation of human rights are filed against one or more persons who have committed an act that may constitute a violation of rights. It is hoped that the Republic of Niger is not a

party to the dispute between Mrs. Aminata Balla Kalto and Mr. Lamoudi Amadou. Consequently, her applications are inadmissible.

The order for Amina Balla to stop the renovation work falls within the scope of a civil lawsuit concerning personal interests between the Applicant and her opponent and that the Republican Niger is completely and utterly foreign to it.

JUDGMENT OF THE COURT

The Court thus constituted delivered the following Judgment:

1. On 17th December 2012, Madam Amina Balla Kalto filed an Application, at the Registry of the Court, for and on behalf of herself, without being assisted by Counsel.

2. By another Application filed on 25 January 2013, through a Counsel, Me. Nanzir Mahamadou, Lawyer registered with the Court BP: 10417, Niamey, Republic of Niger, Madam Amina Balla Kalto brought a case against the Republic of Niger, through its Representative, the Secretary to the Government, and sought from the Court to examine the claims that the Republic of Niger:

   - The Republic of Niger violated Article 4 (g) of the ECOWAS Treaty, which has domesticated the provisions of the African Charter on Human and Peoples' Rights;

   - The Republic of Niger violated the fundamental principles governing the right to fair hearing (the right to effective appeal, the right to be tried within reasonable period, and the right to fair and qualitative judgment following a judicial procedure), as well as her right to property.

3. In the said Application, Madam Amina Balla Kalto sought an order as to the reparation of the prejudices she suffered, owing to the alleged human rights violations, for which she pleads with the Honourable Court to hold the Republic of Niger liable.

FACTS

The facts as presented by Plaintiff/Applicant

4. Madam Amina Balla Kalto claims that she inherited the property with Certificate of Occupancy N°: 1417 from her father, and that as she decided to renovate the said property, she was invited by the

Niamey Police Station, where she was ordered to stop the renovation work on the property, on the ground that the said property had been sold earlier before her father acquired it.

5. Plaintiff/Applicant also claims that in 2008, one Mr. Abdallah, who is the original owner of the property had agreed to sell it off to one Mr. Lamoudi Amadou, who was residing in the USA at a cost of 20,000,000 cfa Francs, and that as Mr. Lamoudi could only pay half of the agreed sales price, Mr. Abdallah later changed his mind to sell his property to an immediate and readily available acquirer. She tendered copy of a deed from a Notary Public, on the authority of Mr. Lamoudi, through which the sale of the property was authorized. Thus, her father has acquired the said property after paying the full selling price;

6. Plaintiff/Applicant also claims that copies of the deed from the Notary Public, together with the property's sales documents to her father were kept in the Government Lands Office in Niamey, and were registered under N°: 36919, on 26th January 2010, and that up till today, the said Government Office has not yet effected the Change of Ownership of the property under litigation in her father's name;

7. In continuing her claims, Plaintiff/Applicant informed the Court that Mr. Lamoudi Amadou took a case before the ***Tribunal de Grande Instance de Niamey***, which ordered the Renovation Work Cessation that she started on the property. Also, Mr. Lamoudi lodged a complaint against Mr. Abdallah for being in possession of, and using fake document, in relation to the power of attorney sent by fax from the USA;

8. Plaintiff/Applicant further informed the Court that she too took a case before the ***Tribunal de Grande Instance de Niamey***, which ordered the Director in the Government Lands Bureau to issue to Plaintiff/Applicant a duplicate of the documents relating to the property under litigation, to enable her proceed with the procedure on Change of Ownership of the inherited property in her own name;

she added that Mr. Lamoudi filed a third party opposition case against this Ruling of the Tribunal in Niamey and obtained its stay of execution, until this Ruling finally became enforceable, in the proceedings initiated against Mr. Abdallah on the charges of holding fake official documents and using same, in regard to the power of attorney sent by fax from the USA;

9. Finally, Plaintiff/Applicant averred that she was not party to this proceedings initiated by Mr. Lamoudi against Mr. Abdallah, the seller of the property that she inherited from her father, and that in order to put a stop to the dysfunctioning of the judicial institutions against her interests, she sent correspondences to Commission in charge of the repair of such dysfunctioning, while at the same time sending copies of such correspondences to the President of the Republic, the National Judicial Council, and the Minister of Justice, but all in vain, as she did not get any reply;

The facts as presented by the Republic of Niger

10. The Republic of Niger declared that Madam Amina Balla Kalto inherited the property under Certificate of Occupancy N°: 1417 from her father, that at the time she started to enjoy the said property, she was confronted with resistance and opposition from Mr. Lamoudi Amadou, who claimed he too is owner of the property bearing the same Certificate of Ownership, because he had acquired it from Mr. Abdallah Henri in 2008, by paying the sum of 10,000,000 CFA Francs, with the understanding that the balance would be offset in installments;

11. The Defendant State averred that following this sale, Mr. Lamoudi Amadou had a Certificate of Occupancy issued to him in his name, and informed, through writing, the Public Notary to Madam Amina Balla Kalto's father, and clarified that the power of attorney purportedly emanating from him, and which was tendered by Mr. Abdallah Henri was fake;

12. The Defendant State further stated that despite this warning and the penal procedure currently undergoing against Mr. Abdallah Henri, for tendering fake official documents, the Public Notary to Madam Amina Balla Kalto's father continued with the process of obtaining a Certificate of Occupancy, but in vain, and above all, the legal actions taken by Counsel to Plaintiff/Applicant have either been rejected, or suffered from a stay of proceedings.

Pleas-in-law by parties

Pleas-in-law by Plaintiff/Applicant

13. In support of her claims, Plaintiff/Applicant cites Articles 28 of the Constitution of the Republic of Niger, and 14 of African Charter on Human and Peoples' Rights, and averred that the Republic of Niger, through the refusal of its Government Lands Bureau to effect the change of ownership on the property acquired by her father, violated her socio-economic right, as enshrined under these instruments, and also, through the decision of the Tribunal in Niamey that ordered the Renovation Work Cessation on the property she inherited from her father, in disregard for Article 121 of Decree of 26 July 1932 on Re-Organization of Lands Matters in Francophone West Africa, which shields the heirs of a duly acquired landed property from any legal contest, by providing that the details entered on a Certificate of Occupancy are intangible and unquestionable.

14. Plaintiff/Applicant equally claims that the Republic of Niger violated her inheritance right guaranteed under Article 21 of the Constitution of Niger, as well as Article 18 of the African Charter on Human and Peoples' Rights, through the refusal, by its Lands Administration Institution, to proceed with the Change of Ownership in her name, of the property she inherited from her father.

15. Madam Amina Balla Kalto equally cites Articles 7 of the African Charter on Human and Peoples' Rights, and Article 14 of the International Covenant on Civil and Political Rights, by averring that the legal proceedings initiated by Mr. Lamoudi is dilatory, as such

proceedings was initiated through the help of the judicial authorities of the State of Niger.

16. Finally, Plaintiff/Applicant cites the violation of her right as a vulnerable person, as enshrined under Articles 22 of the Constitution of the Republic of Niger, 18 (3) and (4) of the African Charter on Human and Peoples' Rights, 2 and 3 of the Convention on the Elimination of all Forms of Discrimination against Women, 2, 3 and 5 of the International Covenant on Civil and Political Rights, and 2 and 3 of the International Covenant on Social, Economic and Cultural Rights. She justifies this alleged violation by the fact that her other co-heirs were enjoying, peacefully, their inheritance, whereas such is not her own case, due to impediments from the Defendant State's Lands Bureau and its Judicial Authorities.

Pleas-in-law by Plaintiff/Applicant

17. The Republic of Niger solicits from the Honourable Court, to declare itsvMemorial in Defence as admissible, as it was duly filed.

As to merit

18. The State of Niger declares that Articles 28 of the Constitution of Niger and 14 of the African Charter on Human and Peoples' Rights, as cited by Plaintiff/Applicant, do not apply in the instant case, it argues that in the instant case, we are not dealing with expropriation, for public use. It is simply a civil litigation between two individuals, who are claiming ownership over the same property under the arbitration of the judicial institution;

19. Concerning the allegation on the violation of Plaintiff/Applicant's right to inheritance, the Republic of Niger averred that it was not privy to the sharing of the estate that was done by the Family Council, which apportioned the property that is the subject of the dispute between Mr. Lamoudi an Plaintiff/Applicant, through pending legal proceedings, which are yet to lead to a final enforceable court decision, thereby obliging its Lands Bureau to stay action on the Change of Ownership;

20. Concerning the allegation on the violation of the right to fair hearing, the Republic of Niger points out that in the proceedings initiated by Plaintiff/Applicant, as well as those initiated by Mr. Lamoudi against her, Madam Amina Balla Kalto enjoyed the services of Counsel, and even appeared at some court sessions in person;

21. The Republic of Niger equally contests the quality of a vulnerable person that Plaintiff/Applicant alluded to herself, by arguing that she is a teacher at the tertiary level of the educational entreprise, a holder of a doctorate in law, a one-time Chairperson of Human Rights Associations, and very recently, the Rapporteur at the National Human and Fundamental Rights Commission in Niger Republic.

LEGAL ANALYSIS BY THE COURT

As to form

22. From the human rights violation Application filed by Madam Amina Balla Kalto, against the Republic of Niger, it can deduced that all allegations made by her against the Republic of Niger relate to civil procedures in the litigation between herself and Mr. Lamoudi, on the claim to ownership of the property bearing Certificate of Ownership N°: 1417;

23. Thus, the Court finds that these are procedures in civil litigation relating to private interests between Plaintiff/Applicant and her opponent, in which the Republic of Niger is absolutely a stranger; and that in this civil matter, where each party at cause is on the same page as per equality before the law, and one of the parties, through the instrumentality of the law, invoking human rights violation against the State, is very unlikely;

24. In these circumstances, the Court finds that under Article 9.4 of the Supplementary Protocol, which empowers the Court *"to examine cases of human rights violation that occurs in any Member State"* does not apply, and it therefore follows that Madam Amina Balla Kalto cannot claim to be victim of human rights violation under the meaning of Article 10.d of the afore-mentioned Protocol, and

consequently, Madam Amina Balla Kalto lacks *locus standi* to bring a human rights violation cases against the Republic of Niger;

Thus, the Court holds that the human rights violation Application filed by Madam Amina Ball Kalto against the Republic of Niger should be declared as inadmissible, for lack of lack of *locus standi*.

FOR THESE REASONS

The Court,

Sitting in a public sitting in a human right violation proceedings, in first and last resort, having heard both parties.

As to form

- **Finds** Madam Amina Balla Kalto's lack of *locus standi* to institute a human rights violation case against the Republic of Niger;
- Consequently, **declares** as inadmissible the human rights violation case brought before it, by Madam Amina Balla Kalto against the Republic of Niger;
- **Orders** each party to bear its own costs.

THUS ADJUDGED, MADE IN A PUBLIC HEARING AT ABUJA ON THE DAY, MONTH AND YEAR MENTIONED ABOVE.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES

1. **Hon. Justice Awa NANA DABOYA** - *President;*
2. **Hon. Justice Hansine N. DONLI** - *Member;*
3. **Hon. Justice Eliam M. POTEY** - *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, IN NIGERIA

ON THURSDAY, 6TH DAY OF MARCH, 2014.

SUIT NO: ECW/CCJ/APP/14/12
JUDGMENT NO: ECW/CCJ/JUD/08/14

BETWEEN
BASSAM EL NAJJAR - *PLAINTIFF*

AND
THE REPUBLIC OF TOGO - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE AWA NANA DABOYA** - *PRESIDING*
2. **HON. JUSTICE C. MÉDÉGAN-NOUGBODÉ** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **WILLIAM BOURDHON (ESQ.)** - *FOR THE PLAINTIFF*
2. **GABRIEL A. DOSSOU (ESQ.),**
   OHINI KWAO SANVEE (ESQ.) *AND*
   EDAH N'JELLE (ESQ.) - *FOR THE DEFENDANT.*

- Lack of quality to file a case before the Court - Inadmissibility.

SUMMARY OF FACTS

Plaintiff claimed that during the years 2008 and 2009, under the pretext of an imminent mutiny, which aimed at toppling the regime of President Faure Gnassingbé of Togo, a police search was conducted in the house of the half-brother of the President, and many political opponents were arrested and tortured. He averred that it was in these circumstances of generalized violence, and absence any material proof that could be tendered against him that an international warrant of arrest was issued against his person on 22 January 2010;

Plaintiff further stated that while fearing for his life, he decided not to answer the warrant issued against him; he was accused of being a member of a clandestine group of persons, who were planning to commit crimes against individuals or properties;

Plaintiff claimed that he was later tried and sentenced wrongly in absentia, pursuant to a totally different and presumed criminal procedure relating to "a plot formed to carry out to undermine State Security", thus violating his fundamental human rights.

The State of Togo claimed that Plaintiff was based in Togo, where he set-up many business outfits, making huge profits, but he had always evaded paying taxes, and he was indebted to the State to the tune of 9 270 000 000 CFA francs of unpaid taxes.

While trying to dodge the payment of taxes, Plaintiff colluded with some civilians and military personnel, to carry out a coup d'état against Togo State Institutions during the years 2008-2009;

Since Mr. Bassam Najjar, learnt that his mentor, Mr. Kpatcha Gnassingbé, the half- brother to the President, was arrested, together with other coup planners, he (Bassam Najjar) fled Togo, despite the

proceedings initiated against him. By Judgment n°59/11 of 15 September 2011, he was tried and sentenced in absentia.

***LEGAL ISSUES**:*

- *Can a Plaintiff invoke the violation of his human rights, within the purview of Articles 9.4 and 10.d of the Supplementary Protocol on the Court, whereas he is sojourning outside the territory of the incriminated Member State, at the time of filing his case?*

- *Can such a case be admissible before the Honourable Court?*

DECISION OF THE COURT

The Court notes the lack of quality of Bassam Najjar to file a case on the violation of his human rights against the State of Togo.

The Court declares as inadmissible, the human rights violation cases filed by him, against the State of Togo.

JUDGMENT OF THE COURT

PROCEDURE

1. By Application filed at the Registry of the Court on 21 September 2012, Mr Bassam El Najjar, represented by Maître William Bourdon, of 16 rue de Rivoli, 750001 Paris-France, and whose address for service is C/o Maître Ohini Kwao Sanvee, Lawyer registered with the Bar in Togo, 32 Rue des bergers, Nyekonakpoe, BP 26091 Lomé, Togo, brought a case before the Court, against the Republic of Togo, and pleaded with Court to note:

   - The violation by the Republic of Togo of his right to security, as provided for in Articles 3 of the Universal Declaration of Human Rights and 4 of the African Charter on Human and Peoples' Rights;

   - The violation by the Republic of Togo of his right to property, as guaranteed in Articles 17 of the Universal Declaration of Human Rights and 14 of the African Charter on Human and Peoples' Rights;

   - The violation by the Republic of Togo of his right to fair trial, as provided for under Articles 10 of the Universal Declaration of Human Rights and 7 (1) (d) of the African Charter on Human and Peoples' Rights;

   - The violation by the Republic of Togo of his right to fair trial, as provided for under Articles 10 of the Universal Declaration of Human Rights and 7 (1) (c) of the African Charter on Human and Peoples' Rights;

   - The violation by the Republic of Togo of his right to presumption of innocence, as provided for under Articles 11 of the Universal Declaration of Human Rights and 7 (1) (b) of the African Charter on Human and Peoples' Rights

2. Consequent upon the allegations of human rights violations made by him, Plaintiff seeks from the Court:

   - An **Order** annulling the judgment of the Criminal Chamber of the Supreme Court of Togo delivered on 15th September 2011;

   - An **Order** on the Republic of Togo, to pay Plaintiff, such an amount that the Court may deem sufficient, for the reparation of the prejudice suffered by him;

   - An **Order** on the Republic of Togo to bear all the costs, pursuant to Article 66.2 of the Rules of the Community Court of Justice, ECOWAS as well as an immediate enforcement of the Judgment that the Honourable Court shall deliver in the instant case;

3. On 8 April 2013, the Republic of Togo filed at the Registry of the Court a Memorial in Defence to which the Plaintiff replied, in writing and was filed before the Court on 30 October 2013;

SUMMARY OF FACTS

Summary of facts according to the Plaintiff

4. Plaintiff claimed that for a better understanding of the facts of the case, it should be recalled that Mr. Faure Gnassimgbé was elected President in 2005 following an election that was criticised world - wide, and which led to clashes between supporters of opposition parties, law enforcement agencies and militia men who were supporters of the ***Rassemblement du people Togolais*** (the ruling party);

   Plaintiff averred that this situation has greatly affected the credibility of the judicial system in Togo.

5. Plaintiff claimed that it was in these circumstances that during the course of 2008 and 2009, acting upon some purported intelligence reports from foreign intelligence agencies, on an impending mutiny

which aimed at overthrowing the incumbent president Faure Gnassimgbé, and in which his half-brother, Mr. Kpatcha Gnassimgbé, a Member of Parliament, was implicated, the army was sent to the latter's home for a security search, whose ulterior motive was to physically supress political opponents to the regime of President Faure Gnassimgbé.

6. Plaintiff explained that following this operation by the security officials, several political opponents were detained and tortured; and that even the crime of torture has been established by the Supreme Court of Togo.

   Plaintiff averred that it was in this setting of general violence and devoid of any material evidence, which could be tendered, as ground for the guilt of an individual that an international arrest warrant was issued on 22nd January 2010 against Mr. Bassam El Najjar.

7. Plaintiff claimed that, while fearing legitimately for his life, he did not comply with the warrant issued against his person; that it was against this backdrop that the Public Prosecutor at the Court of Appeal Lomé filed his final submissions, wherein he requested that the matter be referred to the Judicial Chamber of the Supreme Court of Togo without, however, levelling charges against him.

8. Plaintiff averred that vague charges were levelled against him, which have it that: "**during the course of 2007, 2008 and 2009 he belonged to a group of individuals, or participated in the activities of a group of persons, whose objectives were to plan and commit crime against persons and destruction of properties"**

9. Plaintiff added that subsequently, at the request of the prosecuting counsel at the hearing, Mr. Bassam El Najjar was prosecuted on criminal grounds, contrary to the grounds on which he was referred to the judicial chamber of the Supreme Court of Togo, namely that he participated in a **"plot to disrupt the internal security of the State"**

Summary of facts by the Defendant

10. The Republic of Togo claimed that the Plaintiff, Bassam El Najjar, a Lebanese national settled in Togo where he established several trading companies, which made him prosperous, and who, despite his prosperity, had failed to fulfil his full tax obligations to the Republic of Togo; and that following a tax audit, the tax authority found that there was an outstanding tax payment of 9,270,000,000 CFA francs, which was to be settled by him.

11. The Republic of Togo further claimed that the Plaintiff was unwilling to pay this debt, joined the groups of some civilians and military personnel, to plot destabilising actions against the Institutions of the Republic of Togo as revealed by the Security Services of the Republic of Togo during the course of 2008-2009. This information was confirmed by Foreign Intelligence Service on the impending operation. These same intelligence reports in a concurring manner, revealed that Mr Kpatcha Gnassimgbé, a Member of Parliament and half-brother of the President of the Republic of Togo, was also involved in the coup plot; thus some civilians and military personnel close to Mr Kpatcha Gnassimgbé were arrested, sequel to a warrant issued by the Public Prosecutor at the Court of First Instance in Lomé.

12. The Defendant State argued that the trial followed its course before different competent Courts, and at the end of it all, the trial Judge, at the request of the Public Prosecutor of the Court of Appeal Lomé, declared that it was sufficiently established against the accused persons, the criminal intentions of the group, voluntary violence and attempt to breach the internal security of the Republic of Togo, and referred the masterminds of the failed coup d'état, their accessories which included Plaintiff, to the judicial chamber of the Supreme Court of the Republic of Togo, in order to be tried, in accordance with the law;

13. The Republic of Togo added that as soon he became aware of the arrest of his mentor, Mr. Kpatcha Gnassingbé, Plaintiff took to his

heels; although he was fully aware of the trial process involving him and despite the international arrest warrant issued against him and the summons, Plaintiff still refused to appear before the trial judges, to exercise his right of defence; this is what led to the Judgement N°: 59/11 of 15 September 2011 delivered against him in *absentia*.

THE PLEAS-IN-LAW BY THE PARTIES

The Pleas-in-law by Plaintiff

As to form

14. Regarding the admissibility of the Application, Plaintiff invoked the ECOWAS Declaration of Political Principles of 8 July 1991, Articles 9 (4) and 10 (d) of the Supplementary Protocol on the Community Court of Justice, ECOWAS, and the case-law of the Court itself on the exhaustion of local remedies and its referral by individuals on issues of human right violation, as well as the ECOWAS Revised Treaty.

15. In his rejoinder filed at the Registry of the Court on 30 October 2013, Plaintiff countered the inadmissibility of the Application as raised by the Republic of Togo in her reply. He claimed that Article 33 of the Rules of the Community Court of Justice, ECOWAS does not support inadmissibility, on the basis of omission of home address, since there are means of effecting service, for instance the address or fax number of the counsel to Applicant, as it is in the instant case.

As to the merit of the case

16. Plaintiff averred that his right to security was violated, and invoked Article 4 of the African Charter on Human and Peoples' Rights as well as Article 3 of the Universal Declaration of Human Rights; he cited the prevailing political context in Togo as ground for the violation of his right to security; the political context then gave rise to acts of torture, extrajudicial killings committed against arrested individuals in relation to the instant case, in which he was implicated, and

concluded that it was right for him to entertain fear over his life or his physical integrity, for that reason, he could not go to Togo.

17. Plaintiff also alleged that his right to property was violated. In support of this allegation, Plaintiff cited Article 14 of the African Charter on Human and Peoples' Rights and Article 17 of the Universal Declaration of Human Rights. Plaintiff justifies this alleged violation through his conviction in *absentia*, which included the general confiscation of his properties. He explained since the security personnel of Defendant State obtained testimonies and confessions of accused persons through torture, the proceedings initiated against him were illegal and therefore should be voided; consequently he concluded that the case against him should be annulled since it led his conviction in absentia of 15 September 2011, the order for the seizure of his properties, which was given by the same judgment of Court lacked any legal basis

18. Plaintiff further claimed that his right to fair trial was violated, particularly his right to be heard, his right of defence, his right to presumption of innocence and the disregard for the obligation of the Court which ruled to justify reasons for the conviction handed down against him, and cited Article 1(h) of the ECOWAS Protocol on Democracy and Good Governance, Articles 7(1), 7(1b), 7(1c) of the African Charter on Human and Peoples' Rights, Articles 10, 11(1) of the Universal Declaration of Human Rights, the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights, which provide that everyone charged shall be informed in details of the nature and the cause of the charges against him (N. 1 (a), (b) and (c)); and averred that the tortures and extrajudicial killings which the accused persons were victims of, in the same case as himself, still remain an obstacle to his return to Togo, and thus depriving him the exercise of his right to defend himself. In support of all these claims, he invoked Judgment N°: ECW/CCJ/JUD/09/11 of the ECOWAS Court of Justice, in which the Court found the Republic of Togo guilty of the breach of right to be heard.

The pleas-in-law by Defendant

As to form

19. The Defendant State pointed out that the Application filed by Mr. Bassam El Najjar did not conform to the requirements of Article 33 (1) of the Rules of the Community Court of Justice, ECOWAS because home address of the Plaintiff is not included, and concluded that the Application be rejected for this reason.

As to merit of the case

The Republic of Togo refuted one after the other, the allegations of human rights violations made by Mr. Bassam El Najjar.

20. On the right to security, the Defendant State claimed that Plaintiff lived for several years in Togo, and made fortune, and enjoyed some degree of impunity which enabled him to evade his tax obligations to the point of having and outstanding tax payment of 9, 270,000 CFA francs to the Republic of Togo.

21. On the right to property, the Republic of Togo pointed out that the order for the seizure of properties made against Plaintiff was as a result of a judicial procedure, pursuant to the provisions of Articles 7 and 23 of the Togolese Criminal Code and stated that these provisions are in conformity with Article 14 of the African Charter on Human and Peoples' Rights which provides that:

> *"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."*

22. On the right to fair trial, the Republic of Togo claimed that by leaving hurriedly Togo, upon hearing about the arrest of his mentor Kpatcha Gnassingbé, and by staying outside the territory of Togo during the period of the proceedings initiated against him, Mr. Bassam el Najjar created a situation for himself, not to be heard; he was aware the

proceedings were ongoing; The Defendant State further blamed the deliberate absence of Plaintiff from Court, despite the order on him to appear, as the reason for his inability to exercise his right to defence.

23. The Republic of Togo also refuted the violation of the right to presumption of innocence of Plaintiff and pointed out that the indictment revealed that there was direct link between him and Kpatcha Gnassimgbé, who is the brain behind the plot against State security, which formed the grounds for the case instituted against him.

24. On the reasons for Plaintiff's conviction, the Republic of Togo claimed that the warrant of arrest issued against him under the trial already mentioned that he was prosecuted for being a member of a criminal group, attempt to undermine internal security of Togo; and that the reasons, as stated in the summons on him to appear before the Court, included all these charges. Defendant also claimed that it was the debates, during the proceedings that led the Court to conclude and requalify the charges as an attempt to undermine the internal State Security, pursuant to Article 230 of the Togolese Penal Code.

    In the light of the foregoing, the Defendant State concluded that the human rights violations as alleged by Mr Bassam El Najjar are not established.

25. On the plea by Plaintiff seeking the annulment of Judgment N°: 59/ 11/ of 2011 by the Judicial Chamber of the Supreme Court of Togo, the Defendant State declared that it was a judicial decision by a national Court, and recalled that, by a settled case-law the ECOWAS Court of Justice declared that **"the Court declared that it has no jurisdiction to adjudicate on judgment delivered by the Court of a Member State"** cf. Judgment N°: ECW/CCJ/APP/02/05 of 7 October 2005);

26. In conclusion, the Republic of Togo declared that there was no human right violation in the Application brought by Mr. Bassam El Najjar;

rather, the case filed by Plaintiff simply has to do with an appeal against the afore-mentioned Judgment by the Supreme Court of Togo; and this is at variance with the Togolese constitutional and legal norms, and especially jurisdiction of the Supreme Court itself.

ANALYSIS OF THE COURT

As to form

27. The Court notes that the Application filed by Mr Bassam El Najjar highlights the alleged violation of his human rights, by the Republic of Togo, an ECOWAS Member State, particularly his right to security, his right to own property, his right to fair trial, his right to defend himself of the allegations levelled against him, and his right to presumption of innocence.

28. The Court also notes that, pursuant to Articles 9 (4) and 10 of the Supplementary Protocol A/SP.1/01/05 on the Community Court of Justice, ECOWAS "*The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State." And access to the Court is open to the following: "individuals on application for relief for violation of their human rights;*"

29. Therefore, the Court observes it draws its jurisdiction over the instant case, pursuant to the combined effects of Articles 9(4) and 10 (d) of the Supplementary Protocol, which also relate to its access, on cases of human rights violation; thus, it is trite to argue that, in the instant case, the Plaintiff, Bassam El Najjar ought to be within the territory of the Republic of Togo during the period, over which the allegations of human rights violations that he levelled against the Republic of Togo took place; in this regard, Plaintiff claimed, by himself, and this claim was further established that he was outside the territory of Togo, an ECOWAS Member State since 12 June 2008.

30. From this finding, it shows that it was not possible that the Republic of Togo violated the right to security of Mr. Bassam El Najjar; the implication here is that Mr. Bassam El Najjar ought to have been

present within the Togolese territory, for this violation to have taken place. The same goes for the alleged violations of his right to fair trial, his right to own property, his right of defence and his right of presumption of innocence. The reason for this declaration is that the assessment of these other violations equally requires the presence of Plaintiff on the Togolese territory; their alleged violations have a certain connection with a judicial procedure, in which he was specifically mentioned, and for which he was prosecuted.

31. Upon the foregoing, the Court is of a strong opinion that, having been absent from the Togolese territory, during the period over which he situated the alleged human rights violations, for which he accused the Republic of Togo, the Defendant State, Plaintiff, Mr Bassam El Najjar cannot be considered as a victim of human rights violations, within the purview of the provisions of Article 10 (d) of the Supplementary Protocol A/SP.1/01/05 on the Community Court of Justice;

Therefore, the Court can deduce, and declare that his Application filed against the Republic of Togo is inadmissible on the ground that Plaintiff has no *locus standi*

FOR THESE REASONS

The Court,

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

As to form

- **Notes** the lack of *locus standi* on the part of Mr. Bassam, to bring a case on human rights violation against the Republic of Togo;

- Consequently, the Court **declares** as inadmissible, the Application on human rights violation filed on 21 September, 2012 by Mr. Bassam El Najjar against the Republic of Togo;

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

THUS MADE, ADJUDGED AND PRONOUNCED PUBLICLY BY THE COMMUNITY COURT OF JUSTICE, ECOWAS ON THE DAY, MONTH AND YEAR ABOVE;

And the following hereby append their signatures:

Hon. Justice Awa Nana DABOYA - *Presiding;*
Hon. Justice Clotilde MÉDÉGAN-NOUGBODÉ - *Member;*
Hon. Justice Eliam M. POTEY - *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 FRIDAY, 4TH OF APRIL, 2014.

SUIT NO: ECW/CCJ/APP/08/13
JUDGMENT NO: ECW/CCJ/JUD/10/14

BETWEEN
FEMI FALANA - *PLAINTIFF*

AND
ECOWAS COMMISSION - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE AWA NANA DABOYA** - *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **SOLA EGBYINKA (ESQ.)** - *FOR THE PLAINTIFF/APPLICANT*
2. **DANIEL LAGO, DIRECTOR LEGAL** - *FOR THE DEFENDANT*

Res judicata - Locus Standi - Right of appeal

SUMMARY OF FACTS

The Plaintiff, averred that at the 35th Ordinary Session of the Council of Ministers of ECOWAS which was held in June 2005, a decision was reached that an appellate division of the Court be established. He further stated that the Defendant was mandated to carry out feasibility studies in collaboration with the management of the Court in order to implement the decisions of the Council.

The Plaintiff further avers that seven years after the decision was reached, the Defendant still did not heed to the decision of the Council. He petitioned the Defendant via a letter requesting that the Defendant complies with the decision. Upon the refusal of the Defendant to comply with his request, the Plaintiff filed this suit stating his dissatisfaction with some of the judgments of the Court and his inability to appeal against them because of the non-existence of an appellate division of the Court.

The Defendant opposed the Application on grounds of res judicata and further states that the Plaintiff cannot bring the same action against the Defendant after his earlier action was dismissed by this Court.

That Article 10(c) & (d) of the Supplementary Protocol of the Court of Justice does not clothe natural persons or corporate legal entities with the locus standi to bring an action before the Court for the enforcement of a directive from one Community Institution to another unless such directive violates their human rights.

That the Plaintiff's demand for an appellate division within the Community Court of Justice does not encroach on his right to a fair hearing, as it is an administrative issue.

LEGAL ISSUES:

- *Whether or not the Plaintiff's action is inadmissible on grounds of Res Judicata.*

- *Whether the Application discloses a reasonable cause of action.*

- *Whether the Plaintiff has locus standi to bring this action.*

DECISIONS OF THE COURT

The Court held:

- *That the present application is not caught by the principle of res judicata as the earlier ruling of the Court did not determine the rights of the parties on merits under Article 7 of the African Charter.*

- *That the Decision of the ECOWAS Council of Ministers, which formed the fulcrum of the Plaintiff's case was not before the Court and as such discloses no cause of action against the Defendant.*

- *That a natural or artificial person does not have the locus to sue for the enforcement of a directive by one community institution to another except in cases where such directive violated their rights. Therefore, the Plaintiff lacks the requisite locus standi to maintain the suit.*

- *That there is nothing under Article 7 of the African Charter which provides that regional court like the ECOWAS Court should necessarily establish appellate Court/chambers, failure of which will amount to violating the rights guaranteed thereunder.*

JUDGMENT OF THE COURT

PARTIES

The Plaintiff is a Community citizen by virtue of his Nigerian nationality and a human rights lawyer based in Lagos, Nigeria whilst the Defendant is an institution of the Economic Community of West African States (ECOWAS).

PLAINTIFF'S CASE

The Plaintiff averred that he is a legal practitioner representing many clients in a number of cases either decides or pending before the Community Court of Justice, ECOWAS (the Court). He continued that at the 35th Ordinary Session of the Council of Minister of ECOWAS (the Council), which was held in June 2005 at Abuja, it was decided that an appellate division of the Court be established. Further, he stated that the Defendant herein was mandated to carry out feasibility studies in collaboration with the management of the Court in order to implement this decision of the Council.

Plaintiff further averred that when he found that the Defendant had not carried out the directive of the Council after seven years, he petitioned the defendant viz a letter and requested that the decision of Council be implemented. When Defendant refused to heed to Plaintiff's request, he instituted this suit because his clients and himself have been dissatisfied with some of the Judgment of the Court but have been unable to appeal against them because of the non-existence of an appellate division of the Court. Plaintiff stated that this amounts to a violation of his human right to fair hearing.

The Plaintiff therefore seeks the following reliefs:

A. A **Declaration** that the failure or refusal of the Defendant to establish the appellate division of the Court is illegal as it violates the Plaintiff's human right to fair hearing guaranteed by Article 7 of the African Charter on Human and Peoples' Rights.

B. An **Order** directing the Defendant to establish the appellate division of the Court within three months of the Judgment of this Court.

DEFENDANT'S CASE

Upon service of the originating Application on the Defendant, it opposed the application. Counsel to the Defendant submitted that the Plaintiff's case is inadmissible because of a Ruling of this Court dated 5th February 2013 and numbered ECW/CCJ/RUL/03/13 between the parties herein. Counsel further submitted that the said ruling decided the same issue involved in this Application; and that the earlier action was based on the same set of facts. The Defendant's Counsel contended that based on the doctrine of *res judicata*, the Plaintiff is estopped from bringing the same action against the Defendant after his earlier action was-dismissed by this Court.

The Defendant's Counsel also submitted that the Court held in the above mentioned Ruling (ECW/CCJ/RUL/03/13) that Article 10(c) and (d) of the Supplementary Protocol on the Court of Justice (A/SP/01/05) did not clothe natural persons or corporate legal entities with the *locus standi* to bring an action before the Court for the enforcement of a directive from one Community Institution to another unless such directive violates their human rights.

Finally, the Defendant's Counsel submitted that the case of the Plaintiff lacks substance, even on the merits. Counsel contended that the Plaintiff is demanding the establishment of an Appellate Division within the Community Court of Justice, which amounts to a re-organisation of the Court and has nothing to do with the violation of his right to fair hearing as he alleges. Counsel contended that the re-organisation of the Community Court of Justice is an administrative issue and not a human rights issue.

PLAINTIFF'S REPLY TO DEFENDANT'S STATEMENT OF DEFENCE

In reply to the Defendant's statement of defence, the Plaintiff submitted that the suit is admissible as it is predicated on the fundamental rights of

the Plaintiff to fair hearing guaranteed by Article 7 of the African Charter on Human and Peoples Rights. The Plaintiff further submitted that the plea *of res judicata* raised by the Defendant is inapplicable to the instant Suit as the Court did not determine the earlier case between the parties on its merits. Finally, the Plaintiff submitted that the jurisprudence of the doctrine of *locus standi* has been whittled down in public interest litigation.

CONSIDERATIONS BY THE COURT

A. *RES JUDICATA*

In an originating Application filed on 17 July 2012, Suit numbered ECW/CCJ/APP/08/12, the Plaintiff alleged that the Defendant has violated his right to fair hearing which is guaranteed by Article 7 of the African Charter on Human and Peoples' Rights.

Upon service of the initiating Application on the Defendant, it raised a preliminary objection against the jurisdiction of the Court on two grounds. The objection was predicated upon Articles 87 and 88 of the Rules of Procedure of this Court. The grounds of objection were as follows:

A. That the Suit/Application before this Court does not disclose any cause of action.

B. That the Plaintiff/Respondent lacks the *locus standi* to bring this action.

The Court, in a well-considered Ruling dated 5th February, 2013 and numbered ECW/CCJ/RUL/03/13 upheld the Preliminary Objection on both grounds and dismissed the action.

On the issue of a cause of action.

On the issue of a cause of action, the Court held that the Decision of the ECOWAS Council of Ministers, which formed the fulcrum of the Plaintiff's case was not before the Court, thus disclosing no cause of action against the Defendant. With respect to the issue of *locus standi*, the Court held

that a natural or artificial person did not have the *locus* to sue for the enforcement of a directive from one Community Institution to another except in cases where such directive violated their rights.

The Plaintiff consequently, filed this Application, relying on the same set of facts and seeking the same reliefs. The Defendant contends that this Application is squarely caught by the doctrine of *res judicata* whilst the Plaintiff is of a contrary view. 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 the same matter. The doctrine of *res judicata* serves to ensure that there is finality to litigation. The Plaintiff's argument is that since the earlier case was dismissed at the preliminary stage without the Court making any determination as to the merit or otherwise of the claim, the doctrine of *res judicata* is not applicable to this suit. The Defendant on the other hand contends that the present suit is exactly the same as the earlier one and thus caught by the doctrine of *res judicata*.

ln the earlier case between the parties, the Court dismissed the Plaintiff's application without going into the merits of the case when the preliminary objection of the Defendant succeeded on both grounds. The Court in its earlier ruling gave reasons for dismissing the Application. With respect to the Plaintiff disclosing no cause of action against the Defendant, the Court pointed out that ECOWAS Council's decision (the document) which served as the basis of the claim was not before the Court and therefore it could not make any decisions in respect of same. In the case of the Plaintiff's lack of locus, the Court held that an individual could only sue for the enforcement of a directive from one Community Institution to another only when such directive threatened or violated the rights of the individual. It can be deduced from the reasoning of the Court that if the Plaintiff attached the document and refiled his claim, he could have a valid cause of action against the Defendant. Similarly, if the Plaintiff produced evidence that his rights have been threatened or violated by the defendant's failure to implement the Council's decision in question, he could have the requisite locus to sue.

From the foregoing, the present Application is not caught by the principle of *res judicata* as the earlier Ruling of the Court did not determine the rights of the parties on merits under Article 7 of the African Charter or amounted to a final judgment of the dispute between the parties.

B. *LOCUS STANDI* OF THE PLAINTIFF AND ARTICLE 7 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

In the earlier application filed by the Plaintiff, the Court held that the Plaintiff lacks the requisite *locus standi* to maintain the suit. We deem it expedient to reproduce the key parts of the earlier Ruling of this Court that dealt with the issue of locus in the earlier case between the parties.

We hereby reproduce paragraphs 22-25 of the said Ruling of this Court below:

> *22. Plaintiff's case seems to have some correlation to Article 10 (d) as he alleged the violation of his rights as a result of the failure or neglect of the Defendant to establish an appellate division of the Court. However, whether Plaintiff's claim falls appropriately under it or not can be determined by ·carefully considering the basis of Plaintiff's claim as well as the reliefs sought by him.*
>
> *23. The Plaintiff argues that the failure of the Defendant to carry out the said directive of Council has resulted in the violation of his human rights. What is the thrust of Plaintiff's Application? Is it the violation of his human rights or the enforcement of the Decision of Council? The Plaintiff is essentially saying that his rights would not have been violated if the Defendant had carried out the directive of Council.*
>
> *24. It seems clear that the Plaintiffs Application is essentially to seek the enforcement of a decision or directive of the Council and not the ventilation of a violation of human*

rights. A look at the reliefs sought for by the Plaintiff in his Application clearly shows that the enforcement or non-enforcement of the decision by Council is the object and the basis of his claim. He sought two reliefs as stared above, see paragraph 4. The first is a declaration that the failure or refusal of the Defendant to carry out the directive of Council has resulted in the violation of his human rights, whilst the second, is an order directing the Defendant to establish an appellate division of the Court within three months of the judgment of the Court.

25. *From the provisions of Article 10 (c) and (d) of the Protocol, an individual or corporate body does not have access to this Court for the purpose of seeking enforcement of a directive from one Community Institution of ECOWAS to another, unless such directive violates or threatens to violate the rights of the individual or corporate body. However, in this case the Plaintiff does not complain that whatever directive was given by the Council to the Defendant to facilitate the establishment of an appellate division has violated his rights. So, the order sought to compel the Defendant to comply with the Council's directive is erroneous.*

The Plaintiff: however, contends that he has the *locus* to maintain the present suit because his rights under Article 7 of the African Charter have been violated. The contention of the Plaintiff is in accord with paragraph 25 of the earlier Ruling of the Court (supra) which clearly indicates that an individual will have the locus to sue for the enforcement of a directive from one Community institution to another if directive threatens or violates the right of the individual. Thus, we will consider provisions Article 7 of the African Charter in order to determine whether the Plaintiff's right have been violated, clothing him with *locus standi* to maintain this suit.

ARTICLE 7 OF THE AFRICAN CHARTER PROVIDES:

1. Every individual shall have the right to have his cause heard. This comprises:

a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by Conventions, Laws, Regulations and customs in force;

b) The right to be presumed innocent until proved guilty by a competent court or tribunal;

c) The right to defence, including the right to be defended by Counsel of his choice;

d) The right to be tried within a reasonable time by an impartial Court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Article 7 guarantees every individual the right to have his cause heard. Article 7(1)(a) is obviously the pillar upon which the Plaintiffs claim to *locus standi* rests. It provides the right to **"APPEAL TO COMPETENT NATIONAL ORGANS"** (emphasis ours). By definition, the Community Court of Justice is not a national Court. It is the regional court of the Economic Community of West African States (ECOWAS). It is clear that the right to appeal under Article 7(1)(a) was not intended to apply to an international court such as the ECOWAS Court as it seeks to ensure the presence of appellate division within the national courts of African nations, in respect of criminal trials and fundamental rights issues.

Article 7(l)(b) guarantees the right to be presumed innocent until proven guilty by a competent court or tribunal. This provision has nothing to do with this Court as it has no criminal jurisdiction. Article 7(1)(c) provides for the right to defence, including the right to be defended by Counsel of one's choice. Again, this provision clearly governs criminal trials and has nothing to do with this Court. Article 7(1)(d) provides for the right to be tried within a reasonable time by an impartial court or tribunal. Like the sub paragraphs before it, Article 7(1)(4) has no role in this Court as it regulates the conduct of criminal trials.

Finally, Article 7(2) provides that no one may be condemned for acts or omissions which did not constitute legally punishable offences at the time it was committed and also that punishment can only be imposed on the offender. It is a prohibition against retroactivity in criminal offences.

The provisions above, read together, lead to the irresistible conclusion that Article 7 of the African Charter was intended to guarantee the rights of accused persons in criminal trials and persons whose fundamental rights have been violated within national courts of African nations.

The ECOWAS Court is neither a national court nor a criminal court. Thus, the right of appeal envisaged under Article 7 of the African Charter is clearly not applicable to it. There is nothing under Article 7 of the African Charter which provides that regional courts, like the ECOWAS Court, should necessarily establish appellate courts/chambers, failure of which will amount to violating the rights guaranteed thereunder. We are of the view that Article 7(l)(a) of the African Charter seeks to ensure that accused persons are allowed to appeal to every competent national organ available by law before they are condemned or punished. If the accused person so chooses, he should be allowed to appeal to the various national organs until he has exhausted all the available channels of appeal provided by law before he can lawfully be punished.

From the foregoing, we are of the view that the Plaintiff's assertion that he has a right of appeal guaranteed by Article 7 of the African Charter, which right has been violated by the Defendant because of the non-

establishment of an appellate court/chamber for the Community Court of Justice is legally untenable and same is rejected. Accordingly, the Plaintiffs submission that he has the requisite *locus standi* to maintain the present suit, contrary to the Court's earlier Ruling is rejected.

DECISION OF THE COURT

For the reasons explained above in the previous paragraphs, namely that the Plaintiff lacks *locus standi* to maintain the Application, and also that there is no legally enforceable right of appeal under Article 7 of the African Charter with respect to the Community Court of Justice, the Court holds that the Plaintiffs Application is unmeritorious and rejects same in its entirety.

The parties are to bear their own costs.

THIS JUDGMENT HAS BEEN DELIVERED IN PUBLIC AT THE COMMUNITY COURT OF JUSTICE, ECOWAS HOLDEN AT ABUJA ON THE 4TH DAY OF APRIL 2014.

BEFORE THEIR LORDSHIPS:

1. **Hon. Justice Hansine N. DONLI** - *Presiding;*
2. **Hon. Justice Awa NANA DABOYA** - *Member;*
3. **Hon. Justice Anthony A. BENIN** - *Member.*

Assisted by **Tony ANENE-MAIDOH (Esq.)** - *Registrar.*

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

HOLDEN AT ABUJA, NIGERIA

ON TUESDAY, THE 13TH DAY OF MAY, 2014

SUIT NO: ECW/CCJ/APP/17/12
JUDGMENT NO: ECW/CCJ/JUD/11/14

BETWEEN
TIDJANE KONTE & ANOR. -*PLAINTIFFS*

AND
REPUBLIC OF GHANA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE M. BENFEITO RAMOS** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:

ATHANASE ATANNON (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **SAGARA BOUREMA** - *FOR THE PLAINTIFFS*
2. **DR. DOMINIC AYINE** *AND*
   MRS. DOROTHY A. ANSAH - *FOR THE DEFENDANTS*

-Right to property - Liability for action of agents - Reparation

SUMMARY OF FACTS

On the 14th of August 2008, a trailer belonging to the Plaintiffs meant for the Republic of Mali was released by the Ghanaian customs authority. The driver of the trailer who is a Malian citizen, was ordered to stop by six men who presented themselves as traffic officers; two of which were dressed as policemen. The said traffic officers examined the trailer and found nothing suspicious or incriminating and instead of releasing them, forced the driver and 2 apprentices into a taxis and abandoned them in a remote location.

Upon return to their previous location, the driver and the 2 apprentices noticed that the trailer and all its contents had disappeared, where upon they filed complaints to the Ghanaian and Malian authorities, respectively. On the 15th of August, 2008, the Ghanaian police found the trailer empty and abandoned by the side of the road within the Ghanaian territory.

On the 16th of September 2008, the two uniformed officers were identified, arrested and charged to court by the Ghanaian authorities. On the 4th of June 2009, the two policemen admitted the commission of the crime of conspiracy and armed robbery and were sentenced to 20 years imprisonment.

However, the Court only adjudicated on the criminal acts against the policemen and made no pronouncement on the reparation for the prejudices suffered by the victims. The Defendant denied responsibility for the crimes of the two former policemen as they acted without official sanction and also denied the responsibility for the violation of the property rights of the Plaintiffs.

That the Defendant irrespective of the Convention on Judicial cooperation between the Republic of Mali and the Republic of Ghana which recognizes and guarantees the same rights to citizens of either contracting parties on their territory, or legal protection of goods, failed to pay compensation to the Plaintiffs.

The Defendant in response, denied all material allegations and further state that the two police officers did not carry out the act in their official capacity.

LEGAL ISSUES:

- *Whether the subject matter is within the ambit of the competence of the Court?*

- *Whether from the totality of facts put forward, the Defendant is responsible for the acts of its agents.*

- *Whether the Plaintiffs are entitled to reparation for the loss of their goods?*

DECISION OF THE COURT:

The Court held:

- *That once the allegation in the application by the Applicant/ Plaintiff lodged in the registry of the Court is a complaint on violation of Human Rights in any form or manner whatsoever, same would be held to be admissible for adjudication before this Court by virtue of the provisions of the law mentioned.*

- *That where the conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of governmental authority, such organ having acted in that capacity, shall be considered as an act of the state under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.*

- *The Court ordered the Defendant to pay the Plaintiffs the sum of one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four CFA (XOF 147,146, 564) only as compensation.*

JUDGMENT OF THE COURT

PARTIES

1. The 1st Applicant/Plaintiff, Tidjane Konte is a businessman and citizen of Republic of Mali, resident at Doumazona, Petit Paris, Bamako in Republic of Mali. The 2nd Applicant/Plaintiff, Mr. Issa Diawara is a businessman and a citizen of the Republic of Mali resident at Boulkassoumbogou, Bamako in the Republic of Mali.

2. The Respondent/Defendant is the Republic of Ghana, a Member State of the Economic Community of West African States (ECOWAS).

PROCEDURE

3. By an application dated 15th March 2012, signed by the Applicants Counsel/Lawyer, and lodged at the Registry of the Court on the 4th of October, 2012, in accord with Article 32 of the Rules of procedure, the Plaintiffs sued the Defendant, Republic of Ghana, for alleged violations of human right pursuant to Article 14 of the African Charter on Human and Peoples' Rights. The application was served on the Defendant, through the Attorney General of the Republic of Ghana, on the 8th of October, 2012.

4. The Defendant in response of the application served on them, lodged a defense, dated 20th November, 2013, and filed on 26th November, 2013 at the Court's Registry, in compliance with Article 35 of the said Rules of Court and being out of the stipulated time applied for an extension of time to file Statement of Defence.

5. The Court, pursuant to Article 35 (2) of the Rules, granted the Defendant extension of time to file Statement of Defense and on the 27th of January, 2014, the Defendant filed its Statement of Defense on points of law. The hearing of the case was then fixed for the 12th of February 2014 and the arguments were taken on that date at Lomé, Republic of Togo and as prayed. The Court then called on

the parties to argue their submissions and close their case. The case was then set down for judgment.

FACTS OF THE CLAIM

6. The Plaintiffs assert that on the 14th day of August 2008, the Ghanaian customs authorities released a trailer meant for the Republic of Mali with registration number D-7218-M3 and D-7219-M3, loaded with bicycle and motorcycle spare parts, belonging to the Plaintiffs. The convoy was coming from the TEMA Port in Ghana. When they arrived at the first traffic lights Dzorwulu, just at the entrance of the city of Accra, Mr. Abdul Aziz Djilla, a Malian citizen and a driver who was driving the said trailer was ordered to stop, by six persons, among whom were two uniformed police officers, who presented themselves as traffic police officers. They ordered him to park for a routine check.

7. They examined the vehicle and without finding him guilty of any offence whatsoever, instead of releasing them, they quickly forced Mr. Abdul Aziz Djilla and two apprentices out of the trailer and pushed them into two taxis, which were packed by the roadside. The three persons were taken to a location in Achimota forest and abandoned. Mr. Abdul Aziz Djilla and his two apprentices could only come back to the post where they were taken from, near the traffic light at Dzorwulu roundabout through their personal efforts. When they arrived at the said place, they noticed the disappearance of their trailer and all its contents.

8. At that point, Mr. Abdul Aziz Djilla and his two apprentices returned to TEMA to lodge complaints to Ghanaian and Malian authorities respectively and on the 15th of August, 2008, after an anonymous call, the Ghana police were able to find the trailer empty and abandoned along the Mallam Kosoa road, within the Ghanaian territory. On the 16th of September, 2008, through information gathered on them, the two uniformed officers were identified as Joseph Frimpong and Frank Boakye, posted to the Airport police post. They were arrested and charged to Court.

9. After that, on 4th of June, 2009, Joseph Frimpong and Frank Boakye, were taken to court where they admitted the commission of the crime for conspiracy and armed robbery and sentenced to 20 years imprisonment each with hard labour by a Court in Accra, Ghana. In its judgment, the Accra Court held that Joseph Frimpong and Frank Boakye were actually police officers posted to the airport police post and used their position to commit the crime. However, the court, having found the two state officials guilty, only adjudicated on the criminal action, without a pronouncement on the reparation for the prejudices suffered by the victims. When it became clear the circumstances of the case and the involvement of the Republic of Ghana, the Plaintiffs then made efforts for Republic of Ghana to pay them compensation for the goods that were taken away by the former policemen but failed.

10. Furthermore, the Plaintiffs invited Experts of Mousa Diarra Accounting Firm and that of a Customs Consulting Firm to examine the documents of the goods and gave a report as their value, they evaluated and gave a value of the sum of one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four CFA (XOF 147,146,564) only for the damages done to the trailer, the value of stolen goods and the extent of the prejudices suffered by the Plaintiffs.

11. However, irrespective of the existing Convention on Judicial corporation between the Republic of Mali and Republic of Ghana that recognizes and guarantees the same rights to citizens of either contracting parties on their territory, on legal protection of persons and goods; and in spite of all the several complaints addressed to Ghanaian authorities notably, the Chief of Staff in the Presidency of Ghana, the Attorney General, Minister of Justice and the Ambassador of Ghana to the Republic of Mali, the Republic of Ghana took no steps to address the issue of compensation to the Plaintiffs.

FACTS OF THE DEFENCE

12. The Defendant, Republic of Ghana, in its Defence, denies being responsible for the actions of the two former police constables and denies all the averments made in the Plaintiffs' application and states that it is not responsible for the alleged violation of the property rights of the Plaintiffs, as the police officers were on a frolic of their own and were not acting as official agents of the Republic of Ghana.

13. The Defendant contends that the superior officers of the two constables within Ghana Police Services were not aware of the actions of the two constables and that in the course of their trial before the Circuit Court, Accra, the two former police men admitted that they acted without official sanction. The evidence given by the two police men and other witnesses in Court, show that the two of them were not on official duty on the day that they committed the crime against the Plaintiffs.

LEGAL ARGUMENTS FOR THE PLAINTIFFS

14. Learned Counsel to the Plaintiffs submits that pursuant to the provisions of Articles 9 and 10 of the Supplementary Protocol of 19th January 2005, on the Community Court of Justice, ECOWAS, which provides *"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State and can be accessed by individuals or corporate bodies who are victims of human rights violations".*

15. Learned Counsel to the Plaintiffs further submitted that the infringement on their rights to property, by the actions of the officials of the Defendant clearly constituted a flagrant violation of human rights as provided in Article 14 of the African Charter on Human and Peoples' rights and that Mr. Tidiane Konte and Mr. Issa Diawara, the Plaintiffs have good grounds to lodge their claim before this Court in order to seek redress.

16. Learned Counsel for the Plaintiffs' submitted that the actions of the two policemen of the state of Ghana became the responsibility of the Respondent/Defendant and that the Applicants/Plaintiffs are entitled to compensation of the amount stated in their claim.

LEGAL ARGUMENTS OF THE DEFENDANT

17. Learned Counsel to the Defendant submits that the two police constables stated in Court during their trials that after they had offloaded the goods from the truck which they seized at the traffic interceptions, they were offered the sum of Forty Ghana Cedis (GHc 40.00), the equivalent of Twenty United States' Dollars (US$ 20.00) each in today's value by the person who had procured their services to rob the Plaintiffs of their goods; and in their testimony before the trial Court, the Constables did not reveal the identity of the person who hired them, but it was evident that they were acting privately and not on behalf of the Defendant.

18. Learned Counsel to the Defendant submits that by putting the two policemen on trial and securing a conviction, it had discharged its obligation to protect rights of all persons, including foreign nationals, under the Constitution of the Republic of Ghana and under International Law and it owes no obligation to pay reparation to the Plaintiffs.

ANALYSIS OF THE COURT.

19. 'This action was filed by the Plaintiffs against the Republic of Ghana for the payment of the sum of one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four CFA (XOF 147, 146, 564), as compensation for loss incurred by the Plaintiffs as a result of the theft of their goods by the officers of the Defendant. The Plaintiffs hinged their demand for compensation on the contention that the Defendant is liable for the action of its officials and as such, under obligation to put the Plaintiffs in the same positions they were had the crime not occurred Plaintiffs also maintained that the actions of the officials of the Defendant is a violation of their

property rights as provided under Article 14 of the African Charter on Human and Peoples' Rights and this Court has the jurisdiction to entertain their claim by virtue of Articles 9(4) and 10(d) of the Supplementary Protocol of the Court.

Laws Applicable

20. In Article 19 (1) of the first Protocol, the Court is enjoined to apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the International Court of Justice. Article 38 of the Statutes states:

"The Court, whose function is to decide in accordance with international law such disputes that are submitted to it, shall apply:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law recognized by civilized nations;

d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

21. Articles 9(4) and 10(d) of the Supplementary Protocol on the Court, 2005; Article 4(g) of the Revised Treaty of ECOWAS; and Article 14 of the African Charter on Human and Peoples' Rights and all other international laws on human rights with the jurisprudence

emerging thereto. In that regard as stated in Article 38 of the Statute of International Court of Justice, this Court shall apply same as and when relevant in the determination of this case.

Jurisdiction of the Court

22. Jurisdiction is an important component of adjudication in the courts and where the court has no jurisdiction, the trial no matter how well conducted would become a nullity. In this regard the need to consider this aspect is necessary. Is the claim within the competence of this Court? For competence to be established the following provisions of Articles 9(4) and 10(d) of the Supplementary Protocol 2005 on the Court, Article 14 of the African Charter on Human and Peoples' Rights, referred to us by the Applicant, require consideration. Let us begin by examining them as follows:

    Article 9(4) of the Supplementary Protocol of 2005 stipulates: "**The Court shall have jurisdiction to determine cases of violation of human rights that occur in any Member State."**

23. Article 10(d) of the Supplementary Protocol provides:

    "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;"

    Article 14 of the African Charter states:

    "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."

24. This Court had opportunity to apply the two latter provisions stated above in matters concerning the jurisdiction of the Court in the following cases namely: **Professor Etim Moses Essien *v.* The Republic of The Gambia and University of the Gambia Suit N°: ECW/CCJ/APP/05/05 and decided on 14th day of March 2007;** and in **Olajide Afolabi *v.* Federal Republic of Nigeria Suit No. ECW/CCJ/04**, it held thus,

> ***"it is a well-established principle of law that a Court is competent when it is properly constituted as regards its number and qualifications of the members of the bench, and no member is disqualified for one reason or another; and the subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction and the case comes before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction."***

25. There is no doubt that the first arm of the condition precedent for assumption of jurisdiction in this case, as set out above and indicated in **Olajide Afolabi's case** supra is not in controversy but the issue relating to the subject matter of this suit. Is the subject matter within the ambit of the competence of this Court? By the combined effect of Article 14 of the African Charter on Human and Peoples' Rights and Article 9(4) of the said Supplementary Protocol, the answer is in the affirmative in terms of form, in that, once the allegation in the application by the Applicant/Plaintiff lodged in the Registry of the Court is a complaint on violation of human rights in any form or manner whatsoever, same would be held to be admissible for adjudication before this Court by virtue of the provisions of law mentioned herein above. It therefore follows that an alleged violation of human rights is admissible and justiciable for adjudication. In the instant case the allegation is on violation of human rights of the applicant's property by the servants' of the Defendants - the Republic

of Ghana and therefore there is a *prima facie* case against the Defendant and this Court has jurisdiction to determine the dispute herein.

State Responsibility

26. There is consensus in the evidence relied upon by both parties, the Applicants on one part and the Defendant on the other that the two policemen who accosted the Applicants' driver and two apprentices were police uniformed men in the service of the Respondent/ Defendant at the time the incident occurred and that they took away the goods of the Applicants and gave or sold to an unknown person who gave them Forty Ghana Cedis (GHc 40.00), the equivalent of Twenty United States' Dollars (US$ 20.00) in return. It was also common knowledge that the two policemen were traced, prosecuted, convicted and sentenced to 20 years imprisonment for their action. The question at stake is whether the Defendant is under international obligation to become responsible for the acts of its citizens who violated the rights of other community citizens within the territory of the Defendant.

27. Defendant's argued that the Republic of Ghana should not be held responsible for the action of the two policemen as their actions being criminal in nature same cannot be attributed to the Defendant after the policemen had been prosecuted, convicted and sentenced to 20 years of imprisonment by a court in Ghana-the Defendant. According to the Defendant their international obligation is discharged upon the prosecution and sentence of the culprits in this case. However, the Plaintiffs refuted that argument that even though the policemen had been convicted and sentenced, the issue as to their property which was the subject of the theft remains untried and unsettled. They submitted that the violation of their rights to those properties and the compensation thereto are paramount to them. In this regard it is necessary to ask, consider and determine herein whether the actions of the said two policemen on that date in question when they took away the Applicants' driver and two apprentices of the driver in a

taxi to an unknown location, abandoned them and stole their goods from the trailer is attributed to the State of GHANA - the Defendant or not.

28. The Defendants argued that they are not responsible for the criminal acts of the policemen and further submitted that the policemen were posted on duty at the airport road but left their posting to another location to commit the offence in respect of the property of the Plaintiffs, and that such action could not amount to performing the acts with the instructions or the knowledge of the Defendant. It is appropriate at this point to examine international law concerning the issues raised by the parties as to the responsibility of the Defendants and the arguments of lack of such responsibility. Firstly, the Draft Articles adopted so far by the International Law Commission (ILC) and widely invoked, laid out an important role in respect of state responsibility. Article 1 of the said provision of ILC, provides:

> **"Every internationally wrongful act by a State gives rise to international responsibility. And Article 3 states that: An internationally wrongful act exists where:**
>
> **a) Conduct consisting of an action or omission is imputed to a State under international law; and**
>
> **b) Such conduct in itself or as a direct or indirect cause of an external event constitutes a failure to carry out an international obligation of the State."**

29. In international human Rights law, obligations are placed on States, through all human rights treaties and customary international law; the State is solely responsible for any violation of human rights protected by international law. Article 2(2) of the international convention on civil and political rights (ICCPR) opened for signature on 16 December 1966 and entered into force on 23 March 1976 states:

> ***"where not already provided for by existing legislature or other measure, each state party to the present covenant***

undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant."

30. In the Book, Non-State Actor and International Human Rights Law page 101, it is stated:

> **"Thus, the legal obligations under the treaty are to ensure the rights are protected and obligations are placed on the state."**

It is important to note that the State itself remains the sole legal obligator to respect, protect and fulfill the human rights under the treaty. In further consideration on the matter is the provision of **Article 6 of the report of the International Law Commission on the work of its 53rd session, UN Doc A/56/10/SUPP (of 21 August, 2001) and page 101** on non-state actors and international human rights laws where it is indicated in clear terms that the actions for which a state is responsible under international law are normally limited to actions by state officials. It states that:

> **"The conduct of an organ of the state shall be considered as an act of that state under international law, whether that organ belongs to the constituent, legislature, executive, judicial or other power, whether its functions are of an international or subordinate position in the organization of the state."**

31. In the instant case, the two policemen who took away the Applicant's drivers and the two apprentices to an unknown location and abandoned them after which they stole and disposed of all the goods of the Applicant to an unknown person, can be seen as acts attributed to the police services unit of the State of Ghana because it has responsibility to ensure the protection of the Applicant's goods in transit within its territory. Another aspect there from is that the two police constables or officers were in uniforms but according to the

Defendant, they were not on official duty. Can their actions (police constables) be attributed to the State of Ghana- the Defendant? In the case of **France *v.* Mexico (Caire claim) (1929) 5, Reports of International Arbitral Awards 516**, the Tribunal held that:

> ***"public or state officials would usually include, for example, members of the state's executive, legislature, judiciary, armed forces, police and security services and a state responsibility for the actions of these officials even where those actions are committed outside the scope of the officials duties or organs, or that, in so acting, or acted, at least apparently as authorized officials or organs, or that, in so acting, they used powers or measure appropriate to their official character"***.

32. It is now obvious that generally, the rules of state responsibility described above are applicable to international human rights law - *see* **(1999) 2 Human Rights Quarterly 56, 59, The Hague, (1998) 91, 115**, where it was stated that, **"the European Court of Human Rights has consistently applied the principles articulated in the ILC Draft Articles on state Responsibility without, however, referring expressly to the Draft Articles"**. We endorse the above provision and state that on our part also same is applicable to the instant case. Having stated that the official actions of individuals and units of the state are the responsibility of state party in actions for violation of International Human Rights, can it be said that the actions of the said police constables are the actions of the state of Ghana despite the denunciation of the acts.

33. In the authorities above, it was stressed that *"responsibility can lie for omissions that constitutes a breach of international obligation, as well as for commissions"*. In the German settlers in Poland case, The Permanent Court of International Justice, stated that,

> ***"States can only act by and through their agents and representatives. It has been a central element in the law***

of State responsibility that, where organs of State (such as government departments, or its courts), or individuals or groups in the employment of the State (the Police, the Army, Customs Officers) act in a way that violates international law, their conduct is attributed to the State, and the State is internationally responsible for such conduct".

34. We endorse the above authorities because they are apt to the facts of this case. In the instant case the two policemen were the servants of the Defendants at the time the acts were committed and the rights of the Applicants were violated by their action. Another dimension is whether even in a criminal act by state officials the State would be liable in damages. We hold that the State will be responsible even if it did not specifically order the conduct concerning its servants and even if its servants acted in ways clearly beyond what they were ordered to do. This leads this Court to look at the observations by Publicists and the application of the principles of international law as stated in **'Public International Law' by Gideon Boas page 280 cap 7 with the caption 'State Responsibility'** where it states:

"Responsibility is the corollary of international law, the best proof of its existence and most credible measure of its effectiveness. Every legal system allocates responsibility. Norms, or secondary rules, operate to hold a person accountable for contravening a primary legal obligation."

35. It is also the rule of law going also by the opinion above that a primary rule in domestic law or the Community law is the obligation not to interfere with another's property as in Article 14 of the said African Charter. As the said writer puts it, ***"whether the interference is attributable to a particular person and, if so, what remedies the victim can seek are determined by the secondary rules."*** He also said, **'State Responsibility for international wrongful acts follows the same logic'**. Consequently, we hold that secondary rules in international law are no different from primary rules in that

they must be shown to derive from a treaty, custom or general principles and secondary rules are the rights and obligations that apply after a primary rule has been violated. In our view, by the Articles on Responsibility of States for internationally Wrongful Acts, with Commentaries (2001) Report of the ILC, 53RD session (2001) 11(2) Yearbook of the ILC 26, UN. Doc. A/56/10(2001) (ILC Articles), is not out of place herein.

36. Sometimes, it has been suggested that this principle needs to be qualified, to exclude from State responsibility unlawful conduct by very low-ranking public officials but it was stated that this cannot be right and we reject the statement, in the way that it has always been rejected by its exclusion in cases applied by international human rights court and state that it matters not what type of organ of State is concerned, or what internal function it performs, nor whether it holds a superior or subordinate position in the organization of the State. We also state that in respect of the conduct of persons acting on behalf of the State it matters not whether the persons hold superior or subordinate position, the fact that attribution of their conduct to the State is cast in general terms leads one to the same conclusion.

37. Another example is the case of France, where it acknowledged its responsibility for the acts of its security agents who in 1985 blew up the Rainbow Warrior in Auckland Harbour New Zealand; France quickly acknowledged responsibility and accepted that the act was unlawful even though same was ultra vires or contrary to instructions.

38. For clarity we further hold that where the conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity. Attribution to a state for a wrongful act can be seen in twofold to wit- whether the perpetrator of the relevant conduct has the status of an organ of the state under internal

law of the state and whether the conduct is attributed to the state irrespective of the status of the perpetrator if that person is empowered by-law of-the-state to exercise elements of the governmental authority and was acting in that capacity in the particular instance. As for illegality, it is also the case that where the conduct is unlawful, indeed even exactly contrary to State instructions, it would not erode the responsibility of the State, because, from the perspective of an outsider, all organs and servants of the State are 'the State', and it is meaningless to be told that they acted contrary to the instructions of the State; see the case of **US Diplomatic and Consular Staff in Tehran (1980) ICJ Report 3 and International Law by Richard K. Gardiner**.

39. In the instant case and influenced by the above jurisprudence and juristic views expressed therein, it is undisputed that the international responsibility of a State for violation of human rights occurred within the territory of the Respondent/Defendant through the said policemen under the employment of the Respondent/Defendant and wearing their police uniforms and performing apparently like policemen on duty. These policemen being officials and servants of the Respondent/ Defendant made the Respondent/Defendant responsible for their actions on the date in question.

40. In both cases of violations of human rights as stated hereinbefore, violation can occur either through action of commission or omission, the State is internationally accountable, because of its violation of an international obligation to which it is subject to, by a treaty: a) either the obligation of the State itself not to violate the substantive rule recognizing this right; b) or, the obligation to provide due redress, once the violation has occurred; c) or still, the obligation to investigate and prosecute the perpetrators of the said violation, when they are private entities. We hold that even where the third option is accomplished, the State is required to ensure the payment of reparation or damages in respect of the violation concerned to the victims.

REPARATION/DAMAGES

41. The next question to consider is that of reparation. Are the Applicants/Plaintiffs entitled to be paid reparation based on the assessment for the loss of their goods? It is well accepted principle of law that Reparation by the definition in International Human Rights Books denotes 'to repair the damage caused by wrongdoing'. Reparations are a 'victim centric remedy' focused on repairing harm caused for as a result of wrongdoings. Apart from repairing, reparation also tends to compensate victims for loss suffered. The Applicants stated that they hired the services of Mousa Diarra Accounting Firm and Customs Consulting Firm which evaluated the damages done to the trailer and the value of the stolen goods and came out with a figure in monetary terms as one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four CFA (XOF 147.146, 147) only;

42. The Defendant denied liability or responsibility of the claim and conceded to no amount of damages. The Latin maxim, ***ubi jus ibe remedium*** (for the violation of every right, there must be a remedy) may be observed in this case even if not in strict terms. We uphold this maxim but state that the question is not however whether every right has a remedy, but whether every right should have one. In **Remedies in International Human Rights Law by Dinah Shelton page 62** States generally particularly in Europe accept liability for right to remedy for injury done by the state or state agents and we quote verbatim this maxim thus: **"actes de gestion prove (private acts) Actes de puissance publique (public acts) have incurred state responsibility ..."** and consequently, payment of damages. This Court awarded compensation for violations of human rights in cases lodged before the Court inter alia thus: **Manneh *v.* Republic of the Gambia 2009 CCJLR Pt 2 page 116; Musa Saidykhan *v.* Republic of the Gambia suit no ECW/CCJ/APP/ 11107 dated 16th December, 2010, whereby this Court awarded US$200000.** Damages payable are quantified in different ways but in this case what the Applicants are claiming is the amount of losses

for their goods as stated in this case against the Respondent/ Defendant, as compensation - *see* Frank Gahan, on The Law of Damages (1936). Considering all the submissions made, the materials annexed to the application, the reply to same and the analysis stated above including the jurisprudence on international law on the 'state responsibility' and the guarantee on the rights to property by Article 14 of the said African Charter on Human and Peoples' Rights, we hold that the claim for damages is justifiable and the Respondent/ Defendant shall pay damages as compensation in the sum of one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four. CFA (XOF 147.146, 147) only;

43. DECISION

1. **Whereas** the Applicants brought a claim against the Defendants for violation of their human rights in respect of their property, contained in the trailer No D-7218-M3 and D-7219-M3 which two police constables in police uniforms in Ghana diverted and sold off to an unknown person but refused to reveal his identity;

2. **Whereas** Articles 9(4) and 10(d) of the Supplementary Protocol 2005 on the Court, relied by the applicant, provide that the Court shall have jurisdiction to determine cases of violation of human rights that occur in any Member State, and that, Individuals on application for relief for violation of their human rights; the submission of application for which shall Not be anonymous; nor be made whilst the same matter has been instituted before another International Court for adjudication;

3. **Whereas**, Article 14 of the African Charter on Human and Peoples' Rights states that the right to property shall be guaranteed and 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;

4. **Whereas** in international human Rights law, obligations are placed on States, through all human rights treaties and customary

international law the State is solely responsible for any violation of human rights protected by international law and States can only act by and through their agents and representatives and a central element in the law of State responsibility is that, organs of State (such as government departments, or its courts), or individuals or groups in the employment of the State (the Police, the Army, Customs Officers) act in a way that violates international law, their conduct is attributed to the State, and the State is internationally responsible for such conduct".

5. **Whereas** this Court adjudged that the actions of the two policemen were state responsibilities being that the two police constables were in the services of the Defendants when the acts were committed and were in police uniforms and performing police kind of duties ; and Whereas such acts were proved by the description of state responsibility under international law as quoted in this case; the acts became the acts of the Defendant and within the responsibility of the state; despite the fact that the two police constables were prosecuted and sentenced to 20 years imprisonment;

6. **Whereas** the Applicant referred the matter for expert assessment of their losses to Mousa Diarra Accounting Firm and Customs Consulting Firm which evaluated the damages done to the trailer and the value of the stolen goods, as one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four. CFA (XOF 147.146, 147) only;

7. **Whereas** the Court held that the state of Ghana was responsible for the acts of the said police constables by the so many authorities relied upon in this case; and whereas the Court adjudged that the Respondent/Defendant shall pay compensation to the Applicants/Plaintiffs in the sum of one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four CFA. (XOF 147.146,147) only, the assessed cost of the goods;

8. **Whereas** the facts in this case support the granting of the application for the said compensation, same is hereby awarded in like terms in the sum of one hundred and forty-seven million, one hundred and forty-six thousand, five hundred and sixty-four CFA (XOF 147.146, 564), as compensation for the loss incurred by the Plaintiffs as a result of the theft of their goods by the police officers of the Defendant and this Court awards the said sum accordingly.

COSTS

44. As stated clearly by the Rules of this Court, where the case is successful, the party who succeeded is entitled to cost, in line with the above, we award the sum of N500, 000 for the Applicants/ Plaintiffs as cost against the Defendants accordingly.

THE JUDGMENT IS READ IN PUBLIC THIS 13TH DAY OF MAY, 2014 IN ACCORDANCE WITH THE RULES.

- **Hon. Justice Hansine N. DONLI** - *Presiding;*
- **Hon. Justice M. RAMOS** - *Member;*
- **Hon. Justice Eliam M. POTEY** - *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 WEDNESDAY, THE 13TH DAY OF MAY 2014

SUIT N^{O}: ECW/CCJ/APP/01/13
JUDGMENT N^{O}: ECW /CCJ/RUL/07/14

BETWEEN
CHUDE MBA - *PLANTIFF/RESPONDENT*

AND
THE REPUBLIC OF GHANA - *DEFENDANT/APPLICANT*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE M. BENFEITO RAMOS** - *MEMBER*
3. **HON. JUSTICE C. MEDEGAN-NOUGBODE** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.)- *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:
1. **DR. B. A. M. AJIBADE (SAN), C. OSISIOMA (ESQ.); BOLAJI GABARI (MRS);** *AND* **AYODELE AJAYI (MS)** *- FOR THE PLAINTIFF/ RESPONDENT.*
2. **DR. DOMINIC AYINE** *(DEPUTY ATTORNEY-GENERAL, REPUBLIC OF GHANA)***;** *AND* **MRS. DOROTHY AFRIYIE-ANSAH** *(CHIEF STATE COUNSEL) - FOR THE DEFENDANT/ APPLICANT*

- Application to set aside default judgment

SUMMARY OF FACTS

The Defendant/Applicant filed a motion seeking for an order of the Court to set aside the default judgment delivered by the Court against the Defendant/Applicant in the instant suit on the grounds that due to some administrative lapses on the part of Defendant/Applicant, the Defendant/Applicant was unaware of the Plaintiff/Respondent's motion for default judgment. Hence, the Defendant/Applicant averred that it was unable to respond to the said motion for default judgment. The Defendant/Applicant also averred that it had a valid defence to the instant suit and as such, should be allowed to defend itself. The Plaintiff/Respondent on his part, prayed the Court to dismiss the Defendant/Applicant's Motion on the grounds that the Defendant/ Applicant was duly served on multiple occasions with all the processes filed in the instant suit and afforded ample opportunity to respond to same, but failed to respond to the application for default Judgment.

LEGAL ISSUE:

1. *Whether or not the Defendant/Applicant's Application has satisfied the conditions for the Court to set aside the default Judgment in the instant suit.*

RULING OF THE COURT

The Court held that having duly considered the totality of submissions by the Defendant, there was no convincing ground upon which to base a decision to set aside the default Judgment. Consequently, the Court declared that the Defendant has not established a prima facie case to warrant the setting aside of the default Judgment.

RULING OF THE COURT

1. This Application stems from a motion on notice by the Applicant dated 17th January 2014 and filed on 23rd January 2014 brought under Art1cle 90 of the Rules of this Court, wherein the Applicant prays the Court for an order to set aside the default Judgment entered in favour of the Respondent on 6th November 2013. The motion was supported with a 26 paragraphed affidavit.

2. The summary of the grounds deposed to in the affidavit are:

   a. That the Applicant's failure to file a Defence was as a result of Inter- Agency coordination.

   b. That the Application for default judgment was received at a time a new administration was ushered into the Attorney General's Office.

   c. That the Application for Judgment in Default has not been cited in the Attorney General's Department despite having been recorded as received.

   d. That the Defendant/ Applicant has a valid Defence to the action and has, contrary to the findings of this Court at paragraph 59 of the Judgment, variously Challenged the allegation of human rights Violation.

   e· That the Registry Department of the Court did not communicate them with the Court's Decision refusing the Application for Adjournment.

   f. That it is only fair that Member States, accused of human rights abuse, be granted ample opportunity to defend themselves, in view of the fact that the appeal does not lie from the decisions of the Court.

g. That their non-compliance with the set Rules of this Court has not resulted in substantial miscarriage of justice for the Respondent/ Applicant who could be compensated in monetary term.

3. Defendants also, on the 27th of January 2014, filed a proposed Statement of Defence marked as "EXH AG1".

PLAINTIFF/RESPONDENT'S SUBMISSION IN OPPOSITION

4. Plaintiff/Respondent, denied the facts deposed to in the Defendant's Affidavit in support of the application seeking to set aside the judgment and relied on the ruling of this Honourable Court delivered on the 6th November, 2013, especially paragraphs 21, 22, 23, 24, 30, 31 and 32 thereof as well as the judgment of the 6th November 2013, especially paragraphs 46, 47, 49, 59, 72, 73, 74, 86, 90, 91, 92, 93, 97, 98, 99, 100 and 101 thereof.

5. That the Defendant applied for and was granted extension of time to file its Defence and the extended period granted lapsed without the Defendant/ Applicant filing a Defence.

6. That the Plaintiff/Respondent's Application for Default Judgment was served on the Defendant/ Applicant and it did not file any response to, nor deny any of the facts stated in that Application for Judgment in default.

7. That on 22nd, May 2013, when the matter came up before the Honourable Court for the hearing of the Plaintiff/Respondent's Application for Default Judgment, the Defendant/Applicant was not in Court and was not represented by any Counsel, but instead, wrote a letter delivered to this Honourable Court on the 21st May 2013 and served on Plaintiff/Respondent in Court on 22nd May, 2013, seeking an adjournment on the bare ground that the date was not convenient for the Attorney General of Ghana to attend Court, as she was otherwise officially engaged.

8. That the letter did not seek any additional time for filing of the Defendant/Applicant's Defence, even though the time previously extended had lapsed, nor did it seek to respond to the Plaintiff/ Respondent's Application for judgment in default, which was fixed for hearing on that date.

9. That after refusing the application for an adjournment, this Honourable Court asked the Plaintiff/Respondent to move his application for default judgment and also argue his substantive application on the merit, subsequent to which the Court adjourned the matter to 2nd July 2013 for Judgment on which date although the judgment was ready, it could not be delivered, as it had not yet been translated into the other languages of the Court.

10. That on 17th Ju1y 2013, the Plaintiff/Respondent was served with a Statement of Defence filed by the Defendant/Applicant, and on 17th September, 2013, Plaintiff was served with an Application dated 3rd August 2013 and filed on the 16th September 2013, seeking an extension of time to file the Defence out of time.

11. That the Plaintiff/Respondent filed a Counter Affidavit to the Defendant/Applicant's Application for extension of time and the Court after hearing the parties, adjourned the matter for Ruling on the application and possibly for Judgment if the application failed

12. That when the matter came up for Ruling/Judgment on 6th November, 2013, the Honourable Court, in a well-considered Ruling, dismissed the Defendant/Applicant's Application for an extension of time within which to file its defence and proceeded to deliver its Judgment.

13. That in its Ruling, the Honourable Court held that the Court gave thorough consideration to the issues of admissibility of the Plaintiff/ Respondent's action, the fulfilment of procedural requirement by the Plaintiff/Respondent's and the sufficiency of facts adduced by the Plaintiff/Respondent, before reaching a decision.

14. That this current Application of the Defendant/Applicant is another ploy designed to delay the execution of the judgment and deny the Plaintiff/Respondent the benefit of the judgment entered in his favour.

15. That the Defendant/Applicant has not adduced any new fact in support of its application to set aside the Default Judgment entered in favour of the Plaintiff/Respondent in this suit that were not known to the Honourable Court when it delivered its Ruling and Judgment on 6th November 2013 or otherwise shown any reason why the discretion of the Court should be exercised in its favour.

16. That the Defendant/Applicant will not be prejudiced in any way if this Application is refused, since it has had every opportunity to defend this Suit on the merit but failed, refused and/or neglected to do so and it will be in the interest of justice if this Application is refused, as granting same will overreach the Plaintiff/Respondent.

CONSIDERATION BY THE COURT

17. Article 90 of the Rules of the Court provides for Judgment by Default and Application to set them aside. This Court, by virtue of Article 90 (8), which provides thus***: "application may be made to set aside a judgment by default"***, can set aside its Judgment on an Application to it by a party.

18. In deciding whether or not to grant such an Application, this Court has to consider the reasons for the Applicant's default, the regularity of the Application, the substance of the application and the consequential effect of the grant on the other party.

ON THE REASONS FOR DEFAULT

19. In this case, the Defendant after being served with the originating Application, failed to filed its defence within the time limit stipulated by the Court. It then brought an Application for extension of time to file defence, which was granted, but again it failed to file its defence

and the extended time elapsed. The Plaintiff consequently filed an Application for default judgment.

20. The Defendant again, was served with the Application for Judgment by Default and yet did not file a Reply. On the date fixed for hearing of that application, Defendant chose not to attend, but sent a letter asking for adjournment, on the grounds that the Attorney General was otherwise engaged. The Court refused the request for adjournment and the Plaintiff was allowed to move his motion for Default Judgment, which was duly considered and granted with Judgment entered for the Plaintiff.

21. Even when Judgment was entered, Defendant/Applicant, after being served with it on the 24th of December 2013, took its time to file the present Application on the 23rd of January 2014.

22. The Defendant, in paragraphs 6 and 7 of the Affidavit in support of this application, ascribes the failure to file a Defence to poor Inter-Agency coordination and ushering-in of a new administration into the office of the Attorney General.

23. However, the office of the Attorney General is a continuous one and we need to make it clear that this Court is not and will not be burdened with the internal administration of a party.

24. The Attorney General, as the head of the Justice Ministry, has several Law Officers working with him. If he had considered the Court proceeding important, he could have sent any law officer to hold his brief, even if only to inform the Court of circumstances averred to in the present affidavit. He chose not to do that.

25. It is worthy of note that the Attorney General's letter, asking for an adjournment on the date fixed for hearing of the Plaintiffs Application for default Judgment, merely stated that he was otherwise engaged. The averment in paragraph 9 of the affidavit in support of the Application is therefore an afterthought.

26. The Nigerian Supreme Court in **Williams *v.* Hope Rising (1982) 1-2 SC143**, in an Application to set aside a default Judgment, held that the conduct of a party throughout the proceedings is a vital factor in the Court deciding on whether or not to give its Application a sympathetic consideration.

27. The attitude of Defendant throughout the proceeding showed total and blatant disregard for the proceeding before this Court and for the outcome of the case.

ON THE MERIT OF THE APPLICATION

28. In other to move this Court to grant this Application, the Defendant has to satisfy this Court, through its affidavit evidence that it has a *prima facie* defence to the action.

29. The Defendant based this Application on averments in paragraphs 17, 18, 19, 22 and 23 of the affidavit in support thereof summarized thus;

    a. That though the Defendants were unable to file its defence timeously due to administrative lapses, this Court should, in the interest of justice, oblige the Defendant and hear the case on merit.

    b. That contrary to the findings of this Court at paragraph 59 of the judgment, the Republic of Ghana has always shown an intention to challenge and has variously challenged the allegations of human rights violations as evidenced by the Application for extension of time as well as the attached proposed defence.

    c. That the Plaintiff/Respondent's allegation of attempted expropriation has no legal or factual basis as Respondent did not show any consequential economic or financial loss in the affidavit in support of motion for judgment in default:

d. That this Court, being a Court of first and last instance, should give Member States accused of human right violations, ample opportunity to defend themselves.

e. That the non-compliance with the time limit has not resulted in substantial miscarriage of justice for the Respondent, as they can be compensated in monetary terms for the time spent in Court.

30. In **Khawam *v.* Elias (1960) 5 FSC 224 Abbott FJ** adopting the position of Lord Atkins, stated that one of the Rules guiding the Court in the exercise of their discretion to set aside a default judgment, is that there must be an affidavit of merits, meaning that he must produce to the Court evidence that he has a prima facie case.

31. The main issue now is not just the need to hear the parties as the Defendant was given ample opportunity to be heard. The issue to be considered is whether the totality of the averment in the Defendant's Affidavit, disclose a *prima facie* case to warrant the setting aside of the judgment.

32. In reaching its decision to enter judgment for the Plaintiff, this Court carefully evaluated the facts and evidence presented by the Plaintiff and Judgment was entered in line with the Court's evaluation and not in terms of the prayers in the Plaintiff's motion.

33. We are persuaded by the test established in **Alpine Bulk Transport Co Inc. *v.* Saudi Eagle Shipping Co. Inc. (1986) 2 Lloyds Rep 221**, that in considering whether to set aside a default Judgment, the Defendant must have a reasonable prospect of success and it is not enough to show a merely arguable Defence. *See also* **ED & F Man Liquid Products Ltd. *v.* Patel (2003) CPLR 384** where the Appeal Court held that the test is the same as that of Summary Judgment as what is required to be shown is a real likelihood of success.

34. In order to set aside this Judgment therefore, Defendants has to satisfy us that it has not just as intention to defend, but a reasonable prospect of success.

35. Having duly considered the totality of submissions by the Defendant/ Applicant, we see no convincing ground upon which to base a decision to set aside the default judgment.

36. We need to point out that the submission in paragraph 16 of the Defendant/Respondent's Affidavit on the findings of this Court at paragraph 59 of the Judgment is an issue of an appeal which is not the purpose of this Application and which in any event, will not arise as the decisions of this Court is not subject to appeal.

DECISION OF THE COURT

For this reasons:

37. The Court, adjudicating in a public hearing after hearing both parties and after deliberating:

    i. **Declares** that the Defendant has not established a *prima facie* case to warrant setting aside of the default judgment.

    ii. **Dismisses** this Application for lack of merit.

COST

38. No Order as to costs.

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES;

1. **Hon. Justice H. N. DONLI** - *Presiding;*
2. **Hon. Justice M. B. RAMOS** - *Member;*
3. **Hon. Justice C. N. MEDEGAN** - *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 AT ABUJA, NIGERIA

ON TUESDAY, THE 10TH DAY OF JUNE, 2014

SUIT N^{O}: ECW/CCJ/APP/02/11
JUDGMENT N^{O}: ECW/CCJ/JUD/12/14

BETWEEN
MOUKHTAR IBRAHIM AMINU - *PLAINTIFF*

AND
GOVERNMENT OF JIGAWA STATE & 3 ORS. - *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

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

REPRESENTATION TO THE PARTIES:

1. **NUREINI JIMOH (ESQ.)** - *FOR THE PLAINTIFFS*
2. **YAKUBU A H. RUBA (ESQ.)** - *FOR THE 1ST DEFENDANT*
   CHRIS OSUAGWU (ESQ.) - *FOR THE 2ND DEFENDANT*
   OMONUWA OGIEMUDIA (ESQ.) - *FOR THE 3RD & 4TH DEFENDANTS*

- Jurisdiction - Burden of proof - Proper Parties - State Responsibility - Damages

SUMMARY OF FACTS

The Applicant, Moukhtar Ibrahim Aminu a citizen of the Federal Republic of Nigeria by an Application dated 17th February, 2011, lodged at the Registry of the Court filed a motion for accelerated hearing pursuant to Article 59 (1 & 7) of the Rules of Procedure. The 1st and 2nd Defendants filed a notice of preliminary objection challenging the jurisdiction of the Court to hear and determine the case, stating that the 1st, 2nd and 3rd Defendants are separate entities and not under the direct control and supervision of the 4th Defendant and that the 4th Respondent was not involved in any manner or connected with the alleged infringement of the Applicants fundamental right to life, dignity, personal liberty, freedom of expression and fair hearing, the subject matter of the suit and that none of the Applicant's rights have been infringed by the 4th Respondent. The preliminary objection was taken and overruled.

The Applicant alleged that he posted a message on Face book which the Defendants alleged was defamatory of the Governor and his political party, and that the statements on Face book affected the support for the Governor and made him lose the said re-election. He stated that the Governor, without verification of the author and with a view to clamping down on opposition parties in the State, forced the organs under his control, namely, the State government and the Judiciary under his government and also the Federal Organizations in his State like the Police authorities to arrest him. He was arrested and detained, with hardened Criminals and Homosexuals where he was harassed, assaulted and tortured. He further alleged that the Defendant's action amounted to inhuman and degrading treatment. Also, that he was subjected to poor feeding, inadequate health and living conditions, with no provisions for clothing and sleeping facilities. Other forms of cruel and degrading treatment meted on him include the corporal punishment by means of deliberate mental and physical torture, solitary confinements and chaining all of which constitute

clear violations instigated by the Executive Governor of the 1st and 2nd Defendants. The applicant in his application, sought to recover damages from the Defendants in the sum of 2 billion Naira, for the violations of their human rights.

The 1st and 2nd Defendants in response alleged that the Applicant published a defamatory matter on Facebook where he insulted the Governor and the Governor reported the alleged offence of injurious falsehood to the law enforcement Agencies, the 3rd Defendant through an Officer of the 1st Defendant. The 3rd Defendant maintained that as a law enforcement agency their duties under the Constitution of the Federal Republic of Nigeria and the Police Act is to maintain Law and Order which includes the arrest and detention of Suspects and ensuring their prosecution where necessary and that was what it did in this case and that it is not a proper party to be sued in this case.

The 4th Defendant denied their connection or involvement in the instant case including the Application for enforcement of the Applicants Fundamental Rights and that their name should be struck out and there was no reasonable cause of action by the Plaintiff against them.

LEGAL ISSUES

- *Whether the ECOWAS Court has jurisdiction to hear this matter.*
- *Whether or not the rights of the applicants have been infringed upon.*
- *Whether the 3rd and 4th Defendants are components of the Federal Republic of Nigeria.*
- *Whether or not the Plaintiff is entitled to damages.*

DECISION OF THE COURT

The Court held:

Pursuant to Article 4(g) of the Revised Treaty, Article 5 of the African Charter on human and peoples' rights which was domesticated in

Nigeria as part of the laws of the Federation of Nigeria; and Article 5 of the African Charter on Human Peoples Rights.

- *That the Applicant/Plaintiff had proved his claim as stated therein in the originating application for unlawful detention, the family members must be specified and their violations must be proved for the reliefs sought on their behalf to succeed.*

- *Also, that the Court was persuaded and applied the State Responsibility principle in International Law as embodied in a draft to the United Nations.*

- *That the State of Nigeria was not directly sued in this case but the Attorney-General of the Federation and by the application of Section 150(1) of the Constitution of the Federation which described him as the chief Law Officer of the Federation and by the practice of Nigeria which we endorsed in this case herein particularly by the combined effect of Article38(1)(c) of the Statute of International Court of Justice and Article 19(1) of the Protocol A/P1/7/91 as amended on the Court, the 4th Respondent became a proper party in this case and the State of Nigeria equally, making him liable for the violations of human rights in this case;*

- *That there was proof of violation that was committed against the Applicant/Respondent by the Respondents/Defendants having shown that he-the Applicant was put in detention with hardened Criminals, Homosexual suspects who harassed and assaulted him - the Applicant, proved the need to award damages and we so award the said damages herein.*

Consequently, the Court having found that the Applicant had established his claim awarded the Applicant/Plaintiff compensation for the violation of human rights in the sum of 10 million Naira only against the Respondents/Defendants accordingly.

Cost was awarded in the sum of One Million Naira for the Applicant/ Plaintiff against the Respondents/Defendants.

JUDGMENT OF THE COURT

PARTIES

1. The Applicant, Moukhtar Ibrahim Aminu is the Plaintiff instituting this action for himself and on behalf of all members of his family based in Nigeria and residing at No YA Block 9, Flat 4/5 Gidan Dubu, Dutse, Jigawa State of Nigeria;

2. The 1st Defendant is the Government of Jigawa State with an address at Government House, Jigawa State of Nigeria;

3. The 2nd Defendant is the Judiciary of Jigawa State of Nigeria with an address for service at the office of the Chief Registrar, Jigawa State Judiciary of Nigeria;

4. The 3rd Defendant is the Inspector General of Police of the Federal Republic of Nigeria with an address at Nigeria Police Headquarters, 3 Arms Zone, Abuja, Federal Capital Territory Nigeria;

5. The 4th Defendant is the Attorney General of the Federation with an address for service at the Federal Ministry of Justice, Federal Secretariat, Abuja - Nigeria;

PROCEDURE

6. By an Application dated 17th February, 2011, signed by the Applicants Counsel/Lawyer, and lodged at the Registry of the Court on the same date in accordance with Articles 32 and 33 of the Rules of Procedure marked Document 1A and the summary Document 1B, the Plaintiff sued by himself and on behalf of his family members, the Defendants namely these - 1st Defendant, the Government of Jigawa State with an address at Government House, Jigawa State of Nigeria, the 2nd Defendant, the Judiciary of Jigawa State of Nigeria with an address for service at the office of the Chief Registrar, Jigawa State Judiciary of Nigeria, the 3rd Defendant, the Inspector General of Police of the Federal Republic of Nigeria with an address at

Nigeria Police Headquarters, 3 Arms Zone, Abuja Federal Territory Nigeria, the 4th Defendant, the Attorney General of the Federation with an address for service at the Federal Ministry of Justice, Federal Secretariat, Abuja - Nigeria;

7. The Application was served on each of the Defendants in, accordance with Articles 34 - 35 of the Rules Procedure of this Court and the Plaintiff filed a motion for accelerated hearing pursuant to Article 59 (1 & 7) of the Rules of Procedure, lodged on 17th February, 2011 and marked Document No. 2;

8. The 1st and 2nd Defendants filed a notice of preliminary objection pursuant to Articles 87 and 88 of the Rules of Procedure challenging the jurisdiction of the Court to hear and determine the case, Document No. 3 and dated 8th March, 2011, together with their written address;

9. The Applicant/Plaintiff filed a counter affidavit marked statement in reply by the Plaintiff/Respondent to the 1st and 2nd Defendants notice of preliminary objection dated March, 2011 but filed on 8th March, 2011 and marked by the Court as Document No. 4. And lodged on 7th April, 2011, which the Applicant objected to and attached a written brief of argument in support;

10. The 4th Defendant filed a motion on notice for extension of time to enter conditional appearance; extension of time for the 4th Defendant to file and serve counter affidavit and deem same as duly filed and served pursuant to Article 35(2) of the Rules of Procedure marked, Documents No. 4 and 5, the counter affidavit by the 4th Defendant which stated that the 1st, 2nd and 3rd Defendants are separate entities and not under the direct control and supervision of the 4th Defendant and that the 4th Respondent was not involved in any manner or connected with the alleged infringement of the Applicants fundamental right to life, dignity, personal liberty, freedom of expression and fair hearing, the subject matter of the suit and that none of the Applicants rights have been infringed by the 4th Respondent Document marked No. 6, wherein he restated the averments in Document 5 lodged on 23rd May, 2011;

11. The 4th Defendant lodged his statement of defence marked Document N°. 7 on 4th August 2011;

12. The 1st and 2nd Defendant lodged on the 8th August 2011 a counter affidavit attaching some documents marked exhibits A, B, C and D namely -the First Information Report (F.I.R.), proceeding at the Chief Magistrate Court - Jigawa, Warrant of commitment to Prison by the Chief Magistrate Court, Dutse-Jigawa State; Warrant to Produce Prisoner, and written address opposing the originating Application;

13. The 4th Respondent's written address in opposition to the Applicant's Application. Document marked N°. 9 and lodged on 27th September, 2011 which stated the sole issue for determination as to no cause of action has been disclosed against the 4th Respondent;

14. Proof of evidence by the Applicant, Document marked N°s. 10 and 11, 12, lodged on 14th March 2012; and Document N°. 13 lodged on 7th May, 2012; Documents 14 and 15 lodged on 2nd July, 2012 as motion on notice and proof of evidence;

15. Proof of evidence as Document marked N°. 16 and lodged on 2nd of July, 2012;

16. Memorandum of conditional Appearance by the 3rd Respondent as Document marked N°. 18, and lodged on 29th November, 2012;

17. The 1st and 2nd Respondent's motion on notice for extension of time to file and serve statement of defence out of time and written address marked Document N°.19 and lodged on 19th September, 2012;

18. The 3rd Respondent's counter affidavit to application for enforcement of the Applicant's Fundamental Rights lodged on 4th of November, 2013 marked Document N°. 20;

19. Plaintiffs reply to 3rd Respondent's counter affidavit to application for enforcement of the Fundamental Rights marked Document N°. 21 lodged on 8th November, 2013;

20. The 3rd Defendant's final written address opposing the Applicant's Application of 17th February, 2011 marked Document No. 23 lodged on 18th November, 2013;

21. The 1st and 2nd Respondents final Address marked Document 24 and lodged on 18th November, 2013;

22. The Plaintiffs' final written address as Document marked No. 25 and lodged on 27th November, 2013;

23. The Court granted and deemed the processes so filed by the Parties as duly filed and served in accordance with the provisions of the Rules of the Court.

24. The Preliminary Objection was taken and overruled.

SUMMARY OF THE APPLICANT'S/PLAINTIFF'S CASE.

25. By an action lodged in the Registry of this Court, the Applicant on behalf of himself and the members of his family who reside in Nigeria and Community Citizens, sought to recover damages from the Respondents/Defendants in the sum of 2 billion Naira, for violations of their human rights by several acts instigated by the Executive Governor of the 1st and 2nd Respondents/Defendants which he described his arrest, detention, with hardened Criminals and Homosexuals, harassment, assault and torture.

26. The Applicant by his statement averred that the 1st Respondent/ Defendant is one of the constituent units of the State of Jigawa State and the Federal Republic of Nigeria; while Governor Sule Lamido belonged to the ruling political party in Nigeria called Peoples Democratic Party (PDP), the Applicant and his family largely based in Jigawa State of Nigeria prominently belonged to the opposition party of Action Congress of Nigeria (ACN), with political beliefs and opinion opposed to that of the PDP.

27. The Applicant averred that Governor Sule Lamido alleged that the Applicant, a 26 year old student and heir apparent to the Applicant's family, posted a message on *Facebook* which was insultive of Governor and his political party, and that the statements on *Facebook* were calculated in making the people to down tune their support for the Governor and make him to lose the said re-election at the then forthcoming April 2011 General election.

28. He stated that the Governor, without verification of the author and with a view to clamping down on opposition parties in the State, forced the organs under his control, namely, the State government and the Judiciary under his government and also the Federal Organizations in his State like the Police authorities headed by Hafiz Ringim, the then Inspector General of Police of the Federation, an indigene of Jigawa State of Nigeria to do whatsoever he ordered.

29. The Applicant averred that by the Governor's action he suppressed and subdued the Applicant's family and the various organs of the State and Federal Government and that consequently, the Applicant was arrested and detained on 21st of January 2011 in various Police Cells for periods specified in the claim under dehumanizing and inhuman conditions for 11 days in Dutse, Jigawa State and Abuja Police Command, F.C.T., without being charged for any offence and that the Applicant was kept among Hoodlums and hardened Criminals who tortured, harassed and thoroughly beat him up to succumb to the advancements by Homosexuals in the cell.

30. He further stated that the Respondents/Defendants jointly and collectively connived and kept the Applicant in various Police Cells for 11 days in Dutse, Jigawa State and Abuja Police Command.

31. He stated that the Applicant was also deprived of food and decent living conditions despite the fact that the Applicant was an ulcer Patient and that these acts made the Applicant to collapse and be rushed to the hospital for treatment. The Applicant was moved from FCT, Abuja Cell to Dutse in Jigawa State of Nigeria where he was

arraigned before a Magistrate Court for an offence of insulting the Governor with no bail and that when the application for bail was taken by the Court on Monday 31st January 2011, the Court still adjourned the case to Monday 7th February 2011. The Applicant was shown print-out from a *Facebook* containing a statement against the Governor which he denied being the author or that he made or that it was his own. The *Facebook* print out was identified and marked as attached to the processes as Exhibit A1,and Exhibit A2 and Exhibit B- Daily Trust Newspaper, Weekly Trust and Sunday Trust-reported of "My ordeal in detention", "Interview of Mallam Sule Lamido" and "Why we dragged *Facebook* Boy to Court - Gov. Lamido"

32. He stated that the Governor openly addressed the Press whereby he ordered for the arrest of the Applicant and members of his family by the Sharia Court of Appeal and eventually, the Applicant and his family had to run into the bush to an undisclosed location.

SUMMARY OF THE 1ST AND 2ND RESPONDENTS' CASE

33. The 1st and 2nd Defendants denied the allegation as projected by the Applicant and his witnesses and stated that the Applicant published a defamatory matter on *Facebook* whereby he insulted the Governor and the Governor reported the alleged offence of injurious falsehood to the law enforcement Agencies, the 3rd Defendant through an Officer of the 1st Respondent/Defendant Umar Kyari for the matter raised therein to follow the due process of the law. Eventually, the Applicant was taken to the Magistrate's Court on First Information Report (F.I.R.) for injurious falsehood punishable under Section 393(1) of the Penal Code Law on 31st January, 2011. The 1st and 2nd Respondents denied the claim for violations of the human rights of the Applicants and the members of the Applicant's family but that by reporting the Applicant to the 3rd Respondent, he observed the due process of law in this case. They relied on exhibit A the F.I.R, Exhibit B- the record of proceeding at the Chief Magistrates Court, Dutse, Jigawa State, Exhibit C - warrant of commitment to prison until trial

dated 31st January 2011, Exhibit D - warrant to produce 1st February, 2011. They relied on the evidence of PW1 - PW4 to show that their pieces of evidence did not prove that the 1st and Defendants violated the fundamental rights of the Applicants.

3RD AND 4TH RESPONDENTS RAISED POINTS OF LAW.

34. The 3rd Defendant maintained that as a law enforcement agency their duties under the Constitution of the Federal Republic of Nigeria and the Police Act is to maintain Law and Order which included the arrest and detention of Suspects and ensuring their prosecution where necessary and that was what it did in this case and that the they are not known in law as legally recognized parties to be sued in international law proceedings in this case.

35. The 4th Defendant denied their connection or involvement in the instant case including the Application for enforcement of the Applicants Fundamental Rights as stated therein in the originating Application and that their name should be struck out and there was no reasonable cause of action by the Plaintiff against them.

LEGAL ARGUMENTS BY THE PLAINTIFFS

36. Learned Counsel submitted that Constitutional Right in strict legal parlance is a right which refers to a claim, advantage or benefit validly conferred by a law, on an individual, and which legally entitles the holder to the goods and services of others. He referred to the definition of a Bill of Rights Act of 1689, ***"as a power, privileged, or immunity guaranteed under a Constitution, statutes or decision, all laws, or claim, as a result of long usage."*** He submitted that the Rights which are recognized under the Constitution of civilized societies are called constitutional rights, and are further classified into natural, civil, political and economic rights.

37. He submitted that a Person under an arrest has a right to be informed of the reason for his arrest by the Police Officer, within 24 hours, under section 35(3) of the 1999 Constitution, except where he is

arrested while in the actual course of committing the offence and that any arrest carried out by a Police Officer in contravention of any of the above rights of the citizen constitutes an infringement of his rights and is therefore unlawful. Right to be brought before a Court of law within a reasonable time and that where a person has been arrested either for the purpose of bringing him before a Court or upon reasonable Commission of an offence, or to prevent him from committing an offence, such a Person must be charged to Court within a reasonable time not exceeding 48 hours (Section 35(5) of the1999 Constitution) failing which he must be granted bail pending trial. He referred to **Section 17 (1) of (ACJL) of Lagos State, 2007**, and that where an, arrest failed the test, as in the instant case, the Courts quickly condemn and declare such unwarranted arrests as illegal, null and void. He cited, **Ikonne *v.* C.O.P (1986) 2 NSCC 1130 at 1145**, and **Gwonto *v.* the State (1982) 1 NCR 263 at 264**, where the Court stated that a Court should have valid reasons for issuing the warrant of arrest complained of as the issuance would amount to an abuse of legal process where such warrant was issued without a valid reason; such arrest warrant would be said to have been issued without judicial authority and the conduct of the Issuer would amount to a violation of that individuals right to liberty.

38. He submitted that if the processes are followed strictly, it would prevent the abuse of Police powers that infringe on the individual rights to liberty which would thereby protect the citizens from undue harassment, intimidation, victimization, and needless Police brutality and he referred to **Section 35 (6) of the 1999 Constitution**, any Person who is unlawfully arrested or detained shall be entitled to compensation and an apology from the appropriate Authority or Person, who committed the unlawful act.

39. On the Right at the Police Station he submitted that when a Person is taken to a Police Station for the Commission of an alleged offence or on reasonable suspicion of being about to commit a crime, he is entitled to the following rights, under the Constitution and other subsidiary legislation, presently in force; and as to the Right to Bail,

he submitted that the right of a Suspect to bail is constitutional as rightfully guaranteed under section 35(4) and (5) of the 1999 Constitution, which provides that Suspect is entitled to be released with or without conditions even if further proceedings may be brought against Him, within a period of one day or two days, of his arrest and detention, as the case maybe

40. He submitted that where by virtue of the nature and circumstances of a particular case it is not feasible for the Police to release the Suspect on bail, He must be charged to Court not later than a period of 24 or 48 hours, from the date of detention. He referred to **Eda *v.* Commissioner of Police (1982) 6 NCLR, 233**, where the Court held that where the Police arrests and detains a Person over an allegation or reasonable suspicion of committing an offence and investigation of the case are ongoing, it is their duty to offer bail to the Suspect and/or charge Him to Court within 24 hours, under appropriate section of the CPC.

41. In respect of rights of an accused in Police Custody and the Right to decent Cell conditions and facilities, He submitted that where an accused Person is held in Police custody, he must be kept under decent human conditions, acceptable in any civilized society, and not under sub-standard conditions and deprivations, which run counter to minimum standards permissible under the law. He referred to the opinion in **Wright *v.* McCann 387 F.2D 519 (2d.cir 1967 at 526)**, thus

> ***"We are of the view that civilized standards of human decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold and to be deprived of the basic elements of hygiene such as soap and toilet paper as stated."***

42. On the Right to proper medical attention, He referred to the Right to life which is the most fundamental and crucial of all rights guaranteed under our constitution and submitted that for every Citizen, irrespective of status, class or creed, and whether in lawful custody

or otherwise. Right to life as well as to the dignity of the human Person implied that a Detainee should have full and equal access to medical treatment and attention, available to other Citizens, while in custody of the Police or other Agencies and that the absence of which would make nonsense of the right. He relied on **Gani Fawehinmi *v.* The State (1990) 1 NWLR (Pt.127) 486;** and **Chukwukere *v.* COP. (1975) E.C.S.L.R. 44**,) to stress that the violation of human rights would occur where the Defendants failed to follow the processes guaranteed under the law when they failed to provide proper medical attention to the Applicant who was hypertensive.

43. He also referred to the presumption of innocence in Section 36(5) of the 1999 Constitution and under Section 36(6) (a) which stated that, ***'Every Person who is charged with a criminal offence shall be entitled to be informed promptly in the language that he understands and in details of the nature of the offence,*** 'and contended that the trial of accused should have observed the provision of the Constitution as it was observed in the case of **Biishi *v.* The Judicial Service Commission (1991) 6 NWLR (Pt. 197) 331** where the Court of Appeal, held thus:

> ***"If the right to be heard is to be a real right which is worth anything, it must carry with it right in the accused man to know the case which is made against Him: He must know what evidence has been given and what statement have been made affecting Him, and then He must be given a fair opportunity to correct or contradict with the particulars of the allegation against Him and there was no written or oral representation by the Appellant before the Commission took the decision to retire Him."***

44. He submitted that these safeguards must be followed in order to ensure a fair trial of an accused Person which would defeat allegations of bias and improprieties associated with secret trials, and that an

accused Person must be subjected to a public trial and referred to section 36(4) of the 1999 Constitution that whenever any Person is charged with a criminal offence, he shall, unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a Court or tribunal, unless exceptional reasons are shown to the contrary; He referred also to **Section 35(6) of the 1999 Constitution** that any person who is unlawfully arrested or detained shall be entitled to compensation and an apology from the appropriate Authority or Person, who committed the unlawful act. He further, referred to Article 4, of the African Charter on Human and People's Rights, also in upholding the sanctity of life, which states that:

> ***"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 his rights".***

45. He submitted that the articles of this Charter which have been duly ratified and enacted into law in Nigeria, and now reproduced under Cap. 10 of the laws of the Federation, 1990, as African Charter on Human and People's Rights (Ratification and Enforcements) Act, have been invoked by our courts, including the Supreme Court, in their decisions involving the determination of allegations of infringement of human rights guaranteed under its provisions. He also contended that Prison inmates, whether convicted or awaiting trial, being part and parcel of the universal humanity, are entitled to the above right to life. This must be protected by the government to ensure that the sanctity is upheld in their favour, at all times. The right to life would lose its meaning and force, however, where the facilities for protection and preservation of lives of Prisoners, which must be fair and reasonable, are not provided and guaranteed by the government and kept in crowded Cells, contrary to the universally accepted minimum standards for treatment of Human beings, as is obtainable under our Prison conditions. In **Munn *vs.* Ilinois U.S 113 (1877), Justice Field**, drove the above point home, in his judgment when he stated thus:

> ***"Life means something more than mere animal existence, and the inhibition against the deprivation of life extends to all those limits and facilities by which life is enjoyed."***

46. He submitted that the National Courts have equally thrown its full weight, in support and advancement of this right, through judicial decisions and pronouncements, to the delight and admiration of all and sundry. See the celebrated case of **Mohammed Garuba & Ors *vs.* Attorney General of Lagos State 1 NPILR 1**. As to the right to dignity he submitted that every individual is entitled to respect for the dignity of His Person as provided by section 34 (1) of the Constitution as follows:

    (a) No Person shall be subject to torture or to inhuman or degrading treatment;

    (b) No Person shall be held in slavery or servitude; and

    (c) No Person shall be required to perform forced or compulsory labour.

47. He contended that such inhuman and degrading treatment manifest itself in the scandalous problem of congestion in our prison, where remand inmates are lumped together with condemned Prisoners, in dingy, small and overcrowded Cells, under unprintable poor sanitary conditions. Also, they are subjected to poor feeding, inadequate health and living conditions, with no provisions for clothing and sleeping facilities. The result is the high rate of death in Prison Cells owing to the abysmal health and living conditions there. The sub-standard conditions of the Prisons are against established standard minimum rules for treatment of Prisoners. Other forms of cruel and degrading treatment of Prisoners include the punishment of Detainees by means of deliberate mental and physical torture, through corporal punishments, solitary confinements and chaining. They constitute clear violations of their degrading treatment.

48. He referred to **Wright *v.* McCann 387 F 2d 519 (2d Cir) 1976 at page 526**, about six Inmates were lumped together in a very small Cell, with no toilets, no beds, no water and little hole in the Centre of the room to serve as toilet, with no means of flushing it after use, except from outside the Cell implying that they virtually lived with their faeces. They had only one meal daily with bare hands and were not allowed any opportunity for physical exercises or reading. They were allowed to take their baths once after every eleven days; and that the Court after a critical review of the living condition of these inmates held that the deplorable condition of the Cell constituted a gross violation of the inmates' right to Personal dignity as well as freedom from cruel and degrading treatment. Article 5 of the African Charter of Human Peoples' Rights provides that:

> **"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".**

49. As to the right to participate in politics under Section 40 of the 1999 Constitution, He submitted that every Person shall be entitled to assemble freely and associate with other Persons, and in particular. He may form or belong to any Politics party, trade union or any other association for the protection of his interest; Save in exceptional and proven situation like convicts every person is still entitled to enjoy his right to liberty and presumption of innocence, until convicted of any offence, is definitely entitled to his right to participate in politics, just like other Citizens; To deny him of that right is tantamount to presuming him guilty of the offence charged, even though still standing trial, and treating him like the Convicts; Consequently, there is urgent need as in this case for a judicial intervention aimed principally at mitigating the rigors of the Applicant and members of his family in belonging to opposition party.

50. On the right to cost and compensation as well as public apology, he submitted that In the face of Human rights abuses perpetrated by law enforcement Agencies and other government establishment Agencies hapless and defenseless Citizens, like the Applicant herein while engaged in lawful and peaceful pursuit of business and social well-being, it is only germane and expedient that legal reprieve are available to safeguard the rights of Citizens against such violations and infractions on their civil liberties; These abuses manifest themselves in several facets of life of Citizens, especially as Victims of inhuman treatment while under arrest and detention, under Police custody, as well as while being subjected to needless long and protracted or short but faked or Kangaroo trials; Sometimes, it is based on, mere suspicion of commission of an offence, without credible and sustainable evidence at the Police disposal to prove the case charged against the accused.

51. He submitted that if the accused Person is eventually found innocent and accordingly discharged and acquitted by the court, he is entitled to payment of compensation or damages against his traducers and persecutors, which may include the Police, the Complainant and even the State, as the case may be. Section 35(6) of the 1999 Constitution equally provides for compensation in deserving cases thus:

> **"Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate Authority or Person and in this subsection, "the appropriate Authority or Person" means an Authority or Person specified by law"**

52. He referred to Section 371 of the Criminal Procedure Code, applicable in the Northern states which he contended as being complementary to the above position under the Constitution thus:

> ***"When any person causes the arrest of another person and it appears to the Court by which the case is inquired into or tried that there was no sufficient grounds for causing such arrest, the Court may in its discretion direct***

the person causing the arrest to pay to the arrested person or each of the arrested persons, if there are more than one, such compensation not exceeding twenty-five pounds or fifty naira, to each person as the Court thinks fit and may award a terms of imprisonment not exceeding three months in the aggregate in default of payment and the provisions of Section 74 and 75 of the Penal Code shall apply as if such compensation were a fine."

53. He contended that the Courts have, in several decided cases, awarded damages to persons for unlawful arrest and detention as stated in the case of **Ogor *v.* Kolawole (1985) 6 NCLR 534**.

ARGUMENTS OF THE PLAINTIFF/PLAINTIFF IN REPLY TO THE 3RD DEFENDANT'S SUBMISSION.

54. He submitted that this issue is very frivolous, unnecessary and baseless and that the issue of jurisdiction of this Court was raised at the beginning, of this trial and was overruled. The ruling was delivered on Thursday 7th July, 2011. It must be noted that the argument of the 3rd Respondent is centered on interpretation of Article 10(d) of the Supplementary Protocol. He submitted that the ruling of this Court analyzed this same provision in paragraphs 49 to 50 contained at pages 18 to 19 of the copy of the said Ruling and entered the decision thereon in Paragraph 52, inclusive of the legality of the Defendants to stand trial as organs of the Federal government in paragraph 52 (d) of the decision. He submitted that the Court then concluded, at paragraph 52(h) of the ruling as follows:

"Whereas the grounds for the objection failed to show that this Court is incompetent to hear and determine the substantive case of an alleged violation of human rights that occurred in Member State in accordance with Articles 9(4) of the Protocol of the Court as amended"

55. He submitted that the 3rd Respondent never applied for a revision of this decision before raising the same objection as to jurisdiction. It is

not only frivolous, it was brought *mala fide*. In **Mohammad *v.* Hussein (1998) 11/12 SCNJ 136/163-164, U Mohammed JSC** held as follows:

> ***"Now let me pause here and ask; ...when is a Judge functus officio after delivering a Judgment? The Latin expression functus officio simply means, "task performed": Therefore, applying it to the judiciary, it means that a Judge cannot give a, decision or make an order on a matter twice. In other words, once a Judge gives decision or makes an order on a matter, he no longer has the competence or jurisdiction to give another decision or order on the same matter..."***

56. Furthermore, he submitted that the procedure for raising objections as to jurisdiction for the Court is not to wait and lay ambush, enjoy precious judicial time and judicial effort being wasted and after series of behind the clock Court sitting (both day and night), spring up surprises. Such objection sought to be by way of preliminary procedure raised pursuant to Articles 87 and 88 of the Rules of Procedures. He distinguished the present case with the case of **Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) *v.* The President of the F.R.N & 8 Others (Supra)** cited by the Defendants. He emphasized in his submission these questions to wit:

> ***"Whether the Plaintiff is a judicial person or legal entity under Nigerian Law, and whether it has the locus standi to maintain this action and submitted that the instant case is within Articles 9(4) and 10(d) of the Supplementary Protocol."***

57. With respect to the argument contained in paragraphs 2.12 & 2.13 to the effect that the Defendants are not Member State or signatory of ECOWAS Treaty, and that the 4th Respondent/Defendant is unknown and not equal to the Federal Republic of Nigeria, he submitted that the case of **Mouhtar Ibrahim Aminu *v.* Government**

of Jigawa State of Nigeria in ECW/CCJ/RUL/03/11 delivered on **7th July, 2011** by this Court explained it all. He quoted thus:

> ***"The Court holds a more dynamic approach on the issue of interpretation after considering the submissions made particularly in respect of the application of internal legislations rather than the Community texts that where it is evidently clear that the context of the said Revised Treaty is already made operational by Nigeria, any objection to it should be carefully considered and if found as in this case that the intention was to apply, any objection to it should be jettisoned. The 1st and 2nd Defendants being components of Nigeria are bound by the action / reaction/omission of Nigeria pertaining to the implementation of the said Revised Treaty. In this regard the Court affirms the argument of the Plaintiff's Counsel that the main application being connected with an alleged violation of human rights, pursuance of the provisions of the Community law men should be admissible and all National Courts should give way to the adjudication of this matter through the Community judicial organ in accordance with the Revised Treaty and the Protocols of the Court annexed thereto".***

58. He submitted that the 3rd & 4th Respondents are components of the Federal Republic of Nigeria and submitted opposing the argument that there is no Officer known as Attorney General of the Federation (the 4th Defendant). He submitted that the 3rd & 4th Respondents/ Defendants are components of the Federal Republic of Nigeria and that he argument that there is no Officer known as Attorney General of the Federation (the 4th Defendant) is legally not correct. He submitted that the 4th Defendant's Counsel never complained of misjoinder, therefore, the 3rd Respondent cannot also complain. He contended that joinder of the 4th Defendant is supported by the

provision of section 150 of the Constitution of the Federal Republic of Nigeria,1999 as the Attorney General of the Federation is the Chief Law Officer of the Federation.

59. He submitted that the argument that the Attorney General of the Federation is not synonymous with and cannot be equated with the Federal Republic of Nigeria is outrageously baseless. He contended that the Attorney General of the Federation is the Adviser and Representative of the Federal Republic of Nigeria in all law Suits in the Federation or Federation of Nigeria. He relied on the Nigerian case of **New Ltd. *v.* Denap Ltd. (2001) NWLR (Pt.746) 726; (2001) 12 SC (Pt. II) 136**, where the Court held that:

> ***"it is well settled that that the Attorney-General is a Defendant or a nominal Defendant in civil cases in which the Government issued. In this case, the action of the Governor as a public officer, which makes it a government act, was being challenged in Court. This makes the Attorney-General a proper Defendant to the action."***

He submitted that in the instant case the Attorney General of the Federation Defended the case and filed a defense and that it was too late in time to complain on the alleged mis-joinder.

LEGAL ARGUMENTS OF THE 1ST & 2ND RESPONDENTS/ DEFENDANTS

60. Learned Counsel reiterated the Plaintiffs claim and submitted that the Application of the Plaintiff was for the relief of violation of his human rights and all members of his family based in the Federal Republic of Nigeria and that he brought the action pursuant to:

    a) Sections 33, 34, 35, 36, 39 & 41 of the Constitution of the Federal Republic of Nigeria, 1999;

    b) Articles 3 & 4 of the Revised Treaty of the Economic Community of West African States (ECOWAS) 1993; Article 9(4) of the Supplementary Protocol A/SP.1/1/05

and Articles 11 of the Protocol A/P.1/7/91; Article 10, 12, 18 to 20, 26 of African Charter on Human and Peoples' Rights; and Articles 3, 5, 8, 9, 15,19 & 20 of the Universal Declaration of Human Rights.

61. He also referred to the 44 paragraph affidavit dated 17th of February, 2011 and deposed to by one Ibrahim Aminu and accompanied by Exh.A1, Exh.A2, Exh. A4 and Exh.A5. He referred to the evidence led by the Applicant whereby he called four witnesses in evidence, PW1, PW2, PW3 and PW4 and the document marked, No. 10, 11,12 and 13 all dated 14th day of March, 2012. Learned Counsel referred to the 1st and 2nd Respondents a counter affidavit dated 8th day of August, 2011 and deposed to by one Alhaji Yusif and their statement of defence dated 17th day of September, 2013 in response to the Applicant's statement of fact dated 17th day of February, 2011.

62. The 1st and 2nd Respondents/Defendants called 2 witnesses, DW1 and DW2 in support of their case whose evidence are contained in proof evidence marked as documents No. 15 and 16, all dated 2nd day of July, 2012. The 1st and 2nd Defendants raised three issues for determination as follows:

    i. Whether from the totality of evidence adduced before this Honorable Court, the Applicant has established any breach of his Fundamental Rights against the 1st and 2nd Respondents?

    ii. Whether having regard to the nature of the constitutional and statutory responsibility of the 2nd Respondents, the Applicant can by this Application enforce his fundamental rights?

    iii. Whether the Applicant is entitled to the reliefs sought?

ISSUE ONE:

63. On issue one, Learned Counsel submitted that the case of the Applicant that his arrest and detention by the 1st to 3rd Respondents, and his removal to Abuja, FCT under the control of the 3rd

Respondent who as the head of Police in Nigeria put the life of the Plaintiff in danger and also infringed on his liberty and his Fundamental Human Rights was not proved. Learned Counsel referred to Exh. A1 and Exh. A2 accompanying the affidavit of the Applicant dated 17th February, 2011 whereby an insultive and libelous statement posted on *Facebook* by the Applicant against the 1st Respondents were shown.

64. Learned Counsel submitted that it was based on the material on the Facebook that a complaint was made against the Plaintiff, Exh. A4 & A4A accompanying the counter affidavit of the 3rd Respondents dated 4th November, 2013 to wit, written complaints made to the 3rd Respondent by one Umar Kyari on behalf of the Governor of the 1st Respondent, Alhaji Sule Lamido. Learned Counsel submitted that there was proof that the Plaintiff posted the insultive and libelous statement on the *Facebook*, Exh. A1 & A2 on his Facebook against the 1st Defendant/Respondent contrary to the depositions of the Applicant in paragraphs 8 and 21 of his affidavit in support. He referred to Exh. B1 & B1 A and also statement of Zarro Muhammed Sani in paragraph 2 of his proof of evidence dated 7 May, 2012 and marked as document Nº. 13.

65. Learned Counsel submitted that the freedom of expression guaranteed under sections 39 of the 1999 Constitution, Article 9 of the African Charter on Human and Peoples' Rights; and Article 9 of the Universal Declaration of Human Rights are with limitation and referred to 45(1) (a) & (b) of the 1999 Constitution of Nigeria and Article 9 of the African Charter on Human and Peoples' Rights and Universal Declaration on Humans Rights respectively.

66. Learned Counsel submitted that Exh. A4 & A4A, made on behalf of the 1st Respondent led to the charge of falsehood contrary to section 393 of the Penal code Law Cap. 107 Laws of Jigawa State, 1998 before the 2nd Respondent and in accordance with section 451(1) & (b) of the 1999 Constitution of Nigeria and that the said charge did not contravene Article 9 of both the African Charter on Human

and Peoples' rights and Universal Declaration on Human Rights respectively.

67. Learned Counsel emphasized the provision of Section 393 of the Penal Code (supra) which he said was enacted to secure public order, public morality, and protecting other person's rights against the injurious falsehood of others in accordance with the laws of Jigawa State, and referred to the case of **Olaniyon *v.* Attorney General of Northern Nigeria (1960) NRNLR**, where the Court observed that,

> ***"There is a presumption that the legislature has acted constitutionally and that laws which they passed are "necessary and reasonable"; and that, A restriction upon a fundamental human right before it may considered justifiable must:***
>
> ***(a) Be necessary in the interest of public morality or public order; and***
>
> ***(b) Not be excessive or out of proportion to the object which it is sought to achieve".***

68. He submitted that the Applicant has failed to show, either by his evidence in the 44 - paragraph affidavit in support of the application and/or the evidence of PW1 to PW4 as contained in their proof of evidence marked as documents N°. 10 to 13. He submitted that the 1st Respondent by making the complaint contained in Exh. A4 & A4A did not infringe the fundamental right of the Applicant.

69. He relied on paragraphs 23 & 24 of his affidavit in support where the Plaintiff stated that he was arraigned before a Magistrate Court under the 2nd Respondent on the 31st day of January, 2013 and that a prepared charge which was not made available to him or any member of his family or Solicitors was quickly read to him; and that the Magistrate Court under 2nd Respondent is a Court by the enactment of the State House of Assembly in Section 3 of the Magistrate Court Law Cap 92, laws of Jigawa State1998 and derived

its authority by virtue of section 6(4) (a) of the 1999 Constitution of Nigeria and also exercises its powers in accordance with section 6(6) (a) & (b) of the same constitution.

70. Learned Counsel submitted that the offence under section 393 of the Penal Code Law (supra) is triable by the Magistrate Court under 2nd Respondent by virtue of section 12(1) of the Criminal Procedure Code Law Cap 39, Laws of Jigawa State, 1998; and that the trial of the Applicant by the Magistrate Court under the 2nd Respondent for an offence contrary to section 393 of the Penal Code is in consonance with its judicial powers provided under section 6(6) (a) & (b) of the 1999 Constitution of the Federal Republic of Nigeria and was not in contravention or infringement of the fundamental right of the Applicant guaranteed under the 1999 constitution of Nigeria, African Charter on Human and Peoples' Rights and Universal Declaration on Human Rights.

71. Learned Counsel referred to, Article 6 of the African Charter on Human and Peoples' rights provides that: ***"Every individual shall have the right to liberty and to the security of his Person. No one may be deprived of freedom except for reasons and conditions previously laid down by law. In particular no one may be arbitrarily arrested or detained"***. He contended that the process which led to the trial of the Applicant by the Magistrate Court under the 2nd Respondent was carried out under due process of law as it was in accordance with previously laid down law and rules of procedure to with section 393 of the Penal Code law (supra) by a competent Court under the 2nd Respondent.

72. He submitted that the granting of this application and by extension the relief sought by the Applicant against the 2nd Respondent will amount to this Court interfering in the criminal jurisdiction and power of the Magistrate Court properly constituted under the Laws of the Federal Republic of Nigeria. He referred to the decision of **Alhaji Hammani Tidjani *v.* 1. Federal Republic of Nigeria; 2. Republic of Mali; 3. Republic of Benin; 4. Attorney-General of Lagos**

State; 5. Attorney-General of Ogun State; (Judgment N°. ECW/CCJ/JUD/04/07).

73. He submitted that the Applicant had failed to establish any breach of his fundamental rights under the 1999 Constitution of the Federal Republic of Nigeria, African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights against the 1st & 2nd Respondents.

ISSUE TWO:

74. On the second issue Learned Counsel submitted that the Magistrate Court under the 2nd Respondent is an establishment under the laws of Jigawa State by virtue of section 6(4) (a) of the Constitution of the Federal Republic of Nigeria and which exercise judicial powers by virtue of section 6(6) (a) & (b) of the same constitution; and that in order to protect itself, the 1st Respondent under the leadership of Alhaji Sule Lamido made a complaint to the 3rd Respondent (Exh. A4 & A4A) through one Umar Kyari against the insultive and libelous statements made by the Applicant, which led to the Charge/First Information Report before the Magistrate Court under 2nd Respondent for an offence contrary to section 393 of the Penal Code (supra). He submitted that both the action and procedure of the 1st & 2nd Respondent were in accordance with Section 45 of the 1999 Constitution and Section 6(6) (a) & (b) of the same Constitution and Article 6 of the African Charter on Human and People's Rights.

75. He further submitted that nowhere in the averment contained in the Applicant's 44 paragraphs affidavit in support, proof of evidence of his witnesses P1 to PW4, it was shown that the action of the1st and 2nd Respondents was carried out without due process of law. He contended that the action and procedure of the 1st and 2nd Respondents were in accordance with laid down laws as argued above and that the action was unwarranted for the enforcement of his fundamental rights against the 1st and 2nd Respondents. He referred to Judgment/Decision in **Alhaji Hammani Tidjani *v.***

1. Federal Republic of Nigeria; 2. Republic of Mali; 3. Republic of Benin; 4. Attorney-General of Lagos State; 5. Attorney-General of Ogun State; (supra). He therefore urged this Court to resolve the second issue in favour of the 1st and 2nd Respondents and to hold that by virtue of the constitutional and statutory powers of the 2nd Respondent, the Applicant cannot enforce his fundamental rights against the 1st and 2nd Respondents.

ISSUE THREE:

76. On the third issue he adopted their arguments on the first and second issues above and submitted that the grounds which the reliefs are sought must be clearly and fully stated in such details as to disclose the infringement being complained of and referred to the case of **EKEOCHA (2008) 4 NWLR (pt. 1106) pg. 161**. He further submitted that the averments contained in the 44 paragraph affidavit of the Applicant and the evidence of his witnesses (PW1 to PW4) contained in their proof of evidence did not successfully disclose any infringement of the Applicant's fundamental rights by the 1st & 2nd Respondents to warrant the relief sought from this Court and urged Court to hold as such. He urged the Court to resolve the third issue in favour of the 1st and 2nd Respondents and to refuse all the reliefs sought by the Applicant and relied and the following authorities, Constitution of the Federal Republic of Nigeria 1999 and the African Charter on Human and People's Rights (Ratification and Enforcement Act) CAP.A9, Laws of the Federation of Nigeria, 2004,Universal Declaration on HumanRights1981, Laws of Jigawa State of Nigeria, 1998; **Olanoyin *v.* Attorney General of Northern Nigeria (1960) NRNLR, Alhaji Hammani Tidjani *v.* 1. Federal Republic of Nigeria 2. Republic of Mali, 3. Republic of Benin, 4. Attorney-General of Lagos State, 5. Attorney-General of Ogun State, (Judgment N°. ECW/CCJ/JUD/04/07) Ekeocha (2008) 4 NWLR (pt. 1106) pg. 161;** and these books - **1. Fundamental Rights Enforcement in Nigeria (second edition) by Femi Falana; 2. Cases And Materials on Human Rights by Fred F. Odibei, Esq.**

THE ARGUMENTS OF THE 3RD DEFENDANTS

77. Learned Counsel raised the issues for determination as it concerns the 3rd Defendant thus:

    1) Whether this Court has jurisdiction to entertain the Plaintiffs' suit;

    2) Whether the 3rd Defendant violated the fundamental Rights of the Plaintiffs.

ISSUE ONE:

78. On issue one, Learned Counsel to the 3rd Defendant in opposing of the Plaintiffs' application dated 17th February, 2011 recaptured the complaint in the originating summons dated the 17th of February, 2011 whereby he applied for the enforcement of his fundamental rights. He stated that during the trial proper, the Plaintiff testified as PW1 and called three other witnesses who testified. The Applicant tendered, documentary evidence that were admitted and marked as Exhibit A1 - A10 except for Exhibit A9 that was rejected. The 1st and 2nd Defendant called two Witnesses and tendered Exhibits D1 - D4. The 3rd and 4th Defendants filed a counter affidavit as their defence to the originating motion which was supported by an affidavit.

79. The 3rd Defendant attached 6 Exhibits to their counter affidavit which learned Counsel adopted as their defence to the Plaintiffs case and urged the Court to deem the contents as read. He submitted that under Article 10 (d) of the Supplementary Protocol, any party as an individual, may access the Court, where his fundamental human rights are alleged to have been violated with no pending matter in another international court for adjudication. He submitted that before an application can invoke the powers of the Court against the Defendant, he must establish that such Defendant or Defendants are persons that can be sued before the Court. He argued that the Defendants must be signatories to the Treaty and other legal treaties of the Community. He contended that where the Defendants are not Persons

that can be sued before the Court, the court will lack the jurisdiction to hear the matter. He contended that none of the Defendants are signatories to the ECOWAS treaty and other legal infrastructure of the Community, therefore the Plaintiff cannot maintain this action against the Defendants having not joined the Federal Republic of Nigeria as a party to the suit.

80. He submitted that Courts which apply international law in cases of violation of human rights can only succeed if the correct parties like the state of the community are sued. He submitted that in the instant case, it is only the Federal Republic of Nigeria that is a signatory to the ECOWAS Treaty and other legal instrument. He submitted that none of the 4 Defendants is a signatory to the Treaty. He relied on the authority of the **Registered Trustees of the Socio-Economic Rights of Accountability Project (SERAP) *v*. The President of the Federal Republic of Nigeria (2010) CCJ (ECOWAS) Law Report page 231 at 252-253 paragraphs 71-72.** He submitted that the 4th Defendant is not a legal personality recognized by the provisions of the ECOWAS Treaty or Protocols and same cannot be equated with the Federal Republic of Nigeria. He relied on **Private Alimu Akeem *v*. Nigeria judgment No. ECW/CCJ/RUL/ 05/11 delivered on the 1st day of June 2011 at pages 9 - 10 and 28-29**. He submitted that the Plaintiffs suit is incomplete having not sued the Federal Republic of Nigeria as the Defendant in this suit

ISSUE TWO:

81. On issue two, as to whether from the evidence led by the 3rd Defendant, there was any proof that the 3rd Defendant violated the fundamental rights of the Plaintiff he submitted that from the evidence led by the Plaintiff, there was no fact to establish that the 3rd Defendant violated his fundamental Rights. He contended that the complaint of the Plaintiff against the 3rd Defendant is contained in paragraphs 3, 4, 5, 6 to 23 of the Affidavit in support of the originating motion. But he submitted that none of the Witnesses called proved the alleged breach of his fundamental right. He referred to the powers of the police to investigate crimes and in the process, arrest and

detention of suspects under Sections 4 and 23 of the Police Act Cap P19 Laws of the Federation of Nigeria 2004. He submitted that by the above provisions, the Police have wide powers in respect of criminal investigations and litigation generally. He relied on a Nigerian case law **Onyekwere *v.* State 8 NSCC 250, at 225**. In respect of the arrest and detention of the Plaintiff he submitted that the Plaintiff failed to show that the arrest by the Men and Officers by the 3rd Defendants on the 21 January 2011 and detained for 11 days were unlawful and arbitrary.

82. He submitted that the action of the 3rd Defendant from when the Applicant was invited to its office in Jigawa State in connection with the Complaint made by the 1st Defendant through his special Adviser Musa Kyan on the 14 January 2011 as shown as Exhibit A attached to the 3rd Defendant's counter affidavit document No. 20. He submitted that the said letter showed that the 1st Defendant alleged that the Plaintiff posted some defamatory and libelous words against him on his *Facebook* page and requested for a discrete investigation into the matter as shown on Exhibits A, A1 and A2 attached to the 3rd Defendant's counter affidavit. That based on the above facts the Plaintiff was invited by the Police and to which investigation he Responded on the 21st January 2011. At the Police Station, the Applicant met the Commissioner of Police who confronted him with the allegation against him and he denied that he was not the one who posted the alleged words on his *Facebook*, but that he did not deny that the alleged words were posted on his *Facebook* wall. He submitted that the Applicant was taken to Abuja for further investigation because Jigawa State was not equipped to verify the authenticity of the denial by the Applicant that he posted the alleged seditious matter on the *Facebook.*

LEGAL ARGUMENTS BY THE 4TH DEFENDANT

THE ISSUE:

83. Learned Counsel for the 4th Defendant raised a lone issue for determination as stated therein thus: Whether having regard to the

facts of the circumstances of this case a cause of action has been disclosed against the 4th Defendant/Respondent warranting this Court to proceed against the 4th Defendanton the breach of the Plaintiffs' rights. Learned Counsel for the 4th Defendant submitted that a cause of action is the factual situation which if substantiated entitles the Plaintiff to a remedy against the Defendant and he referred to **Adimara *v.* Ajufo (1986) 3NWLR Pt 80 page 1; Onadeko *v.* Union Bank of Nigeria Plc. (2005) 4 LR Pt 916 page 441 at 459-460; Rhein Mass Und (supra) and Dalfam Nig Ltd *v.* Qkaku International Ltd (2001) 15 NWLR Pt. 735 page 203 at 240 - 241;** and **Kwara State Ministry of Agriculture Natural Resources 7 Ors *v.* Societe Generate Bank Nigeria Ltd. 1998 11 LR Pt. 575, ratio 2** and urged the Court to hold that there is no connection between the alleged infraction with the 4th Defendant and the Plaintiffs and therefore the 4th Defendant should not have been joined as a party to this proceedings. He further urged the. Court to strikeout the name of the 4th Defendant from the case.

ANALYSIS BY THE COURT

84. The facts of this case are not complicated and same shall be recaptured by stating the material points upon which the parties relied upon in their respective claims and defences. The Executive Governor of the 1st and 2nd Defendants Alhaji Sule Lamido made a report to the Agents of the 3rd Defendant in Jigawa State through Umar Kyari that the Applicant/Plaintiff posted a material that was injurious against the Governor on his *Facebook* in Hausa language and when it was translated it meant that 'God will scatter the Governor and his friends and that will destroy the Governor and his friends, and that the Governor was not a believer in Islam' etc, and that when the written complaint was made against the Plaintiff, on Exh. A4 & A4A, to the 3rd Respondent, the Applicant/Plaintiff was invited and arrested for questioning as to the allegation. The Governor of the 1st Defendant believed that the Plaintiff posted the insultive and libelous statement on his *Facebook* to wit, Ex. A1 & A2. The Applicant/Plaintiff was detained in spite of the fact that the Applicant denied the allegation

that he did post the said material on the Facebook against the Governor so that the electorate would reject him in the then forth coming election at that time.

85. The Applicant having vehemently denied the allegation stated further that the Facebook print-out that carried his photograph was faked and also that the material was not posted by him. He also denied the Facebook print out which carried his photograph that it was faked but that he was shown the print out of the Facebook without his photograph at the Police Station which he denied having posted the material contained therein. Subsequently, the Applicant stated his ordeal because of the case to the extent that he was dehumanized when he was detained in a Police cell with hardened Criminals and Homosexuals who assaulted him and that at a point because he was deprived of food he fell ill and had to be taken to the hospital after several pleas were made even to the 4th Defendant by the father of the Applicant/Plaintiff with no response. The Applicant also stated that he was detained for 11 days without being taken to court in both Jigawa and Abuja which was more than the period allowed by law for the detention of suspects by the Agents of the 3rd Respondent. He further stated that Governor Sule Lamido used his position to influence the 1st and 2nd Defendants and the 3rd and 4th Respondents to commit the violations of his human rights as opposed to the safeguards provided for persons in the African Charter on Human Rights and the Constitution of the Federation of Nigeria.

86. The Court considered the facts of this case in their detailed form, the arguments by the Attorney General of Jigawa State, respective Learned Counsel for the parties and the provisions of the law under which the action was brought before this Court Before delving into the consideration of this case, it appropriate for this Court to reflect on the issues for determination set out above by the parties.

JURISDICTION

87. By Article 9(4) of the Supplementary Protocol of the Court 2005, the Court has jurisdiction to determine cases of violation of human

rights that occur in any Member States and by Article10(d) of the said Protocol, 'access to the Court is open to the following… (d) Individuals on application for relief for violation of their human rights. Also Article 4(g) of the Revised Treaty of ECOWAS provides for the, recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; Article 4, of the African Charter on Human and Peoples Rights, also in upholding the sanctity of life, which states that:

> **"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 his rights."**

Section 36(5) of the l999 Constitution and under section 36 (6) (a) which states that:

> ***'Every person who is charged with a criminal offence shall be entitled to be informed promptly in the language that he understands and in details of the nature of the offence,'***

88. Also by Article 19 of the initial protocol of the Court to wit Protocol A/P.1/7/91, the Court shall examine the dispute before it in accordance with the provisions of the Treaty and its Rules of Procedure, it shall apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the international Court of Justice. It follows therefore that from the review of the applicable law concerning an allegation of violation of human rights the facts of this case fit into the jurisdiction of this Court as a *prima facie* case has been shown that the respondents violated the human rights of the Applicant in Dutse in Jigawa state and Abuja in Nigeria.

89. We have been enjoined by the said Article4(g) of the Revised Treaty of ECOWAS, Article 4 and 5 of the provisions of African Charter on Human and Peoples' Rights and by Article 38(1) of the said Statute in respect of other human rights instruments particularly those assented to by the Federation of Nigeria and other civilized Nations

are applicable in considering claims of violations of human rights and the Plaintiff in the instant case relied on Articles 1 - 10, 18 - 20 and 26 of the said Charter to support his claim.

Articles 5 and 6 of the Charter provide that:

> **'5. Every individual shall have right to the respect of the dignity inherent in a human being and to the recognition of the 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.'**
>
> **6. Every individual shall have the 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 particularly, no one may be arbitrarily arrested or detained.'**

90. Looking at these instruments in respect of violations of human rights alleged by the Applicant, we have no constraint at all in holding that the objection to jurisdiction must be dismissed as no justifiable argument has been further disclosed to persuade us to see any substance in the objection but on technical grounds as to the status of the parties in the instant case which shall be expatiated upon hereunder. We hereby uphold the arguments of Learned Counsel to the Applicant that there was a preliminary objection on jurisdiction which had settled the issue of jurisdiction and to reconsider the issue in great details would amount to reopening the case already adjudicated upon and determined which the Court is not permitted to do being *functus officio*. Having stated as above, this Court cannot but hold that it has jurisdiction to determine any violation of human rights that occur in any Member State by the provision of Article 9(4) of the Protocol on the Court as amended.

BURDEN OF PROOF

91. The arguments that stemmed from the presentation of the Plaintiffs case is that based on onus of proof and the question as to whether the Plaintiff has attained this onus of proof by the standard required in International law practice and whether the evidentiary burden shifted on the Defendants to prove what they also alleged in their defence would be a crucial point for focus. The practice in the National court is that the burden of proof does not lie with the Plaintiff throughout the proceedings because the evidentiary burden may shift on the Defendant. The standard of proof in the instant case would require the consideration of the two principles together in order to realize whether the Plaintiff had proved his claim and whether the evidentiary onus shifted on the Defendant. As clearly advocated in international parlance, the burden of evidence as a separable element of the burden of proof has no place in this Court as it is not regarded necessary to create such division. In **William A. Parker (USA) *v.* United Mexican States, (1926) 4 UNRIAA 39, in the Mexico-USA General Claims Commission**, the Tribunal in dealing with the presentation of pleadings and evidence and whether it could be governed by municipal law of either the US or Mexico, said that 'as an international tribunal, the Commission denies the existence of international procedure.

92. Another method was considered in procedure in international tribunal, which is the method of persuasion on the evidence, that the burden of persuasion which has surfaced in trial in the international tribunal and equated same to a lesser burden to the burden of proof appeared to be more complicated in the determination of which evidence is more weightier than the other. In the General Principles of Law as applied by **International Courts and Tribunals OUP, London, (1953) 329** Cheng noted thus the burden of proof, however closely related to the duty to produce evidence implies something more. It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, of

sufficiency, or proof Consequently, the *maxim actoriincumbit onusprobandi* or the claimant carries the burden of proof suffices which may be explained in a plainer manner for understanding that the claimant has the responsibility for adducing evidence on every point necessary to prove his case. As earlier stated above, however, in practical terms, the burden does not always lie on the claimant, for example, where a defence is put forward, the Defendant bears the burden of proving the elements necessary to establish the defence.

93. The maxim has manifested itself in both common law and civil law traditions. For examples Cross, on evidence, noted that the legal burden of proving facts lie on him who asserts them, and the French Nouveau Code de Procedure Civile, adopted in 1981, states in Article 9 that II *incombe a chaque partie de prouver conformement a la loi les faits necessaries au success de sa pretention*. This is a well-accepted principle of national law and could therefore be concluded to be a source of international law in accordance with Article 38 of the Statute of international Court of Justice as enjoined to so apply pursuance of Article 19 (1) of Protocol A/P.1/7/91 on the Court of ECOWAS. In the instant case the Plaintiff was required to proof of the facts he relied upon to justify the claim with documents if the need arises in order to persuade the court to grant the claims sought. However, the practice in the international/Regional court is transformed as explained herein to govern specially whether the burden has been discharged or where it shifted whether such was also discharged. In Article 33 (5) of the Rules of this Court states as follows: The Application shall be accompanied where appropriate, by the documents specified in the first paragraph of Article l5 of the Protocol Article 15 of the Protocol on the Court provides for production of documents thus:

> ***"At anytime, the Court may request the parties to produce any documents and provide any information or explanation which it may deem useful. Formal note shall be taken of any refusal ....."***

94. The Plaintiff who has the burden of proof is to justify his assertion as to his arrest, detention dehumanization of his dignity in being kept in a cell where the Applicant was harassed and assaulted by Homosexuals in the same cell with him. **In Corfu channels case (United Kingdom *v.* Albania) ICJ, 15 December 1949**, the Court applied a high standard of proof in respect of the allegation of the United Kingdom that the mine fields in question had been laid with the connivance of the Albanian Government. In **Khodorkovskiy *v.* Russia**, Judgment delivered on the 31st of May 2011, the European Court of Human Right held that in deciding cases of unlawful detention, its standard of proof should be very high which would require incontrovertible and direct proof Credibility of evidence depends on the quality of evidence produced before the Court and allowing no room for speculative evidence that does not persuade or influence belief of the fact one way of or the other and on this point are two persuasive authorities. In the General Principles of Law as Applied by International Courts and Tribunals OUP, London, (1953) 329 and **William A. Parker (USA) *v.* United Mexican States,(1926)4 UNRIAA 39**, in the Mexico - USA General Claims Commission, affirmed the position of law of practice that where the evidence is scanty, the Court will hold that the evidence is not satisfactory in the face of such a serious allegation in the claim.

95. The assertion that the Applicant/Plaintiff was arrested and detained for 11 days and violated upon as described in this case was not denied specifically or materially contradicted in evidence. However, to prove the application preponderance of evidence, the evidence adduced must have reached a high level of standards required to sustain the claim for the violation of human rights. In order to catapult the evidence to the level of high standard of proof of evidence in international law practice by high standard of proof or preponderance of evidence required in this case, the evidence must be considered in material particular. The Applicant called four witnesses including the Applicant who gave detailed evidence and adopted the proof of evidence filed in this case. The 1st and 2nd Defendants testified and called two witnesses - DW1 and DW2. All the witnesses gave

credible evidence in support of their respective cases. Learned Attorney General for the 1st and 2nd Defendants dwelt on the issue of the Facebook and its and its content which was translated from Hausa language to English language and the evidence was that the words as contained in the said face book were defamatory and injurious falsehood of the reputation of the Executive Governor, His Excellency, Mallam Sule Lamido, the Executive head of the 1st and the 2nd Respondents/Defendants. While the Learned Counsel to Applicant/Plaintiff submitted that he has proved the case, the Defendants argued that the Plaintiff failed to prove that they committed the violations of human rights or that it caused the detention of the Plaintiff.

96. Learned Attorney General submitted that the Governor under the 1st Defendant made a complaint against the Plaintiff to the 3rd Defendant which was responsible for Police duties, like effecting an arrest, detention of accused Persons as enshrined in the Constitution of the Federal Republic of Nigeria and the Police Act, and the Learned Counsel to the 3rd Defendant submitted that they performed those duties in respect of the Plaintiff in accordance with the law. Learned Attorney General also submitted and, emphasized the provision of the Constitution that gave the various powers to the 1st, 2nd and 3rd Defendants but denied manipulating the organs of the 1st Defendant-Jigawa State Government, and the State Judiciary - the 2nd Defendant - i.e. Magistrate Court, and Sharia Court of Appeal under it, which supported the submission for the Executive Governor Learned Counsel to the 3rd Defendant referred to the powers of the Police to investigate crimes which included the powers to arrest and detain suspects under sections 4 and 23 of the Police Act Cap Pl9 Laws of the Federation of Nigeria 2004.

97. He submitted that by the above provisions, the Police have wide powers in respect of criminal investigations and litigation generally. He relied on a Nigerian case law of **Onyekwere *v.* State 8 NSCC 250, at 225** to substantiate the duties of the 3rd Defendant under the Act and the Constitution. In respect of the arrest and detention of

the Plaintiff he submitted that the Plaintiff failed to show that the arrest by the Men and Officers of the 3rd Defendants on the 21st January, 2011 and his detention for 11 days were unlawful and arbitrary. He submitted that the action of the 3rd Defendant from the time the Applicant was invited to its office in Jigawa State connection with the complaint made by the Governor of the 1st Defendant through his Special Adviser Musa Kyari on the 19th January, 2011 as shown on Exhibit A attached to the 3rd Defendant's counter affidavit, document No. 20 to the time of his release was legal as provided by law. He submitted that the said letter of complaint showed that the 1st Defendant alleged that the Plaintiff posted some defamatory and libelous words against him on his face book page and requested for a discrete investigation into the matter as shown on Exhibits A, A1 and A2 attached to the 3rd Defendant's counter affidavit, and that based on the above facts, the Plaintiff was invited by the Police for investigation which he responded to on the 21st January, 2011.At the Police Station, the Applicant met the Commissioner of Police who confronted him with the allegation against him. Learned Counsel contended that even though Applicant denied that he was not the one who posted the alleged words on his *Facebook*, but that he did not deny that the alleged words were posted on his face book wall.

98. For the 4th Defendant, the Attorney General of the Federation, by his Counsel submitted that there was no proof that the Attorney General was involved in this case and denied liability in causing the violation of the Plaintiff's human rights and that the alleged violations of human rights is not connected to the 4th Defendant as a party and that the 4th Defendant should not have been joined as a party to this proceedings and urged the Court to strike out the name of the 4th Defendant from the case. In the instant case, the 1st and 2nd Defendants stated in their pleadings, proof of evidence that was filed by them and through the witnesses they called, that they acted within the country's laws and the laws of the state of Jigawa and the Constitution of the Federal Republic of Nigeria by reporting the offence that they suspected the Applicant to have committed an offence against the Executive Governor, Sule Lamido, in publishing

the seditious matter in the (Applicant's) Facebook. They (1st and 2nd Defendants) stated that it was the 3rd Defendant - the Inspector General of Police that made the arrest and detention of the Applicant and held him in Police Cells as required by law of the land.

99. The 3rd Defendant stated that the power of arrest and detention was within his powers to so do in accordance with the constitution of the Federal Republic of Nigeria and the provisions of the Police Act. Considering these defenses of the 1st, 2nd and 3rd Defendants/ Respondents, we find three issues emanating there from for our examination as follows:

    a) The suspicion of the commission of a crime would be reasonable when there is a *prima facie* evidence to back-up the reasonableness of the suspicion that the Applicant/Plaintiff was the author of the material on the *Facebook*?

    b) Was the content of the *Facebook* injurious falsehood or seditious or defamatory with criminality in it therefore requiring an arrest or detention or both.

    c) Was the detention by the 3rd Respondent/Defendant lawful or unlawful?

100. Taking the first point above, what amounts to reasonable suspicion is the description in Black's Law Dictionary Deluxe Ninth Edition by Bryan A. Gamer -Editor-in-Chief, of reasonable suspicion thus, ***"A particularized and objective basis, supported by specific and articulated facts, for suspecting of a person of criminal activity... " d)*** What was the content of the face book in the translation and the hard copy that was given to the Police upon which the Applicant was arrested and detained in various Police cells for 11 days? There are two sets of contents of the face book, exhibit A2 attached to the counter affidavit paras 21-22 which the Applicant denied and stated that same was faked. The other *Facebook* print-out was admitted in evidence without objection which the Applicant admitted that it was the face book that was shown to him at Police Station and inside the Cell.

The Applicant stated at while the former Facebook print-out showed photograph of ownership, the latter Facebook print-out showed no photograph of the Applicant. These differences are material in social media evidence and the ardent need to prove the real offending face book. In the case of **United States *v.* O'Keefe 537 F. Supp. 2d 14,20 (D.D.C) 2008**, where it was stated that the authentication of electronically stored information involved the following questions at a minimum, its creator, source of custody - where was the evidence collected, who handled the evidence before it was collected and how was the evidence collected. In **People *v.* Valdez 201 Cal. App. 4th 1429, 1434-37 (Cal. App. 41 Dist. 2011)**, in a criminal trial it was held *inter alia* that there must be concrete evidence that the social media belonged to the Defendant.

101. We apply the above authorities which are persuasive because of their relevance, their scientific formation and the logic displayed in them. A *Facebook* cannot be produced just like that, if the veracity of its truth is not laid bare or apparent for all to see. The next point was in the area of the content as to whether it is seditious or defamatory. An examination of the words written in the *Facebook* showed that the author was calling on God to destroy Sule Lamido-the Governor and his friends and the other one is saying that Sule Lamido is a Pastor and so on. We strongly hold that to call by written form that a Moslem is a Pastor and publishing same in his Community in a wildly read *Facebook* all over the world is unacceptable and clearly defamatory and injurious to a man holding a position of a Governor of the 1st and 2nd Respondents. Secondly, the call in the Facebook by the author was also spiritual one that God should destroy or scatter Sule Lamido and his friends. We hold that the latter even though had the coloration of spiritualism, is devoid of cogent proof and effectiveness. Such spiritual statements cannot be taken to be seditious or defamatory. They are mere statements that can be dislodged through the same fervent call unto God to nullify the initial call with no physical harm resulting there from or effecting harm on the Governor because it is common knowledge that he is a well-respected Governor. The crux of this matter of proof is the

requirement to identify the authorship of the face book in a concrete manner rather than speculative evidence.

102. We hold that after examining the facts of this case that no matter how the facts of a case are, once the facts are speculative, they cannot amount to credible evidence that should be believed or acted upon. Unless the facts transcend to concretizing into material and circumstantial evidence, with no loopholes therein, before the court can hold such facts as the truth of the matters in question that would persuade the Court to act upon them. In proof of an electronic social media, statements such as we have in the said *Facebook*, a high evidential standard proof is relied by the Respondents/Defendants. It is evident that the circumstances of this case where the internet printout is being denied or challenged by the Applicant/Plaintiff, the internet printout requires a witness declaration in combination with a document, that is circumstantial *indicia* of authenticity i.e. which will indicate the date and web address and how it was obtained and the source for same to dislodge any doubt that may cast on it in the case of **Kennerty v. Carrsow-Franklin 456 B.R.753, 756-57 (Bankr. D.S.C. 2011)**, there must also appear on them a declaration of authenticity and without the declaration the evidence will fail.

103. After examining the evidence of the Plaintiff and his witnesses on one part and the evidence of the 1st and the 2nd Defendants on the other, coupled with the evidence as to the denial of posting the matter complained about on the face book by the Plaintiff, this Court holds that there was no *prima facie* evidence of reasonable suspicion that the Applicant made the statement posted on the said face book as to warrant the detention for 11 days above the mandatory allowable period of at least two days for such detention before charging a suspect to Court. Having exceeded that period of two days under the conditions described by the Applicant, the 3rd Respondent/ Defendant we hold the 3rd Defendant responsible for violations of the Applicant/Plaintiff's human rights and those of his family members. Consequently, the allegation of injurious falsehood against the Applicant and reasonableness that the Applicant/Plaintiff committed

the offence of sedition or injurious falsehood that he was accused cannot stand for the reasons given above. Furthermore, the statements of the Applicant/Plaintiff to the Police appeared to be written by the investigating police officer who was assigned to handle the investigation as one of the team of investigators and on the face of them there was nothing to connect the Applicant with them or the instruction he gave for same to be recorded by the investigator. It was not shown that the recorder - (IPO) explained to the accused/ Applicant that he could write his statements but that the accused asked him-the investigating police officer to write or record them for him. For it is important that IPOs comply with all the essentials of recording statements on behalf of accused persons to ensure acceptability and on the basis that the IPO of the 3rd Respondent did not comply as so stated that we hold that the statements are unacceptable as proof of what the contained therein. We therefore, reject them for not having met the requirements of voluntariness as prescribed by the law of evidence.

104. Having held that the statements on the face book against the Governor of the 1st Defendant were statements that are injurious falsehood but that there was no concrete evidence that the Plaintiff made the offensive statement in the face book, we move to consider the processes that followed the Governor of the 1st and 2nd Defendants' instruction, through the officer of the 1st Respondent/Defendant - Kyari Umar who made the report of the case to the Police. There is no doubt that the 1st and 2nd Respondents/Defendants are organs of the State Government of Jigawa State but the 2nd Respondent/ Defendant is clothed with the provisions of the law that made it independent in its official functions. While the 1st Respondent may be said to be influenced because his Excellency, Sule Lamido, the Governor, is its chief Executive, the 2nd Respondent cannot be seen in that light despite the procedure they adopted to hear the case of the Accused/Applicant. As referred to this Court, section 3 of the Magistrate Court's Law Cap 92, laws of Jigawa State 1998, the Court derived its powers under section 6(4) (a) of the 1999 Constitution of the Federation of Nigeria and also under section 6(6)

(a) & (b) of the same Constitution. The alleged offence reported by the Special Adviser to the Governor - Kyari against the Applicant/ Plaintiff fell within the ambit of section 393 of the Penal Code Law (supra) and triable by the Magistrate Court under the 2nd Respondent by the provision of the Criminal Procedure Code Law Cap 39, Laws of Jigawa State, 1998 as submitted by Learned Attorney General of Jigawa State Counsel to the 1st and 2nd Defendants.

105. It is apparent that the position of Law postulated above is correct and in fact the Applicant/Plaintiff did not provide anything to the contrary except that the 1st and 2nd Respondent/Defendants acted outside the boundary of the provisions of the law to satisfy the wishes of the Governor of the State by his control over them. We find that latter argument as very slim and not convincing at all in supporting the Plaintiffs position in this case. Even though we could see many loopholes in the case, it is clear that the case was referred to the 2nd Defendant after the long period of detention by the authority of the 3rd Defendant's in the 3rd respondent's cell in Dutse - Jigawa State and Police Force Headquarters - Abuja before the Applicant/Plaintiff was taken back to Jigawa to the 2nd Defendant who made an order for prison custody before he granted the *nolle prosequi* or ruled on the application for bail but it eventually released the Applicant/Plaintiff. The procedure adopted from the record before that Court and the Sharia Court and tendered in this case appeared not to be in compliance with the provision of the Criminal Procedure Code as applicable to Jigawa State - 1st Defendant because of the movement of the case from the Magistrate's Court to the issuance of summons by the Sharia Court but even then one cannot categorically state that the Applicant was so prejudiced by the actions of the 2nd respondent and as a result that it violated his human rights to fair hearing and that the Governor was connected to such processes or that the influenced it/them. Having seen the linkage of influence by the Governor to the 2nd Respondent/Defendant, we equally dismiss such far - fetched insinuations by the Applicant/Plaintiff.

106. Furthermore, there was no evidence of an overt act from the Governor to influence, the 1st and 2nd Defendants in this instant case and even if there was it was properly tucked into all the steps taken and cannot be seen vividly by the common man. The publications in the Dailies attached to this case speak for themselves that the Governor was emotional hurt but that same should be expected in governance. Despite all these pieces of evidence we so hold that there was no clarification of apparent interference by him the Governor as such. The 2nd Defendant is an independent organ in Jigawa State in particular and Nigeria as a whole. This Court holds that where an Organ is clothed with independence, there is a presumption of regularity that its operations were regular and independent. A presumption of regularity is a presumption that forms part of the law of evidence in both common law and civil law. It is expressed by the maxim of law - ***omnia praesumuntur rite et solemniter essa acta donec probetur in contrarium*** which may be shortened to ***omnia praesumuntur rite et solernniter essa acta*** that where there is an objection to this presumption as to its independence there must be clear evidence rebutting same that it was interfered with and that the interference affected the pendulum of upholding justice independently. *See* the case of **Latif *v.* Obama 666F. 3D 746, 752 (D.C. Cir.2011)** - where the Supreme Court extended the habeas right to non-citizen detainees in 2008, it tasked the lower courts with developing a workable habeas remedy that would give detainees a meaningful opportunity to demonstrate the unlawfulness of their detention, yet it left unaddressed the content of the governing law. *See* **Boumediene *v.* Bush, 553 US. 723, 779 (2008)** that a presumption of regularity, if not rebutted, only permits a court to conclude that the statements in a government record were actually made; it says nothing about whether those statements are true Exhibit A, B, C and D attached to the Counter affidavit of the 1st and 2nd Defendants are regular and did support the independence of the performance of their function. Mere assertions without more cannot rebut the presumption of regularity.

107. Still on the influence on the 3rd Respondent/Defendant by the Governor of the 2nd Defendant on the grounds that both are from Jigawa State, the opinion that we firmly hold herein is that the assertions are mere and that the relationship between the Governor and the then Inspector General of Police - Nafiz Ringim, the then Inspector General of Police of the Federal Republic of Nigeria can only persuade us as mere brotherliness that they belong to the same State of origin and that such is not enough to prove such influence on him as to make him act the way he did through his officers in this case. We accept that both of them are indigenes of Jigawa State and so also the Plaintiff. We reject also that there was such an influence on 3rd and 4th Defendants by the Governor of the 1st and 2nd Respondents/Defendants. On the 3rd Respondent/Defendant's action in respect of the detention, we state herein that there was a prolonged detention in the Police cell without bail and as the Plaintiff stated in his originating application and his testimony in Court that he was detained in the Police Cell with hardened Criminals and Homosexuals, for an alleged offence of sedition which he did not commit and he further stated that the action by the 4th Defendant was a wicked act which violated his human rights we hold that the Applicant had proved sufficiently and accept them and act upon them. We believed the Plaintiff that he was so detained with co-detainees that are hardened Criminals and homosexuals and that he was harassed and assaulted because the averment and evidence of the Applicant/Plaintiff were facts and not matters of law which were not contradicted and same stand as proved. We have no doubt about them and believed them. We therefore hold that the action was clearly a violation of his rights as an accused person/Applicant and that those awaiting trials in Police and Prison cells also do have some rights which must be protected under Article 5 of the African Charter on Human and Peoples' Rights and the Universal Declaration on Human Rights and that the acts of the 3rd Respondent/Defendant contravened or infringed the fundamental rights of the Applicant/ Plaintiff.

108. In the light of the above, it is the opinion of this Court that these defenses cannot be sustained in favor of the 1st, 2nd, 3rd and 4th Defendants because there was no proof as to the suspicion that the Applicant posted the seditious or injurious falsehood matter in the face book and we hold that the 3rd Defendant exceeded his powers of detention pending trial because of there was the presumption of innocence which prevails unless there is evidence to the contrary. The description of the poor conditions of the Cell and that there was congestion therein and that some of the detainees who were known to be Homosexuals and Hoodlums and hardened Criminals assaulted him - the Applicant/Plaintiff with no quick medical attention when he suffered from ulcer as a result of lack of food depicted clear violation of human rights. These facts have therefore proved the violations of his human rights as stated in the originating application. We also noted that a cell should not be allowed to be in a deplorable and dehumanizing state in a civilized nation like the State of the Federal Republic of Nigeria. We hold that the Applicant/Plaintiff has proved the facts of his complaint as stated therein in the application.

REASONABLE CAUSE OF ACTION/PROPER PARTIES

109. The questions that remain are whether the Respondents/Defendants are proper parties before this Court and whether there was a reasonable cause of action against them. Learned Counsel to the 3rd Defendant submitted that they were not proper parties and cited the case of **Alamu *v.* FRN and Nigeria Army** (supra) to justify his point. Learned Counsel to the Plaintiff relied on the case of **Denap** (supra) to submit in respect of the position of the Attorney General in this case that he is rightly sued as a party for actions against Nigeria or the Federation of Nigeria. This point attracted serious consideration on our part before deciding on same. Even though the Applicant's Counsel objected to the 3rd Defendant's argument in raising the point in respect of the Attorney General of the Federation instead of the 4th Defendants Counsel raising it himself, the Court felt obliged to delve into such an important question no matter how it was raised. It is trite that in international Law, the party to be

joined in a suit of this nature is the State of Nigeria which is a Sovereign State and the signatory of this ECOWAS Treaty. As we held in numerous cases before this Court, parties may be proper parties or nominal parties. The Attorney General was regarded as a nominal party in the case of **DENAP Ltd** supra. What is then the position of the Attorney General? The Attorney-General was regarded as a nominal party and an officer of the Federation. At this juncture we turn to the state practice in the State of Nigeria as regard the position of the Attorney-General of the Federation Section 150(1) of the Constitution of the Federal Republic of Nigeria, placed the Attorney-General of the Federation as the Chief Law Officer and he represents Nigeria in most suits in the National Courts. If the cases in Nigeria are examined, we can trace a handful of them against the Attorney General of the Federation when in actual fact the cases are in substance against the Federation of the Federal Republic of Nigeria. *See* the cases of **Olanoyin *v.* Attorney-General of Northern Nigeria (196p) NRNLR. Denap Ltd (2001) NWLR (Pt. 746) 726; (2001) 12SC (Pt. II) 136**, where all suits were against the Attorney-General of the Federation of Nigeria in respect of actions against Nigeria. In **Denap Ltd. supra** the Court stated that the Attorney-General was a nominal party who may be joined in suits against the Federal Republic of Nigeria.

110. It is in that regard that we apply Article 38(1) (c) of the Statute of International Court of Justice to hold that the joinder of the Attorney-General of the Federation as a party can suffice even without the mentioning of Nigeria after the Attorney-General of the Federation as stated in this application. We have no doubt and the parties have not said that they were mis-led by the omission of the word, "Nigeria" as stated above. Having stated above, it is the opinion herewith that the 1st , 2nd and 3rd Defendants being nominal parties in this case, only the 4th Defendant that can be held responsible for the violation of human rights complained against the Defendants as officials and Organs of the Federal Republic of Nigeria, by the Plaintiff. Also, the practices of the National courts of Nigeria invariably if considered

in with Article 38 (1) (c) of the said Statute enjoins this Court to apply state practices where applicable and necessary to so do in the interest of justice and where the parties would not be prejudiced. It is in the circumstance that we think the interest of justice would be best served if this Court imports state practices and adopt same herewith. The practice this Court is adopting is the practice to allow the Attorney-General of the Federation to represent the Federal Republic of Nigeria in this instant case. *See* the cases referred to this Court by the Applicant's and Respondents and the notoriety of the practice.

STATE RESPONSIBILITY

111. State Responsibility simply means that the wrong committed by the acts of the organs and agents and officials should be attributed to the State Party in international law where the acts were committed within the territory of the State, in violations of human rights matters. In clear terms it is now the position that the conduct of an organ of the state shall be considered as an act of that state under international law, whether that organ belongs to the constituent of the legislature, executive, judicial or other power and whether its functions are of an international or subordinate position in the organization of the state. The acts complained of by the Applicant may be categorized into two phases to wit - whether the action was committed on behalf of the State and whether the action was committed by any official who may be recognized as Agent (s) or Organs of the State. In the case of **United States *v.* Iran (1980) ICJ Reports 149, 210 the ICJ** the Court maintained that the actions should be considered to deduce from same that the acts are attributable to the Iranian State only if it was established that in fact on the occasion in question the Military acted on behalf of the State having been charged as a competent organ of the Iranian State to carry out a specific operation. The International Court of Justice found no such indication in respect of the attack itself however, when turning to an examination of the subsequent development, the ICJ declared that state responsibility of Iran was engaged with what it called seal of official Government's

approval which the Court saw stemming from a degree of approval on November 17 by Ayatollah Khomeini. In that case it was found that he expressly declared the premises of the Embassy and that the hostages will remain until the United States returned the former Sheik for trial and also his property to Iran. The Court held the approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State as the acts of the State.

112. The Court also held that the Militants, authors of the invasion and Jailers of the Hostages had now become Agents of the Iranian State, for those acts in the state itself was internationally responsible see paragraph 74 of that decision. Therefore, being persuaded by the above case a state is responsible for the actions of its Agents, Judicial bodies as state responsibility for the conduct of such agents and organs to become part of international customary law. In the instant case the question is whether the action of the 1st and 2nd Respondents which are State and state organ within the component of Jigawa State would also be attributed to the Federal Republic of Nigeria as to defeat the argument of Learned Counsel to the Federal Republic of Nigeria who contended that there is no connect between the alleged violations against the Applicant and the 4th Respondent - the Federal Republic of Nigeria. As for the 3rd Respondent, there is no gain saying that the 3rd Respondent is an agent Organ of the Federal Republic of Nigeria. There is no doubt that the 1st, 2nd and 3rd Respondents are nominal parties when it comes to who bears the brunt in cases of violation of international human rights. Even though in a Federated State, there are independent states within the Federation, such independency cannot avail the States in cases of international human rights violations. In this respect, the states within the State Party become organs that are accountable to the State Party and any violations falling under the realm of international human rights in an international court whether the rights are described as Vertical as opposed to horizontal human rights same shall be attributable to the State Party. A State Party will be held liable for the conduct of officials even when these officials or organs act contrary to orders or even where the organs exercise legislative, executive,

judicial functions, in the organization of the state, and whatever its character may be in the Central Government or a territorial unit of the State. *See* the case of **Tidjane Konte & 1 Or *v.* Republic of Ghana** case **N°: ECW/CCJ/APP/17/12 and N°: ECW/CCJ/JUD/11/14** decided on **13th day of May, 2014** by this Court.

113. An organ includes any person or entity which has that status in accordance with the internal law of the state. In Moses case, for example a decision of a **Mexico - United States mixed claims commission, Umpire Liebel** said. "An Officer or Person in authority represents *pro tanto lie* government which in an international sense is the aggregate of all Officers and Men in authority. The actions or omissions of organs of the state must also be attributed to it as an international responsibility. Judge R. Higgins, in International Law by Richard K. Gardiner page 441, described responsibility as attributable or imputable to a State. One must note that International Law Commission which has been attending to the subject-matter since 1949, produced a draft articles which has been regularly cited and this process of endorsement and application of individual provisions can be expected to continue and will be enhanced the adoption of the text by the General Assembly - *see* the Fourth Report on State Responsibility by James Crawford, Special Rapporteur, 31 March 2000, UN Doc. A.C.N/4/517.

114. Having examined the above stated authorities and the jurisprudence accompanying same, this Court is persuaded by them and applies same to hold that a breach of internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. The question as to whether there has been an internationally wrongful act depends, first, on the requirements of the 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 for the action. The term 'international responsibility' covers the new legal relations which arise under international law by reason of the internationally wrongful act of a state. Article 4(g) of the Revised Treaty, enjoined State

Parties to recognize, protect, promote and enforce human rights to all and sundry as enshrined in the African Charter on Human and Peoples Rights. An internationally wrongful act of a State would therefore include violation of human rights by States against their citizens if same are embodied in an international instrument and that its adjudication is within the competence of a Regional Court or an international Court like this Court. We refer to International human rights instruments assented to by the State Party of Nigeria and hold them applicable to this case where same is necessary regarding violations of human rights.

THE POSITION OF THE ATTORNEY GENERAL OF THE FEDERATION

115. Learned Counsel for the 4th Respondent/Defendant raised a question as to whether having regard to the facts of the circumstance of the case, a cause of action has been disclosed against the 4th Defendant/ Respondent warranting this Court to proceed against the 4th defendant on the breach of the Plaintiffs' rights and he relied on the cases of **Adimara *v.* Ajufo 1986 3 NWLR Pt 80 page 1**; **Onadeko *v.* Union Bank of Nigeria Plc (2005) 4 NWLR Pt 916 page 441 at 459-460**; **Rhein Mass Und supra and Dalfam Nig. Ltd. *v.* Okaku International (Ltd) (2001) 15 NWLR Pt 735 page 203 at 240-241**; and **Kwara State Ministry of Agriculture Natural Resources 7 Ors *v.* Societe Generale Bank Nigeria Ltd (1998) 11 NWLR Pt 575, ratio 2**. Learned Counsel to the 3rd Respondent/ Defendant submitted *inter alia* that the 4th Defendant is not a legal personality recognized by the provisions of the ECOWAS Treaty or Protocols and same cannot be equated with the Federal Republic of Nigeria and relied on **Private Alimu Akeem *v.* Nigeria** judgment No: **ECW/CCJ/RUL/05/11** delivered on the **1st day of June 2011 at pages 9-10 and 28** and that the Plaintiff's suit is incomplete having not sued the Federal Republic of Nigeria as the Defendant but the Attorney-General of the Federation.

116. Learned Counsel of the Plaintiff replied that the 3rd & 4th Respondents are components of the Federal Republic of Nigeria and opposed the argument that there is no Officer known as the Attorney-General of the Federation (the 4th Defendant). He submitted that the 3rd & 4th Respondents/Defendants being components of the Federal Republic of Nigeria, the argument that there is no officer known as Attorney-General of the Federation (the 4th Defendant) is legally not correct. **He submitted that the** 4th Defendant's Counsel never complained of misjoinder, therefore the 3rd Respondent cannot also complain. He contended that joinder of the 4th Defendant is supported by the provision of **Section 150 of the Constitution of the Federal Republic of Nigeria, 1999** where it is clearly stated that the Attorney-General of the Federation is the Chief Law Officer of the Federation. He submitted that the argument that the Attorney-General of the Federation is not synonymous with and cannot be equated with the Federal Republic of Nigeria is outrageously baseless. He contended that the Attorney-General of the Federation is the Adviser and Representative of the Federal Republic of Nigeria in all law suits in the Federation or Federation of Nigeria. He relied on the Nigerian case of **New Ltd *v.* Denap Ltd (2001) NWLR (Pt. 746) 726; (2001) 12 SC (Pt. II) 136**, were the Court held that: ***the Attorney-General is usually joined as a Defendant or a nominal Defendant in civil cases in which the Government of Nigeria is required to be an implementer of the outcome of a Court decision***. He relied on the said authority of **New Ltd *v.* Denap Ltd (2001) NWLR (Pt. 746) 726; (2001) 12 SC (Pt. II) 136**. Thirdly, he submitted that the Attorney-General of the Federation defended the case and filed a defense and that it was too late in time to complain on the alleged mis-joinder.

117. Parties is described in Articles 33 to 35 of the Rules of Procedure of the Court and as defined in Blacks Law Deluxe Dictionary page 1231 as one who takes part in a transaction. An indispensable party on page1232 is a party who, having interests that would inevitably be affected by a Court's Judgment, must be included in the case. If

such party is not included the case must be dismissed. This follows for us to consider necessary party who, being closely connected to a lawsuit should be included in the case if feasible, but whose absence will not require dismissal of the proceedings. As have been submitted by Counsel to the 3rd Defendant, that the 1st, 2nd and 3rd Defendants are not proper parties in international cases and references was made to the case of **Alimu supra** decided by this Court, the definition of proper party becomes apt Proper Party was defined as a party who may be joined in a case for reasons of judicial economy but whose presence is not essential to the proceedings. Misjoinder is described as the improper union of parties in a civil case on page 1090 of the said Dictionary. The description of proper party shows that in international law practice, State Party is a proper party in respect of actions connected with violations of Treaty obligations.

118. The definition used the word 'may' which makes the joining of proper party optional and not mandatory as in the case of **AFOLABI v. FRN Judgment Nº. ECW/CCJ/JUD/01/04**, where the Court decided on 27th April, 2004, thus, this Court observed that the use of the word 'may' should be given its literal meaning thereby making the provision of Article 9(3) of the old Protocol on the Court to have an optional or elective stance. We think that it is therefore appropriate to apply the same principles on the definition of 'proper party' as to be flexible so that the definition is given that flexibility which will enable this Court to apply the state practice. This would enable us to decide whether the joinder of the Attorney-General of the Federation was proper or not. Also, state practice of Nigerian courts would impress upon us to hold the view that where the Attorney-General is sued instead of the Federal Republic of Nigeria as held in the case of **New Ltd *v.* Denap Ltd. supra** the case should survive. The arguments by learned Counsel for the 3rd and 4th Respondents are strong but to allow it, would defeat the principles of substantial justice. As always, the goal of justice is for the Courts to do substantial justice to the parties.

119. By, the numerous authorities that we set out above, it is apparently clear that the 1st, 2nd and 3rd Respondents/Defendants are nominal. Parties and only the State Party can be responsible for the actions of its organs and officials whether they are States organs, or Federal organs, Officers or officials of the Legislature or judiciary. Having stated above, the position of the Attorney-General becomes dicey in the face of Section150 of the Constitution of the Federal Republic of Nigeria *viz-a-viz* the principles of State Responsibility. *See* **New Ltd *v.* Denap Ltd supra**. It follows that if there is a dispute relating to an area where no satisfactory international law exists and there is a relevant principle at the national level, the Court may choose to use or apply that principle. *See* **Bosalyn Higgins a renowned jurist (former president of the international Court of justice - The Hague in her book - on the Problems and process: 'International Law and how we use it.' Printed by Oxford: Clarendon Press, (1994) and reprinted 2007 pages 208, 218** where she stated clearly how the principle works. An example of state practice and application of evidence law of procedure is where witnesses are called and the Procedure thereto, the Court may borrow such national practice particularly where there is no international law practice relating to evidence law in existence on the specific area in dispute, the Court would borrow state practice of national courts or develop its practice by so many legal notions in compliance with the principle of law as applicable pursuant to Article 38(1) (c) of the said Statute see **Anglo-Iranian Oil Co. case (United Kingdom) *v.* Iran (1952) ICJ Rep. 93.** It must further be stated that reference to the national laws of states that have been consistently applied may amount to various bundles of rules of law and if same gained notorieties on some practices same my give rise to a general principle of international law or act as evidence of state practices in the determination of customary international law. These practices may be imported into international courts or tribunals in those areas where the law is obscure. For the foregoing reasons, the Applicant/Plaintiff has successfully proved his case against the 4th Defendant by the evidence before this Court accordingly.

REPARATION/DAMAGES REPARATIONS

120. A State must make full reparations for any injury caused by an illegal act for which it is intentionally responsible. Reparation consists of full restitution of the original situation if possible or compensation where that is not possible; compensation where it is not possible, or satisfactory i.e. acknowledgement of an apology for the breach, may contribute immensely to resolving wounds from the violation. Reparation of consequences of the violations and indemnification for patrimonial and non-patrimonial danger including emotional harm may be awarded. *See* Report by **Caro Ferston MARIANA Guerz Alan Stephens-Martino Njloff published in 2009 page 246** that supports the above opinion. This was also found to be necessary for healing emotional distress caused by violations.

121. The International Court of Human Rights decided in the case of **Papamichalopoulos and ors *v.* Greece (1995) 330 - B** where the Court expressed its opinion that Convention, and stated that Article 53 imposes a duty on each state to do more than compensate the victim ***"it follows that a judgment in which the court finds a breach, imposes on the respondent state a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach."*** In the instant case much has been shown that the Plaintiff suffered from violations as a result of the actions of the Defendants 1st, 2nd & 3rd Defendants/ Respondents by the various harassments, arrests, detentions, in dehumanizing conditions with all manner of suspects in the same room and this Court cannot but make an order for compensation. As to reparation or award, human rights treaties of other international court also adopted a process of making an award in inevitable cases. This Court by its Protocol in particular the Revised Treaty of ECOWAS, and the Supplementary Protocol of this Court, 2005 have the implied powers embedded in them to make an award for reparation upon finding Defendants/Respondents state liable for the violations committed on the Applicant by the 1st, 2nd and 3rd Respondents/

Defendants which the 4th Respondent/Defendant is responsible for under international law, under State Responsibility Law. *See* Article 9 (4) of the said Protocol and Article 27(1) of the Protocol to the African Court on human rights.

122. The Applicant/Plaintiff requested for 2 billion naira as reparation for the violations of human rights committed on him by the organs and officials of the State of the Federal Republic of Nigeria. The Respondents/Defendants traversed generally and denied liability and the quantum of the claim. There are no perimeters for measuring their defence as to reparation but for the Plaintiff/Applicants, the violations committed on him were spelt out in the originating application and the pleadings and evidence. We find them outrageous to put an accused person in detention with hardened criminals and Homosexual suspects to give room for the Applicant to be attacked physically and spiritually which may carry a life time consequences and that he stated that the said assaults were afflicted on his person and that the detention for his claim was 11 days. The 3rd Defendant's action in allowing this to happen in our estimation amounted to a gross and irreparable damage on the Applicant/Respondent and no amount of monetary compensation may place the Applicant back to his normal position or as nearly as possible to his former state, before the harm was committed on him. In any case the Court took into consideration all these factors in this award. We hereby award a monetary compensation in the sum of N10,000,000.00 (Ten Million Naira Only) for the Applicant/Plaintiff against the Respondents/ Defendants jointly and severally.

123. DECISION

1) **Whereas** the Applicant brought an action for violation of human rights against the 1st, 2nd, 3rd and 4th Defendants in pursuance of Article 4(g) of the Revised Treaty, Article 5 of the African Charter on human and peoples' rights which was domesticated in Nigeria as part of the laws of the Federation of Nigeria; and whereas the said Article 5 of the African Charter on Human Peoples Rights provides that:

"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, which we accepted as applicable to this case".

2.) **Whereas** this Court found that the Applicant/Plaintiff had proved his claim as stated therein in the originating application for unlawful detention for 11 days and for *torture, cruel, inhuman or degrading punishment and treatment as specified in his pleadings and evidence in Court. Whereas in Article 10 of the Supplementary Protocol of the Court, the names of the family members must be specified and their violations must be proved for the reliefs sought on their behalf to succeed.*

3.) **Whereas** this Court was persuaded and applied the State Responsibility principle in International Law as embodied in a draft to the United Nations for approval of the same which have been applied by various international courts without mentioning the draft, indicates that the State Party is responsible for the violation of the human rights of individuals within their territorial jurisdiction committed through their officials and organs within the State of Nigeria, and in this case the violation of human rights committed on the Applicant/Plaintiff by the 1st, 2nd , 3rd Respondents are equally attributable to the 4th, Defendant/ Respondent;

4.) **Whereas**, the State of Nigeria was not directly sued in this case but the Attorney-General of the Federation and by the application of Section 150(1) of the Constitution of the Federation which described him as the chief Law Officer of the Federation and by the practice of Nigeria which we endorsed in this case herein particularly by the combined effect of Article 38(1)(c) of the Statute of International Court of Justice and

Article 19(1) of the Protocol A/P.1/7/91 as amended on the Court, the 4th Respondent became a proper party in this case and the State of Nigeria equally, making him liable for the violations of human rights in this case;

5.) **Whereas** the Applicant/Plaintiff requested for 2 billion naira as reparation for the violation of human rights committed on him by the organs and officials of the State of the Federal Republic of Nigeria; and whereas the Respondents/Defendants traversed generally in respect of the said reparation and denied liability and the quantum of the claim; but the Court found that there was proof of such violation that was committed against the Applicant/Respondent by the Respondents/Defendants having shown that he - the Applicant was put in detention with hardened Criminals, Homosexual suspects who harassed and assaulted him - the Applicant, proved the need to award damages and we so award the said damages herein.

6.) **Consequently**, the Court having found that the Applicant had established his claim decides to award the Applicant/Plaintiff compensation for the violation of human rights attributed to the Respondents/Defendants in the sum of 10 million Naira only against the Respondents/Defendants accordingly.

COSTS

124. The cost is hereby awarded in the sum of One Million Naira for the Applicant/Plaintiff against the Respondents/Defendants.

JUDGMENT READ IN PUBLIC IN ACCORDANCE WITH THE RULES OF THIS COURT ON THIS 10TH JUNE, 2014 AT ABUJA, THE SEAT OF THE COURT.

- **Hon. Justice HANSINE N. DONLI** - *Presiding;*
- **Hon. Justice ANTHONY A. BENIN** - *Member;*
- **Hon. Justice ELIAM M. POTEY** - *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

THIS TUESDAY 10TH JUNE, 2014

SUIT NO: ECW/CCJ/APP/15/13
JUDGMENT NO: ECW/CCJ/JUD/13/14

BETWEEN
MAIMUNA ABDULMUMINI - *PLAINTIFF*

AND

1. **FEDERAL REPUBLIC OF NIGERIA**
2. **KATSINA STATE GOVERNMENT**
3. **THE NIGERIAN PRISONS SERVICE**

} *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE AWA NANA DABOYA** - *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **AJARE NOAH** *WITH*
   KOLAWALE OGUNBIYI - *FOR THE PLAINTIFF*
2. **NO APPEARANCE** - *FOR THE 1ST DEFENDANT*
3. **HASSAN YUSUF** *WITH*
   ABDULRAHMAN UMAR - *FOR THE 2ND DEFENDANT*
4. **OCHE VERONICA** - *FOR THE 3RD DEFENDANT*

Jurisdiction-Human Rights - Right to Fair Hearing - Right to Due Process of the Law - Right to Freedom from Torture - Inhuman and Degrading Treatment - Right to Life - Child Rights - Right to Special Treatment - Right to Legal and other Appropriate Assistance - Death Sentence - Applicability of International Law - Evidence - Jurisdiction

SUMMARY OF THE CASE

On March 28, 2006, the Plaintiff was arrested on the suspicion of setting her husband on fire thereby causing his death. At that time she was only 13 years old and had already been married for 5 months. She was remanded in Katsina Children's Remand Home for about six months until the conclusion of the investigation.

Two years after the death of her husband, after she remarried and had a baby, she was charged with culpable homicide on the person of her previous husband. A Counsel was assigned to her by the State but the Counsel during the trial did not file a final address nor make any mitigation plea on her behalf. Consequently, she was sentenced to death by hanging and admitted in Katsina central prison.

Aggrieved, the Plaintiff brought an Application before this Court against the Defendants for breach of her human rights, asking this Court to quash the death sentence and order her release until it can be ensured that she will receive fair trial in accordance with international standards.

The Defendants while denying the allegations aver that the Plaintiff was a full grown adult at the time of the commission of the offence and that, the Counsel assigned to defend her at the trial court failed to give his final address on the grounds that his address will not improve on the facts of the case.

The Defendants further contend that nothing in the Nigerian law prevents or prohibits a court from sentencing/committing a nursing mother to prison and that going with an infant into prison custody is done at the discretion of the inmate/mother.

LEGAL ISSUES:

1. *Whether the death sentence was imposed on the Plaintiff while a minor is in violation of her fundamental rights as guaranteed under Articles 5 and 17 of the African Charter on the Rights and Welfare of the Child?*

2. *Whether imposition of death by hanging is a form of torture, cruel inhuman and degrading treatment or punishment?*

3. *Whether Articles 5(3) and 17 of the African Charter on the Rights and Welfare of the Child are applicable in this case?*

4. *Whether or not declaring Articles 5(3) and 17 of the African Charter as rights of the Child is applicable to this case amount to reviewing the decision of the High Court of Dutsin-ma in Katsina State?*

DECISION OF THE COURT

The Court held:

- *That where facts raise issues of violation of human rights that occur in any Member State and the complaint is by an individual and pursuant to Article 9(4) and 10 (1) (sic) of the Supplementary Protocol, Article 4 (g) of the Revised Treaty of ECOWAS, Article 5 of the African Charter or any of the provisions of the African Charter on Human and Peoples Rights relating to the rights of people collectively and individually and other international human rights instruments assented to by the Member State of ECOWAS with no pending litigation in any international court, this Court would assume jurisdiction.*

- *That the jurisdiction of this Court does not extend to appeals from decision of domestic courts of Member States.*

- *That at the time the offence was committed, Applicant was below the age of 18; the conflicting evidence as to whether she was 13 years or more was resolved in her favour.*

- *The Plaintiff is entitled to compensation in the sum of N5,000,000.00 (Five Million Naira).*

JUDGMENT OF THE COURT

PARTIES

1. The Plaintiff is Maimuna Abdulmumini a Nigerian and a Community Citizen who was convicted contrary to Section 221 of the Penal Code of Nigeria for culpable homicide punishable with death and sentenced to death by hanging.

2. The 1st Respondent is the Federal Republic of Nigeria.

3. The 2nd Respondent is Katsina State Government where the Applicant was tried, convicted and sentenced to death by hanging.

4. The 3rd Respondent is the Nigerian Prison Service where the Applicant is remanded in custody pending the hearing of her appeal and/or execution of her death sentence.

PROCEDURE

5. The Applicant lodged her application pursuant to Articles 32-33 of the Rules of Procedure on 13th of August 2013. Marked Document No. l stating the violations and the reliefs sought in this Court.

6. The Applicant filed a motion on notice pursuant to Article 59(1)(3)(7) 79 of the Rules for accelerated hearing of the Application. Marked Document No. 2.

7. The 1st Defendant filed on 4th October, 2013 their Statement of Defence raising their plea in law under Section 29(4) of CFRN of 1999 that every married woman is of full age. Marked Document No. 3.

8. The 2nd Defendant filed motion for extension of time and counter affidavit under Article 33 of the Rules. Marked Document No. 4 and 5.

9. Records of proceedings of the High Court. Marked Document No. 5A.

10. Statement of Defence of the 2nd Defendant. Marked Document No. 8.

11. Statement of the 3rd Defendant under Article 1 (1) of the Rules. Marked Document No. 11.

SUMMARY OF THE FACTS OF THE APPLICATION

12. The Plaintiff/Applicant lodged in the Registry of the Court an originating application dated 13th August, 2013 under Article 33 of the Rules of the procedure of this Court whereby she sought the following reliefs stated inter alia thus:

    a) A **declaration** that the pronouncing of death penalty against the Plaintiff is a violation of her right to be represented in Court and of the right to due process as guaranteed by Article 7 of the African Charter;

    b) A **declaration** that the sentence against the Plaintiff for facts that happened during her minority is a violation of her fundamental rights as guaranteed under Articles 5 and 17 of the African Charter on the Rights and Welfare of the Child;

    c) A **declaration** that the condemnation of the mother of a young child to death is a gross violation of Article 30 of the African Charter on the Rights and Welfare of the Child;

    f) A **declaration** that the condemnation to death by hanging is a form of torture cruel in human and degrading treatment or punishment;

    g) An **Order** that the death sentence be quashed and the Plaintiff released until it can be ensured that she will benefit from fair proceedings as guaranteed by international standards;

h) In the alternative an **Order** that the Defendant commutes forthwith the sentence of death penalty to another sentence which will take care of the case's peculiarities, the condemnation were pronounced for facts committed during the minority of the Plaintiff and while she is actually the mother of a young girl;

i) In the further alternative, an **Order** that the Plaintiff be transferred to other facilities specifically suited for the holding of a young woman who was below 18 years of age when the facts occurred;

j) In any event an injunction to **restrain** the Defendants from executing the death sentence pronounced without respect of the Plaintiffs rights to defence, to a special treatment as a minor and as a mother, to dignity, and to be free from torture and inhuman punishment;

k) an **Order** directing the Defendant to pay adequate monetary compensation of N10,000,000.00 (ten million naira) only as a result of the undergone moral damage.

FACTS OF THE CASE

13. Based on these reliefs the Plaintiff narrated the facts of the case to justify the granting of the said reliefs. The Plaintiff was arrested on March 28, 2006, being suspected of setting her husband on fire and causing his death. At the time, she was only 13 years old and had already been married for 5 months. She was remanded in Katsina Children Remand Home, where she spent about six months, until the conclusion of the Police investigation. She was released on bail.

14. She remarried two years after the death of her first husband and gave birth to a baby girl, who is now 18 months old. She is still nursing her. She received legal advice on February 25th 2009, more than 2 years after her release on bail. She was charged for culpable Homicide on the person of her previous husband, pursuant to Section 221 of the Nigeria Penal Code. Katsina State assigned her a Counsel, who did not file a final address nor made any mitigation plea on her

behalf. As a result, the Judge sentenced her to death by hanging on December 6th 2012. She was subsequently admitted in Katsina Central Prisons, where she remains till today. She is imprisoned in a cell with six other inmates and nursing her baby girl inside the prison.

15. The 1st Defendant denied the allegations contained in the Plaintiffs statement of claim and demanded for the strictest proof thereof. The 1st Defendant narrated their defence that the Plaintiff was a full-grown adult at the time of the commission of the crime of murder of her husband. She was accordingly charged to Court, convicted and sentenced to death. The 1st Defendant claimed that any woman who is married in Nigeria shall be deemed to be of full age.

16. The 1st Defendant also claimed that the Plaintiff was an adult both in law and biologically when she committed the offence of murder. The 2nd Defendant claimed that the Plaintiff knowing fully that, her husband is a cripple and while he was asleep she intentionally decided to set the room ablaze and locked him inside, at the end of the exercise she went away to an unknown destination and after sometime; she appeared on the pretext that she was confused. The 2nd Defendant also claimed that the case was investigated by the police who submitted the case diary for legal advice and after a careful perusal; the Counsel found that, the Plaintiff narrated the way and manner she committed the offence because nobody saw her as at the time of the incidence. Consequently, the trial court had no alternative than to rely on her confessional statement and convicted her accordingly.

17. The 2nd Defendant also claimed that a Counsel was assigned to defend her and a careful perusal of the record of proceedings shows that the Counsel to the Plaintiff at the trial court failed to give his final address on the basis that his address will not improve on the facts of the case. The plea of *allocutus* was made by her Counsel which the trial Judge considered and rightly recommended the Executive Governor of Katsina State to act under his prerogative power of mercy to commute the sentence to life imprisonment. The 2nd Defendant further claimed that the Plaintiff intentionally decided to

hold her baby girl until she has weaned her in order to call for local, national and international support for her release despite the initial demands for her to release the baby to her father, the Plaintiff refused to do so. Furthermore, that there is no law that exists in Nigeria which prohibits passing death sentence on either adult or young person, he therefore claimed that death sentence is constitutionally and statutorily recognized and permitted in Nigeria.

18. The 3rd Defendant in its defence, claimed that the Applicant was received into prison custody by a lawful Court Order. Also, that it is statutorily mandated to take and keep custody of persons legally interned. The 3rd Defendant also claimed that the Applicant was committed to its custody vide a valid commitment warrant. The 3rd Defendant also claimed that the Applicant was an adult above 18 years when she was received into prison custody. The 3rd Defendant further claimed that it is not its duty to prosecute inmates in its custody hence it did not participate in the prosecution of the Plaintiff.

19. Also that nothing in the Nigerian law prevents or prohibits a court from sentencing/committing a nursing mother to prison. That going with an infant into prison custody is at a total discretion of the inmate/mother. The 3rd Defendant claimed that the Plaintiff's cell was reasonably decent, hygienic and standard being a new cell block. That toiletries, beddings, mattress and mosquito nets were provided for all the inmates particularly the claimant and her infant. The 3rd Defendant also claimed that clean portable water is pumped by bore hole on daily basis. That the right of appeal against the decision of High Courts in Nigeria, lies to the Court of Appeal.

LEGAL ARGUMENTS OF COUNSEL

The Plaintiff:

20. The Plaintiff's Counsel based their arguments on the African Charter on Human and Peoples' Rights which is applicable to all Member States of ECOWAS, pursuant to Article 4 of the Revised Treaty which provides that:

'The High contracting parties, in pursuit of the objectives stated in Article 3 of this Treaty, solemnly affirm and declare their adherence to the following principles:

4(g) ... recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human Rights'

21. That the Federal Republic of Nigeria itself has ratified and adopted the African Charter on Human and Peoples' Rights in 1990, implemented in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter A9, Laws of the Federation of Nigeria, 2004. The Plaintiff avers that, being a citizen of Nigeria, she is entitled to the enjoyment of her fundamental rights as set out in the Chapter IV of the 1999 Constitution of the Federal Republic of Nigeria and in the African Charter on Human and Peoples' Rights. The Plaintiff avers that the sentence is a violation of the right to defence resulting from Article 7(c) of the African Charter and of the right to appeal a conviction. That this sentence violates her fundamental rights, the judge having ruled without considering the fact that her Counsel did not effectively defend her nor represent her during the trial.

22. Also, that Article 4 of the African Charter on Human and Peoples' Rights and Article 6 of the International Covenant on Civil and Political Rights both protect the right to life and provide that no one maybe arbitrarily deprived of this right. Further, that **Article N°. 10 of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Arica reads**:

'Everyone convicted in a criminal proceeding shall have the right to review of his or her conviction and sentence by a higher tribunal' and more specifically 'Anyone sentenced to death shall have the right to appeal to a judicial body of higher jurisdiction.'

23. Therefore, being subject to a death sentence, the Plaintiff must be awarded the possibility to appeal the Ruling. Moreover, the appeals

proceedings would stay the execution of the death sentence, as provided by the same text *'A judicial body shall stay execution of any sentence while the case is on appeal to a higher tribunal'*. Plaintiff relied on the case of **Bello *v.* AG Oyo State (1986) 5 NWLR (PT45) 828@ 860-861**, the Court held that the execution of an inmate while the appeal on his conviction was still pending to be unconstitutional. The sentence violates the rights of the Plaintiff as a child resulting from Article 5(3) and Article 17 of the African Charter on the Rights and welfare of the Child. Also, that death sentence cannot be pronounced for the crimes committed by persons below eighteen years of age. That Nigeria acted in violation of its international obligations when it agreed to include children in the scope of death penalties. Indeed, Article 6§5 of the International Covenant on Civil and Political Rights provide that:

> ***'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age'***.

And Article 5§3 of the African Charter on the Rights and welfare of the Child that:

> ***'death sentence shall not be pronounced for crimes committed by children'***.

24. He submitted that the Plaintiff was below the age of 18 when the facts occurred. That special treatment due to minors has been denied to the Plaintiff since the Nigerian judge did not take into consideration the fact that she was a minor when the fact occurred. Plaintiff claimed that under the African Charter on the Rights and Welfare of the Child ***'A child means every human being below the age of 18 years'***.

As provided in its Article 17 ***'every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth'***, and ***'shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence'***.

25. Moreover, Article 10 of the International Covenant on Civil and Political Rights provides that: *'Juvenile offenders shall be segregated from adults'*, therein the Plaintiff was presented and sentenced by a Court as an adult, without any consideration of her young age.

    That the African Charter on the Rights and welfare of the Child also provides in its Article 30 that ***mothers should not be imposed death sentence***. That the detention of a mother with her infant deprived of any access to basic care constitutes a form of torture, cruel, inhuman and degrading treatment or punishment. Plaintiff relied on Article 5 of the African Charter and Article 30 of the African Charter on the Rights and welfare of the Child to buttress their point.

26. In conclusion, Plaintiff avers that death by hanging is a form of torture, cruel, inhuman and degrading treatment or punishment. The Plaintiff avers that she is entitled to perpetual injunction to restrain the Defendants from infringing on her fundamental rights aforesaid.

1st Defendant

27. The 1st Defendant relied on **Section 29(4) of CFRN, 1999** (as amended) which recognizes every married woman as of full age. Also, that decisions of High Courts lie on appeal to the Court of Appeal. Furthermore, that the constitution provides for prerogative of mercy to be exercised by the Governor upon the application of Section 212 of the CFRN, 1999 as amended and that death penalty is still an extant law in Nigeria. It therefore prayed that the application be dismissed for lack of merit.

2nd Defendant

28. Relying on the case of **Joseph Ibidapo *v.* Lufthansa Airlines (1997) 4 SCNJ PG 1 AT PG 3**, the 2nd Defendant stated that in view of the decision in the above case, no law exists, which prohibits passing death sentences on either adults or young persons. Also, in

the case of **Joseph Amoshima *v.* The State (2011) 6 SCNJ Pg 245 at 247** held:

> ***'Whereas in very many jurisdictions the death sentence is frowned upon or even abolished. In Nigeria, it is fairly enshrined in our statutes'***.

29. Therefore, death sentence is constitutionally and statutorily recognized and permitted in Nigeria. On the applicability of International Conventions, the 2nd Defendant relied on the case of **Albarka Air Service (Nig.) Limited *v.* Emeka Keazo Esq**. **(2011) 6 SCNJ 151 AT 155** where it was held that:

> ***'The Warsaw Convention 1929 which is applicable and relevant to the instant appeal was domesticated as a Nigerian Law by the carriage by air (colonies, protectorates and Trust Territories) order 1953 Vol. XI laws of the Federation 1958, as amended by the Hague Protocol. It is still part of the existing law in Nigeria pursuant to Section 315 of the 1999 Constitution as it has not been repealed by any law or rendered invalid or incompetent by any court of competent jurisdiction'.***

30. The 2nd Defendant stated consequently, that all the conventions mentioned with the exception of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter A9, Laws of the Federation of Nigeria, 2004, none of such conventions was either ratified or domesticated as Nigerian Law to warrant its applicability in the country, they therefore urged the Court to discountenance the submission made by the Plaintiff's Counsel. Furthermore, that in the case of **Abacha *v.* Fawehinmi (2000) 6 NWLR PT (660) PG 228 AT PP 288-289** where it was held:

> ***'Suffice to say that an International treaty entered into by the Government does not become binding until enacted into law by the National Assembly see Section 12 (1) of the 1979 Constitution'.***

31. The fundamental rights as provided in Chapter IV of the 1999 Constitution of Federal Republic of Nigeria as amended were dully observed by the trial Court bearing in mind that, the offence of culpable homicide contrary to Section 221 of the Penal Code carries death sentence. On enforcement of international human rights standards, the 2nd Defendant cited the case of **Segun Ogunsanya *v.* The State (2011)** 6 SCNJ PAGE 190 AT PAGE- 195 where the Court held that:

> ***"A case is won on credible evidence and not on address. No amount of brilliant address or playing to the gallery by Counsel can make up for lack of evidence to prove or defend a case in Court. The main purpose of an address is to assist the Court, and is never a substitute for compelling evidence. Failure to address will not be fatal or cause miscarriage of justice'.***

The 3rd Defendant

32. The 3rd Defendant relied on the provisions of Regulation 2 of the Prisons Regulation made pursuant to Section 15 of The Prison Act Cap P27 Laws of the Federation of Nigeria, 2004 which lays down the conditions by which a person may be admitted into Prison custody. Also, that the Prisons Standing Order 2011 provides in Order 476 that the officer who receives any prisoner must satisfy himself that the usual papers are brought with the prisoners and that they are in order. Based on this, the 3rd Defendant stated that they have exhibited the warrant/commitment which the accused person was admitted into custody. The 3rd Defendant also relied on the United Nations Minimum Standard Rules for the treatment of Prisoners (UN MSR) adopted by the United Nations General Assembly Resolution 43/173 of 19th December 1988 which sets out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of penal institutions. The provisions of Nigerian Prison Standing orders concerning treatment of infants complies substantially with the UN MSR.

33. Furthermore, the 3rd Defendant avers that it does not lie within its powers to determine whether, when or how a death warrant is to be executed. That it is the exclusive preserve of the representative State Governors or the President of the country. It made reference to Sections 371 and 374 of the Criminal Procedure Act Cap C41 Laws of the Federation of Nigeria, 2004 and Sections 294-298 (Criminal Procedure Code). Also, Section 204 of the 1999 Constitution of the Federal Republic of Nigeria vests in the Court of Appeal, the exclusive jurisdiction to hear and determine appeals from the High Court of a State. The 3rd Defendant relied on the case of **Mousa Leo Keita *v*. The State of Mali (2009) 1 CCJLR (PT2) 58**. The Community Court of Justice held that it is not a Court of Appeal *vis-a-vis* the national courts of member states. Also, that it does not possess the power to revise decisions made by the domestic courts of member States; hence it was powerless and cannot adjudicate upon decisions of national courts. It therefore submitted that the jurisdiction of the Community Court does not extend to appeals from decisions of domestic courts of member States.

ANALYSIS OF THE COURT

34. Having considered the facts of this case, the legal arguments of the respective parties, the reliefs sought by the parties, we hold that the said issues require serious consideration to determine their veracity, justification and the-proof of the application herein.

JURISDICTION

35. Let us restate clearly from the onset that the question of jurisdiction was determined in the preliminary ruling decided in this case whereby the Court held that where the facts raised the issues of violations of human rights that occur in any member state and the complaint is by an individual and pursuant to Articles 9(4) and 10(1) of the Supplementary Protocol, Article 4(g) of the Revised Trea1y of ECOWAS, Article 5 of the African Charter or any of the provisions of the African Charter on Human and Peoples' Rights relating to the

rights of the people collectively and individually and other international human rights instruments assented to by the Member States of ECOWAS with no pending litigation in any international court, this Court would assume jurisdiction. Having considered the facts and all the relevant instruments we held that the Court had jurisdiction to determine the subject-matter in this case. We further affirm that this Court has jurisdiction in this case. Now to the issues raised in the substantive matter which shall be taken below thus:

a) **Whether** the sentence of death passed on the Applicant/Plaintiff by the Defendant happened when she was a minor thereby making her conviction and sentence of death a violation of her fundamental rights as guaranteed under Articles 5 and 17 of the African Charter on the Rights and Welfare of the Child. A declaration that the condemnation of the mother of a young child to death is a gross violation of Article 30 of the African Charter on the Rights and Welfare of the Child;

b) **Whether** a declaration that the condemnation to death by hanging is a form of torture cruel in human and degrading treatment or punishment;

c) **Whether** Articles 5(3) and 17 of the African Charter on the Rights and welfare of the Child are applicable in this case to defeat the conviction and sentence of death passed on the Applicant being a child below the age of 18 years.

d) **Whether** by declaring or not that Article 5(3) and 17 of the said Charter are applicable amounted to reviewing the decision of the High Court of Dutsinma in Katsina State, a judicial organ of Nigeria, a Member State.

36. **Whether** the provision of any national legislation can defeat the provision of a Treaty or the African Charter on Human and Peoples' Rights which have been domesticated under Section 12 of the Constitution of the Federation of Nigeria.

37. The submission of the 3rd Defendant that it did not lie within the powers of this Court to determine when or how a death warrant is to be executed is misconceived even though the conviction and sentence is the exclusive preserve of the State Governors or the President of the country to amend or vary same. Sections 371 and 374 of the Criminal Procedure Act Cap C41 Laws of the Federation of Nigeria, 2004 and Sections 294-298 (Criminal Procedure Code) are applicable to the proceedings in the national trial court and also Section 204 of the 1999 Constitution of the Federal Republic of Nigeria for such cases to lie on appeal at the Court of Appeal, from the High Court of a State in terms of violation of human rights pertaining. The 3rd Defendant relied on the case of **Mousa Leo Keita *v.* The State of Mali (2009) 1 CCJLR (PT2) 58**: The Community Court of Justice held that it is not a Court of Appeal *vis-a-vis* the national courts of member states. Also, that it does not possess the power to revise decisions made by the domestic courts of member States; hence it was powerless and cannot adjudicate upon decisions of national courts. It therefore submitted that the jurisdiction of the Community Court does not extend to appeals from decisions of domestic courts of member States.

38. The question is whether the relief sought in this case by the Applicant/ Plaintiff had been justified. Taking the first issue for determination, the review of what the Learned Counsel submitted becomes necessary in this case. The 1st Defendant relied on Section 29(4) of CFRN, 1999 (as amended) which recognizes every married woman as of full age also, that decisions of the High Court lie on appeal to the Court of Appeal of Nigeria. The 2nd Defendant, relying on the case of **Joseph lbidapo *v.* Lufthansa Airlines (1997) 4 SCNJ Pg1 at pg 3**, stated that in view of the decision of the above case, no law exists, which prohibits passing of death sentences on either adults or young persons and also relied on the case of **Joseph Amoshima *v.* The State (2011) 6 SCNJ Pg 245 at 247** where the court held:

> ***"Whereas in very many jurisdictions the death sentence is frowned upon or even abolished. In Nigeria, it is fairly enshrined in our statute".***

38. He therefore, urged the Court to hold that death sentence is constitutionally and statutorily recognized and permitted in Nigeria and that the fundamental rights as provided in Chapter IV of the 1999 Constitution of Federal Republic of Nigeria as amended were dully observed by the trial Court bearing in mind that, the offence of culpable homicide was contrary to Section 221 of the Penal Code which carried a death sentence. The 3rd Defendant relied on the case of **Mousa Leo Keita *v.* The State of Mali (2009) 1 CCJLR (PT2) 58** where this Court held that it is not a Court of Appeal for the decisions of national courts of Member State. Also, that it did not possess the power to revise decisions made by the domestic courts of member States; hence it was powerless and cannot adjudicate upon decisions of national courts. It therefore submitted that the jurisdiction of the Community Court does not extend to appeals from decisions of domestic courts of member States.

39. However, the Plaintiff contended that the sentence of death passed on the Applicant/Plaintiff is a violation of her human rights pursuance of Article 7(c) of the African Charter on Human and Peoples' Rights and that the trial judge having even observed that her counsel did not effectively defend her nor represented her during the trial. He also referred to Article 4 of the African Charter on Human and Peoples' Rights and Article 6 of the International Covenant on Civil and Political Rights which are laws that both **protect the right to life** and provide that **no one may be arbitrarily deprived of this right**. He further referred to Article N. 10 of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa to justify his stance.

40. On the decision of the trial Court being subject to appeal and that execution of the sentence shall be stayed while the appeal to the Court of Appeal is yet to be determined, he urged the Court to hold that execution of the Applicant should be halted until the appeal is determined. Plaintiff relied on the case of **Bello *v.* AG Oyo State (1986) 5 NWLR (PT45) 828 @ 860-861**, where the Court held that:

> ***'the execution of an inmate while the appeal on his conviction was still pending to be unconstitutional thereby justifying that a judicial body shall stay execution of any sentence while the case is on appeal to a higher tribunal'***.

The sentence violates the rights of the Plaintiff as a child resulting from Article 5§3 and Article 17 of the African Charter on the Rights and Welfare of the Child.

41. Also, that death sentence cannot be pronounced for the crimes committed by persons below eighteen years of age. That Nigeria acted in violation of its international obligations when it agreed to include children in the scope of death penalties. Indeed, Article 6(5) of the International Covenant on Civil and Political Rights provide that:

> ***"Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age"***.

And Article 5(3) of the African Charter on the Rights and welfare of the Child that:

> ***"death sentence shall not be pronounced for crimes committed by children"***.

42. He submitted that the Plaintiff was below the age of 18 when the facts occurred. That special treatment due to minors has been denied to the Plaintiff since the Nigerian judge did not take into consideration the fact that she was a minor when the fact occurred. Plaintiff claimed that under the African Charter on the Rights and Welfare of the Child ***"A child means every human being below the age of 18 years"***. As provided in its Article 17 *"every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth'*, and *'shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence"*. Moreover, Article 10 of the International Covenant on Civil and Political Rights provides that: *"Juvenile offenders shall be*

segregated from adults", therein the Plaintiff was presented and sentenced by a court as an adult, without any consideration of her young age. The African Charter on the Rights and welfare of the Child provides in Article 30 that mothers should not be imposed death sentence and that the detention of a mother with her infant would deprive them of access to basic care constitutes a form of torture, cruel, inhuman and degrading treatment or punishment. On Article 5 of the African Charter and Article 30 of the African Charter on the Rights and welfare of the Child justified the argument. The Plaintiff submitted that death by hanging is a form of torture, cruel, inhuman and degrading treatment or punishment and urged the Court to grant the Applicant a perpetual injunction to restrain the Defendants from infringement of her fundamental rights aforesaid

43. After reviewing the submission the Court hereby reiterates that this Court is not an appellate court over the decision of the national courts as decided in **Mousa Leo Keita *v.* The State of Mali (2009) 1 CCJLR (PT2) 58** and rightly cited by the 3rd Defendants Counsel. However, by the provision of Article 4(g) of the Revised Treaty of ECOWAS which enjoined all member states of ECOWAS to:

> ***'Recognize, promote and protect human and peoples' rights in accordance with the provisions of the African Charter on Human Rights, the African charter became an important instrument for that regard'.***

44. On the whole this Court holds that the Application succeeds in part as enumerated above and the issue of her being a minor even though as opposed to other national laws of Nigeria succeeds and that at time the offence was committed she was below the age of 18 and the conflicting evidence as to whether she was 13 years or more is also resolved in her favour accordingly.

45. **DECISION**

1. **Whereas** the Applicant filed an Application seeking for three main reliefs albeit an Order for accelerated hearing, an Order

for injunction restraining the Defendants from executing the death sentence pending the decision of the Court and same was granted as set out hereinbefore under Article 20 of Protocol A/P.1/7/91 on the Community Court of Justice;

2. **Whereas** an Order that the death sentence be quashed and the Plaintiff released until it can be ensured that she will benefit from fair proceedings as guaranteed by international standards which is not within the competence of this Court and such order cannot be assented to;

3. **Whereas** the Applicant sought an alternative Order that the Defendant commutes forthwith the sentence of death penalty to another sentence which will take care of the case's peculiarities, as the condemnation was pronounced for facts committed during the minority of age of the Plaintiff and while she is also actually the mother of a young girl and whereas this Court was of the view that the issue of age of a convict is not foreclosed by the fact of the marriage of the Applicant and where there is doubt as to the age of the Applicant as in this case, same shall be resolved by this Court in favour of the said Applicant and we so resolved her minority status in her favour.

4. **Whereas** the Applicant sought for an Order that being a minor at the time of the offence it shall be necessary to keep the Applicant in young persons' prison or home as the case may be and we so grant it herewith.

5. **Whereas** the Applicant sought for an Order for injunction to restrain the Defendants from executing the death sentence pronounced on the Applicant and whereas this Court was influenced by Article 6(5) of the International Covenant on Civil and Political Rights provide that ***'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age,'*** and also Article 5(3) of the African Charter on the Rights and welfare of the Child that death sentence shall not be pronounced for crimes committed by

children; this Court holds that the said Article 5(3) stated above applies herein.

6. **Whereas** the Applicant sought for an Order directing the Defendant to pay adequate monetary compensation of N1,000,000.00 but considering the magnitude of the crime of culpable homicide punishable by death in that a person died as a result of her action even though this Court is not an appellate court over that decision, we make an Order of compensation for 5 million Naira for the Applicant against the Respondent accordingly.

The Court Decides that:

7. In view of the fact that her age was in doubt as to whether she was 13 years at the time of the offence and as also stated by the trial Court, Article 5(3) of the African Charter on the Rights and Welfare of the Child applies.

8. Consequently, the Applicant is entitled to compensation in the sum of 5 Million Naira against the Respondents.

46. **COSTS**

This Court in line with its Article 66 of the Rules of Procedure makes an award of cost in sum of One Million Naira accordingly.

THE JUDGMENT IS READ IN PUBLIC IN ACCORDANCE WITH THE RULES OF THIS COURT ON THIS 10TH JUNE 2014 AT ABUJA-NIGERIA.

Hon. Justice Hansine N. DONLI - *Presiding Judge*
Hon. Justice Awa NANA-DABOYA - *Member*
Hon. Justice Anthony A. BENIN - *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 AT ABUJA, NIGERIA

ON THE 10TH DAY OF JUNE 2014

SUIT NO: ECW/CCJ/APP/04/12
JUDGMENT NO: ECW/CCJ/JUD/15/14

BETWEEN
MRS. MODUPE DORCAS AFOLALU - *PLAINTIFF*

AND
THE FEDERAL REPUBLIC OF NIGERIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE BENFEITO MOSSO RAMOS** - *PRESIDING*
2. **HON. JUSTICE AWA NANA DABOYA** - *MEMBER*
3. **HON. JUSTICE C. MEDEGAN-NOUGBODE** - *MEMBER*

ASSISTED BY:

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

REPRESENTATION TO THE PARTIES:

1. **SOLA EGBEYINKA (ESQ.)** - *FOR THE PLAINTIFF*
2. **PAMELA OHABOR** - *FOR THE DEFENDANT*

-Burden of proof - State Responsibility - Human Rights violation - Effective investigation - Reparation

SUMMARY OF THE FACTS

The Applicant filed an Application against the Defendant alleging that the post-electoral violence which took place in Zaria Kaduna State caused the death of her husband, Mr. Felix Afolalu the father of their two children. That on 18th April 2011, her husband was on duty at the Nuhu Bamali polytechnic, Zaria when a mob chased him to his residence, and hacked him to death in the presence of the members of his family.

That after the death of her husband, she and her children have been deprived of their source of financial, social and economic support which has undermined their enjoyment of basic economic and social rights, thereby subjecting them to unimaginable suffering and untold hardship.

The Applicant further avers that, the Defendant discriminatorily singled out ten families of victims of National Youth Service Corps who were killed in the course of the post-electoral violence and each received a compensation of Five Million Naira (N5,000,000) from the Federal Republic of Nigeria for the harms done to them. That the Defendant failed to provide her with any relief in reparation for the harm suffered as a result of her husband's death.

The Defendant in denying the allegations put the Applicant to the strictest proof and further states that during the post-election, it mobilized security agencies to quell the violence which erupted from the mob action that followed the election. That it also set up committee of inquiry to investigate the incident.

That the Applicant's request for relief in the sum of Twenty Million US Dollars (USD20,000,000) is speculative and far from being realistic.

LEGAL ISSUES:

- *Whether from the totality of evidence presented, the Applicant has established her claims.*

- *Whether the Defendant is in breach of its obligation to ensure the protection and safety of the Applicant's husband.*

- *Whether the Applicant is entitled to compensation*

DECISION OF THE COURT

The Court held:

1. *That in the absence of any contrary proof, the exhibits contained in the Applicant's Application establishes the evidence of the allegation brought before the Court.*

2. *That the Federal Republic of Nigeria breached the obligation imposed on it by Article 1 of the African Charter on Human and Peoples' Rights, which require that it ensures the protection and safety of its citizens, not only by way of appropriate legislation and effective implementation of same, but also by protecting its citizens from injurious acts which stand the chance of being committed by third party.*

3. *That the component of the right to life may equally be sub-divided to include explicit obligation upon the State to institute proceedings into any matter to which the State is connected, notably by conducting an effective inquiry into the violent incidents, and into the death which occurred.*

4. *The Court awarded the sum of N10,000,000 (Ten Million) naira to the Applicant as compensation against the Defendant.*

JUDGMENT OF THE COURT

PROCEDURE

1. On 12 March 2012, Mrs. Modupe Dorcas Afolalu, represented by Sola Egbeyinka (Esq.) of Falana & Falana's Chambers, with address at 22 Mediterranean Street, Imani Street, Maitama District, Abuja, lodged at the Registry of the Community Court of Justice, ECOWAS an Application dated 12 March 2012, pursuant to Articles 1, 4, 18 and 23 of the African Charter on Human and Peoples' Rights, Article 33 of the Rules of the Community Court of Justice and Article 10 of the Supplementary Protocol AP/1/7/91 relating to the Community Court of Justice.

2. On 24 May 2012, the Registry of the Court, by a Notice of Registration, and in compliance with Article 35 (2) of the Rules of the Court, informed the Federal Republic of Nigeria via the Defence Counsel.

3. On 11 July 2012, the Federal Republic of Nigeria, represented by Pamela Ohabor, Defendant Counsel, Federal Ministry of Justice, whose address is at 71B Shehu Shagari Way, Maitama, Abuja, lodged at Registry of the Community Court of Justice its Statement of Defence not dated.

4. On 20 January 2013, the Court Registry received the Reply of the Applicant dated 31 January 2013.

5. On 9 April 2013, the Applicant lodged at the Court Registry a Motion on Notice dated 8 April 2013 pursuant to Article 43 of the Rules of the Community Court of Justice and under the inherent jurisdiction of the Honourable Court.

6. In its hearing of 8 April 2014, the Court heard the Applicant as witness in the case, upon the request of her Counsel.

7. Counsel for the Federal Republic of Nigeria, who stood in for his learned colleague, stated that she could not proceed to be cross-examined since she did not have a firm grasp of the substance of the procedure. The Court therefore granted her adjournment till the following day, 9 April, 2014.

8. When the Court sat, the two Parties failed to appear in court. The proceedings was thus adjourned to 13 May 2014.

9. On that date, the Federal Republic of Nigeria did not appear in court and did not put in any appearance, whereas it had been served with a notice of the date for the court hearing.

10. Plaintiff Counsel obtained leave of the Court to adopt his statements, and the case was adjourned for deliberation on 10 June 2014.

THE FACTS OF THE CASE

The facts of the case as narrated by the Applicant

11. In her Initiating Application, the Applicant averred that the post-electoral violent incidents which took place at Zaria in Kaduna State caused the death of her husband, Mr. Felix Afolalu. Father of three children aged 7, 5 and 2 years, Mr. Felix Afolalu, according to the Applicant, was a lecturer at the Nuhu Bamalli Polytechnic, at Zaria, where he lived with his family.

12. That as a lecturer at the said polytechnic, her late husband was on an annual salary of One Million Naira (N 1,000,000) and was the breadwinner for his family.

13. The Applicant maintained that Mr. Felix Afolalu was on duty on 18 April, 2011 when a mob chased him to his residence, where he was hacked to death in the presence of the members of his family.

14. She stated that following the death of her husband, she and her children were forced to relocate to Ekiti State where they had to squat with her father-in-law, Mr. Maurice Olufemi Afolalu.

15. That from the time her husband died, she had been living a miserable life, a situation which was worsened by the death of her 76-year old father-in-law, who succumbed to the emotional shock and trauma occasioned by his son's death. She affirmed that she and the members of her family have been deprived of their source of financial, social and economic support, which has undermined their enjoyment of basic economic and social rights, thereby subjecting them to unimaginable suffering and untold hardship.

16. She claimed that there was discrimination in the Defendant's singling out of certain ten families of victims of National Youth Service Corps who were killed in the course of the same post-election violence, each having received a compensation of Five Million Naira (N5,000,000) from the Federal Republic of Nigeria for the harms done them.

17. She condemns the lack of compassion on the part of the Federal Republic of Nigeria, claiming that the Federal Republic of Nigeria failed to provide her with any relief in reparation for the harm suffered as a result of her husband's death. She accused the Defendant State for not acting upon the report submitted by the Commission of Inquiry which it set up in the aftermath of post-electoral violent incidents.

PLEAS-IN-LAW

Pleas-in Law advanced by the Applicant

18. The Applicant relies on Articles 1, 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights in asking the Court declare that the Federal Republic of Nigeria defaulted in its obligations to ensure the protection and safety of his husband and to prevent the acts of violence which caused his death.

19. She equally contends that the failure by the Defendant to promptly and effectively investigate and bring to justice those responsible for the unlawful killing of her husband during the post-election violence, is unlawful, as it violates the right to life, and to security, dignity of

the human person and equal protection of the law, as guaranteed by Articles 4, 5 and 13 of the African Charter on Human and Peoples' Rights.

20. The Applicant advances her arguments by equally relying on decisions made by the African Commission on Human and Peoples' Rights (ACHPR) in **Amnesty International & Others *v.* Sudan (2000) AH RLR 297 (ACHPR 1999), Malawi African Association and Others *v.* Mauritania (2000) AHLRLR 149, pp 164-165, paragraph 84, Mulezi *v.* Democratic Republic of Congo (2004) AHRL 3**.

21. Furthermore, in referring to judgments of the Community Court of Justice, in **Ebrima Manneh *v.* Republic of Gambia**, and **Hadidjatou Mani Koraou v. Republic of Niger**, she asks the Honourable Court to award general damages fixed at Twenty Million US Dollars (USD 20,000,000) as compensation.

The position of the Federal Republic of Nigeria

22. In its Statement of Defence, the Federal Republic of Nigeria denies each and every allegation made by the Applicant. It questions the truthfulness of the facts of the case as narrated by her in her Application and puts her to the strictest proof thereof.

23. The doubts entertained by the Federal Republic of Nigeria concern: the marital status of the Applicant; the nature and amount of the salary earned by her alleged late husband; the truth of the conditions surrounding his murder; the death certificate of the deceased; the absence of reaction following the submission of the report of the Commission of Inquiry; the amount of 5 Million Naira granted, in the words of the Applicant, to the families of 10 members of the National Youth Service Corps killed in the aftermath of the post-electoral violence; the death of her father-in-law as a result of the emotional shock and trauma of his son's death; and the living conditions of the Applicant and her children.

24. The Federal Republic of Nigeria admits that following the post-election violence in which there was a mob action that led to loss of lives, it set up a Commission of Inquiry in respect of the violence. It alleges that since the Federal Republic of Nigeria was dissatisfied with the initial report submitted by the Commission, it set up another committee to do a more thorough job. The Federal Republic of Nigeria contends that it took all security measures for curbing post-election violence.

25. The Federal Republic of Nigeria further contends that the Applicant's request for relief in the sum of Twenty Million US Dollars (USD 20,000,000) is speculative and far from being realistic, and it asks the Court to dismiss all her claims.

ANALYSIS OF THE COURT

As to lack of evidence to the allegations made by the Applicant

26. The Court observes that the Applicant accuses the Federal Republic of Nigeria for violation of Articles 1, 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights, as arising from the Federal Republic of Nigeria defaulting on its obligation to prevent the acts of post-electoral violence which claimed the life of her spouse. She therefore asks the Court for compensation for the harm done her, in the sum of 20 Million US Dollars.

27. The Court notes that the Federal Republic of Nigeria contests that allegation and demands from the Applicant evidence which prove her assertions. For the Court, the probate value of the documents produced or of the facts invoked by the Applicant thus constitutes the core of the dispute between her and the Federal Republic of Nigeria. The dispute will therefore be resolved on the basis of what answer to be provide to that fundamental question.

28. The main purpose of the law of evidence is to establish the truth, and the general rule in that field of law requires that it is the applicant that proves what he affirms, in the light of the saying that, "The

necessity for evidence lies on he who brings the complaint". The responsibility for discharging the burden of proof may be reversed.

29. In its Judgment of 17 February 2010 in *Case Concerning* **Daouda Garba** *v.* **Republic of Benin**, the Court held, in paragraph 35, that:

> ***"It is a general rule that during trial the party that makes allegations 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."***

30. For the purposes of clearly establishing the matters in dispute, the Court refers to the pleadings lodged in the case file by the Parties. It is therefore the duty of the Court to point out and analyse all such matters, together with the exhibits pleaded in support of the Parties' claims, so as to clearly establish its clear stand thereon.

31. The Court notes that the Federal Republic of Nigeria contests, from the outset, all the arguments raised by the Applicant on the ground of lack of evidence. However, the Federal Republic of Nigeria did not provide or advance arguments to buttress its rejection of the allegations made by the Applicant.

32. The Defendant indeed maintains in its defence, that the Applicant contented herself with affirming, without proof, that she was legally married to the late Mr. Felix Afolalu, that they had three children aged 7, 5 and 2 years; that the late husband was a lecturer at the Nuhu Bamalli Polytechnic; that he was on an annual salary of One Million Naira (N1,000,000.00);that she received a letter of condolence from the said Nuhu Bamalli Polytechnic and the sum of Fifty Thousand Naira (N50,000.00); that she has not been compensated by the Nigerian Government, which has expressed no

compassion for her, whereas at the same time it has singled out the families of 10 members of the National Youth Service Corps who fell victim to the same incidents of post-electoral violence, and paid them a compensation of 5 Million Naira each; that she has been living a miserable life, worsened by the death of her father-in-law, whose death was a consequence of the emotional shock and trauma which resulted from the murder of his son.

33. The Court finds however that the Applicant supported her Application with pieces of evidence which presume that the facts narrated by her were true. The Court holds, as it has had occasion to do previously, in its Judgment of 17 December 2009 in *Case Concerning the* **National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD) *v.* Republic of Cote d'Ivoire,** paragraph 17, that:

> ***"if in criminal matters, the burden of proof in regard to presumption of innocence is lies on the accused, in civil matters, good faith is presumed and the onus is therefore on the party contesting any claim to provide evidence to the contrary."***

34. In the instant case, the Defendant State argues that the Applicant based her claims pertaining to compensation granted the families of the 10 slain Youth Corp members, on a dubious commission of inquiry report which she obtained on the internet, and as such, it contests the report.

The Court is of the view that all the parties in a trial must contribute towards establishing the truth, and that in that regard, the onus is on the Federal Republic of Nigeria, which refutes the allegations of the Applicant, to provide evidence to the contrary. By asking the Applicant to provide evidence to the truth of the facts invoked, the Defendant attempts to reverse the responsibility for discharging the burden of proof. The Court finds, on that score, that the Federal Republic of Nigeria did not provide any contrary evidence to prove its rejection of the Applicant's allegations.

35. Consequently, in the absence of contrary proof, the Court holds that the exhibits contained in the Application do establish the evidence of the allegations brought before the Court by the Applicant. Therefore, the Applicant has the legal ground to plead her case before this Honourable Court and to defend her cause.

36. **As to the alleged violation of Articles 1, 2, 3, 4, 5, 18 and 23 of the African Charter on Human and Peoples' Rights arising from the Federal Republic of Nigeria's default in its obligation to ensure the protection and safety of the late Mr. Felix Afolalu and to prevent the post-electoral violence which caused his death**

37. The Applicant blames the Federal Republic of Nigeria for failing to take appropriate measures to protect and ensure the safety of her husband against post-electoral violence.

38. Relying on Article 4 of the 24 July 1993 Revised Treaty of the Economic Community of West African States (ECOWAS) which provides for the applicability of the African Charter on Human and Peoples' Rights to the Members States of ECOWAS, the Applicant maintains that by virtue of Article 1 of the African Charter on Human and Peoples' Rights, the Defendant is under obligation to recognise the rights, duties and freedoms enshrined in the said African Charter; and to undertake to adopt legislative or other means to give effect to them.

39. Plaintiff Counsel pleads that the combined effect of the above-cited provisions of the said African Charter is that States shall be held responsible for private acts if they fail to act with due diligence to prevent violations of rights, or if they fail to investigate and punish acts of violence, or provide adequate compensation for victims of such violent incidents.

40. The Applicant equally buttresses her arguments by relying on publications of the African Commission on Human and Peoples' Rights (ACHPR) **in Amnesty International & Others *v.* Sudan**

(2000) AHRLR 297 (ACHPR 1999) Malawi African Association and Others *v.* Mauritania (2000) -AHLRLR 2000, 149, Mulezi *v.* Democratic Republic of Congo (2004) AHRL 3, Thomas Sankara *v.* Burkina Faso (2006) AHRLR 23.

41. The Federal Republic of Nigeria refuted all her allegations, considering them as speculative, pre-emptive and baseless. Neither in its written pleadings nor in the oral procedure does the Federal Republic of Nigeria demonstrate the inaccuracy it alleges as contained in the argumentation of the Applicant. The Court observes that the Federal Republic of Nigeria contented itself with rejecting the allegations of the Applicant on the ground that they are not proven.

42. The Court notes however that the Defendant affirms that it mobilised security agencies to quell the violence which erupted from the mob action that followed the elections, and that it set up a Committee of Inquiry to investigate those incidents; therefore, it was conscious and alive to its responsibilities.

43. The Court notes, first and foremost that unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms, the issue of human rights violations arising from violent acts, riots or insurgencies is not catered for by the African Charter on Human and Peoples' Rights. Again, in the light of the circumstances of the case, the issue of the protection and safety of the Applicant's late husband and of his murder, is provided for within the general framework of State liability, incumbent upon Nigeria as a State, in relation to the pleas in law invoked by the Applicant, especially Article 4 of the African Charter on Human and Peoples' Rights, which provides: ***"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."***

44. It is trite that States shall be held responsible for groupings and gatherings which degenerate into violent incidents resulting in human rights violations.

45. The State is indeed blameable in civil terms for damages and injuries, resulting from crimes and offences committed with open force or through violence, by armed or unarmed groups or by mobs, against persons or properties.

46. Applying this principle to the instant case, the Applicant maintains that her husband was engaged in official work on 18 April 2011, at the Nuhu Bamalli Polytechnic, when he was set upon by a group, chased to his residence, and murdered in front of the members of his family. The murder occurred within the context of post-electoral violence.

47. It is the view of the Court that the facts as narrated by the Applicant do show that the Nigerian authorities, or generally speaking, the Federal Republic of Nigeria, is not involved in the murder of Mr. Felix Afolalu.

48. However, the Court holds that non-involvement of the Federal Republic of Nigeria in the murder of Mr. Felix Afolalu does not absolve the State of Nigeria from blame for defaulting on its State responsibilities, more so when it has declared in its own words that it is very much alive and conscious to its responsibilities.

49. The Court points out that strict liability may only be admitted if it is demonstrated that the Federal Republic of Nigeria did not take the appropriate measures for ensuring the safety and protection of persons and properties or for preventing or averting post-electoral violence, i.e. if the Federal Republic of Nigeria had not demonstrated failure in putting in place measures capable of preventing violations of human rights and loss of human lives, notably the death of the Applicant's husband.

50. The Court recalls that this clearly stated obligation regarding protection of life, as enshrined in Article 4 of the African Charter on Human and Peoples' Rights, implies that the State shall put in place an administrative and legal framework specifically designed to deter violent acts from being committed against people; the framework

must be anchored on a mechanism of application conceived to prevent, suppress and sanction violent acts.

51. Consequently, in the context of tension-packed elections, the Court is of the view that the State shall take the required security measures and make the utmost effort at ensuring maintenance of order. The State is under obligation to prevent all demonstrations with the likelihood of degenerating into violent acts which may cause loss of human lives.

52. Besides, while engaging in such preventive enterprise, the State shall undertake investigations to detect risk of violence and adopt appropriate measures thereof.

53. As recognised by the African Commission on Human Rights in its Decision 272/03 in *Case Concerning* **Association of Victims of Post-Electoral Violence & Interights *v.* Cameroon**, the issue at stake in that case was not so much a matter of finding what acts may have contributed to the violation of the rights in question, but that of ascertaining whether the State took the required measures to prevent those acts from being committed.

54. It is not a question of incriminating the State for every act perpetrated by any citizen against guaranteed rights, but determining whether, given the imminence of the risks of serious violations, notably during the period of elections, the State applied the necessary due measures.

55. In its judgment of 29 July 1988 on **Velasquez Rodriguez *v.* Honduras** (SER.C No. 4), paragraph 172 the Inter-American Court of Human Rights held, that: *"... **an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."***

56. It is apparent from the Statement of Defence filed by Federal Republic of Nigeria that the measures (mobilising security agencies and setting up a Committee of Inquiry) were taken *after* the outbreak of the post-electoral violence which caused the death of the Applicant's husband. The conclusion therefore is that no preventive measures were put in place to prevent the post-electoral violence.

57. Manifestly, that negligence played the role of a catalyst in the outbreak of the post-electoral violence which took away the life of the Applicant's husband.

58. Hence, by failing to prevent the post-electoral violence, the Court holds that the Federal Republic of Nigeria defaulted in the ultimate obligation imposed on it by Article 1 of the African Charter on Human and Peoples' Rights, which require that it ensure the protection and safety of its citizens, not only by way of appropriate legislation and effective implementation of same, but also by protecting its citizens from injurious acts which stand the chance of being committed by third parties.

59. The Court is of the view that the provisions of Articles 2 and 4 of the African Charter were violated since Mr. Felix Afolalu, a lecturer in a polytechnic establishment where his residence was located, was alive within his rights and freedoms when he was attacked. The attack infringed upon his rights and freedoms and caused his death, and both of these transgressions were facilitated by the Federal Republic of Nigeria defaulting in its laid down obligation to protect him from such violence.

60. Consequently, the Court is of the view that the liability of the Federal Republic of Nigeria is established.

61. The Federal Republic of Nigeria does not at any rate deny its responsibility in the matter at stake, but rather affirms that it set up a Commission of Inquiry in, respect of the violence, and that after the Commission had submitted its report, it was not satisfied with the

extent of work done and so it set up another one to do a more thorough job.

62. In that regard, the Court holds that the components of the right to life may equally be sub-divided to include explicit obligation upon the State to institute proceedings into any matter to which the State is connected, notably by conducting an effective inquiry into the violent incidents, and into the death which occurred. To that end, the Defendant's responsibility does not only involve the setting up of a commission of inquiry.

63. State responsibility also brings the State under the obligation to cause the arrest of the persons responsible for the said violent acts, including the murder of the Applicant's husband, and to prosecute them before the competent courts of law, and also award a just and fair compensation to the heirs of the deceased.

64. The Court finds that till today, three years after the murder of Mr. Felix Afolalu, the Defendant State has neither produced the report of the Commission of Inquiry which was setup, nor has it taken any steps towards trying before the courts of the Federal Republic of Nigeria, those responsible for the unlawful killing of Mr. Felix Afolalu; equally, the Federal Republic of Nigeria has not compensated the Applicant.

The Court holds therefore that the violation of the provisions of Articles 1, 2 and 4 of the African Charter on Human and Peoples' Rights is proven.

As to compensation of the Applicant

65. The Applicant affirms that victims of arbitrary killings are entitled to appropriate compensation. She relies on judgments delivered by this Honourable Court in the cases concerning **Chief Ebrimah Manneh *v.* Republic of Gambia, Hadidjatou Mani Koraou *v.* Republic of Niger**.

66. For the purposes of awarding the compensation due her, which she evaluates at 20 Million US Dollars, the Applicant asks that it may please the Court take into account, the annual salary her late husband used to earned (estimated at more than 1 Million Naira), the perilous economic conditions in which she finds herself together with her children, their substantial loss of income, and her inability to educate her children to the university level.

67. She draws the attention of the Court to the discriminatory treatment of the Defendant in terms of awards given to victims of the post-electoral violence. She affirms that the Nigerian Government has expressed no compassion for her, but at the same time it has singled out the families of 10 members of the National Youth Service Corps who were victims and paid them a compensation of 5 Million Naira each. That she only received from the Nuhu Bamalli Polytechnic, where her husband was employed, the sum of Fifty Thousand Naira (N50,000) to enable her organise the funeral ceremonies.

68. The facts, as related by the Applicant, are denied by Nigeria on grounds of lack of evidence.

69. The Court recalls that the principle of reparation constitutes one of the fundamental principles of the law regarding liability. It is sufficient that the harm to be repaired must exist in reality, must be directly linked to the victim, and shall be true and capable of being evaluated.

70. The principle of reparation thus demands a concrete assessment of the harm actually suffered. May be compensated in law: harms suffered, lost profits notably loss of benefits with the potential of increasing the values of inherited wealth, and finally, material harm suffered by indirectly affected victims in circumstances of the death of the principal victim.

71. In general terms, the Court made a pronouncement on the principle for providing relief for harms arising from human rights violations, in the cases concerning **Ebrimah Manneh *v.* Republic of Gambia, Hadidjatou Mani Koraou *v.* Republic of Niger**.

72. In the instant case, the Court finds a link between the post-electoral violence and the murder of Mr. Felix Afolalu, which triggers a *de facto* and *de jure* liability of the Federal Republic of Nigeria.

73. The Court concludes that the Applicant has, without any shred of doubt, suffered considerably as a result of the post-electoral violent incidents: she did not only lose her husband and suffered psychological trauma and material deprivations, but she also had to endure helplessness before the flagrant lack of due diligence exhibited by the authorities in the conduct of the inquiry. Besides, the Defendant State stated that it is not apparent from the pleadings of the case, that the Applicant suffered any material harm, and that she rather experienced some psychological pain.

74. According to doctrine and case law in international law of human rights, full or comprehensive reparation is impossible in matters of human rights violation, because such reparation does not fully or completely wipe off the harms caused the direct and indirect victims, who still continue to remain victims after the reparations proffered. It is therefore along this line of legal reasoning that the Inter-American Court of Human Rights orders, as the case may be, reparation of the consequences of the measure or situation which gave rise to the rights violation in question, and also, payment of a fair compensation to the injured party, including compensation of "indirect" victims such as heirs or "close relatives" of the direct victims (*cf.* Judgments on **Velasquez Case**, paragraphs 135-139; **Loayza Tamayo** Case, paragraph 92; **Alocboetoc Case**, paragraph 62).

75. As things stand, and considering the sufficiently convincing pleadings of the case, this Court, in carrying out an assessment which takes into consideration the gravity of the harms caused and the consequences of the material and psychological injuries suffered, as well as the personal and professional situation of the victim and his heirs, decides to award the Applicant an all-inclusive fair compensation, and grants her the sum of 10,000,000.00 (Ten million naira) for all the harms suffered.

DECISION

76. The Community Court of Justice, **adjudicating** in a public hearing, after hearing both Parties, in a matter on human rights violation, in first and last resort;

In terms of formal presentation

77. **Admits** the Application brought by Mrs. Modupe Dorcas Afolalu.

In terms of merits

78. **Adjudges** that the Federal Republic of Nigeria violated its obligations, under Articles 1, 2, 4 of the African Charter on Human and People's Rights;

79. **Adjudges** that owing to its lack of due diligence, the Federal Republic of Nigeria is held responsible for the post-election acts of violence which occurred at Zaria, Kaduna, resulting in the death of Mr. Felix Afolalu;

80. **Adjudges** that the said liability implies that the Federal Republic of Nigeria is required, not only to put in place a commission of inquiry in respect of the case at hand, but also arrest and prosecute before the competent courts, within the shortest possible time, those involved in the violent acts, and consequently, offer a just and fair compensation to the heirs of the victims of the violent post-election incidents, namely to the victims and/or heirs of the late Mr. Felix Afolalu;

81. As to reparation, the Court orders the Defendant State to pay to the Applicant the sum of N10,000,000.00 (Ten million naira) for all the harms caused;

82. Dismisses all other requests made by Mrs. Modupe Dorcas Afolalu;

83. Asks the Federal Republic of Nigeria to bear the costs, in accordance with Article 66 (2) of the Rules of Procedure of the Court.

84. **Thus made, declared and pronounced in a public hearing by the Community Court of Justice, ECOWAS at Abuja, in Federal Republic of Nigeria, on the day, month and year stated above.**

AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES:

1. **Hon. Justice Benfeito RAMOS** - *Presiding;*
2. **Hon. Justice Awa Nana DABOYA** - *Member;*
3. **Hon. Justice Clotilde MEDEGAN-NOUGBODE** -*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 AT ABUJA

JUDGMENT DELIVERED ON THE 10TH OF JUNE, 2014

SUIT N°: ECW/CCJ/APP/10/10
JUDGMENT N°: ECW/CCJ/JUD/l6/14

BETWEEN
THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS & ACCOUNTABILITY PROJECT (SERAP) & 10 ORS. } *PLAINTIFFS*

AND
FEDERAL REPUBLIC OF NIGERIA & 4 ORS. -*DEFENDANTS*

COMPOSITION OF THE COURT:
1. **HON. JUSTICE BENFEITO M. RAMOS** - *PRESIDING*
2. **HON. JUSTICE CLOTILDE N. MEDEGAN** - *MEMBER*
3. **HON. JUSTICE ELIAM M. POTEY** - *MEMBER*

ASSISTED BY:
TONY ANENE-MAIDOH (ESQ.) - *CHIEF REGISTRAR*

REPRESENTATIONS TO THE PARTIES:
1. **A. A. MUMUNI (ESQ.),** *WITH* **OLATIGBE OLAKITAN** *&* **SHOLA EGBEYINKA (ESQ.)** - *FOR THE PLAINTIFFS*
2. **MR. R. N. GODWINS,**
   (SOLICITOR-GENERAL, RIVERS STATE) WITH
   O. GBASAM (ESQ.) -*FOR THE 3RD, 4TH & 5TH DEFENDANTS.*

-Human Rights Violation - Right to Peaceful Assembly - Locus Standi - Legal Capacity - Cause of action - Proper parties - Jurisdiction of the Court - Uncontroverted evidence - Award of damages

SUMMARY OF FACTS

The Plaintiffs filed an Application against the Federal Republic of Nigeria alleging that without adequate consultation or compensation, the Defendants planned large-scale demolitions of settlements on the waterfront in their community. In a bid to peacefully protest against the enumeration and proposed demolitions, the Defendants' agents without any warning started shooting into the crowd which left some of the protesters injured and their properties destroyed.

The Defendants denied the allegations of facts and raised Preliminary Objection on the grounds that the 1st Plaintiff lacks standing to institute the action and the Court lacks jurisdiction to entertain the suit pursuant to section 46 (1) of the 1999 Constitution of the Federal Republic of Nigeria

In addition, the 3rd to 5th Defendants raised a Preliminary Objection on the jurisdiction of the Court to entertain the action on the grounds that the 3rd-5th Defendants are not proper parties to the suit and the suit is a proliferation of similar suit pending before a National court.

LEGAL ISSUES

1. *Whether the 1st Plaintiff has the standing to institute the action.*
2. *Whether the 3rd to 5th Defendants are proper parties to entertain the suit.*
3. *Whether the Plaintiffs' case discloses a cause of action.*
4. *Whether the pendency of an action before a domestic court ousts the jurisdiction of this Court.*

DECISION OF THE COURT

The Court held:

a. *That a Non-Governmental Organization may enjoy standing to file a complaint, even if the Applicant has not been directly affected by the violation.*

b. *That only States that are contracting parties to the ECOWAS Revised Treaty, the African Charter on Human and Peoples' Rights and other similar Human Rights Treaties can be sued before it, for alleged violation of Human rights accordingly. The 3rd - 5th Defendants are not proper parties.*

c. *That the mere allegation that there has been violation of human rights in the territory of a Member State is sufficient prima facie to justify the jurisdiction of this Court.*

d. *That the fact that a matter is already pending before a National Court, cannot be taken as an obstacle to the ECOWAS Court jurisdiction on alleged human rights violation.*

e. *That by alleging facts from which it can be inferred, at least prima facie, a remote possibility that the Defendant may have violated their rights, have established cause of action.*

f. *That the Federal Republic of Nigeria, is in violation of its obligation to guarantee the Plaintiffs' right to peaceful assembly, by failing to prevent or carry out a thorough investigation in order to hold accountable those responsible for the unlawful disruption of that peaceful demonstration, and to provide remedy for the victims of the arbitrariness of the security agents as provided by African charter on Human and Peoples' Rights and the International Covenant on the Civil and Political Rights.*

g. *The Federal Republic of Nigeria, to pay to each of the 2nd to 11th Plaintiffs, an equitable compensation of N500,000.00 (five*

hundred thousand naira) for the violation of their rights to peaceful assembly.

h. *Orders the Defendant, Federal Republic of Nigeria liable and to pay an equitable compensation for injuries suffered and distress endured to the following plaintiffs:*

   i. *Jonathan Gbokoko, the sum of N3,000,000.00 (Three Million Naira);*

   ii. *Joy William, the sum of N2,000,000.00 (Two Million Naira);*

   iii. *Mark Bomowe, the sum of N1,000,000.00 (One Million Naira).*

JUDGMENT OF THE COURT

PARTIES

1. The 1st Plaintiff is a human rights Non-Governmental Organization registered under Nigerian laws, while the 2nd to 11th Plaintiffs are indigenes of Bundu Ama and neighbouring communities in Rivers State of Nigeria.

2. The 1st Defendant is the Federal Republic of Nigeria, while the 2nd Defendant is the Chief Law Officer of the Federal Republic of Nigeria. The 3rd, 4th and 5th Defendants are the Governor and Chief Executive Officer, the Chief Law Officer and a public officer of the Rivers State Government, respectively.

PROCEDURE

3. By Application dated 28th October, 2010 and lodged at the Registry of the Court on 29th October, 2010, the Plaintiffs sued the Defendants for alleged violations of the rights guaranteed by Articles 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14 and 16 of the African Charter on Human and Peoples Rights; Articles 2, 3, 5, 7, 9, 12, 13, 17, 20, 21 and 25 of the Universal Declaration of Human Rights; Articles 2, 3, 6, 9, 10, 12, 22 and 26 of the International Covenant on Civil and Political Rights; Articles 2, 3, 5, 10, 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.

4. The Application was duly served on the Defendants.

5. On the 12th of November, 2012, the Plaintiffs filed an Application for accelerated hearing, dated 11th day of November, 2010.

6. On 21st June 2011, the 3rd to 5th Defendants filed an application dated 21st June for extension of time to file their defence and for deeming the attached statement of defence duly filed and served.

7. On 22nd June 2011, the 3rd to 5th Defendants also filed a notice of Preliminary Objection to the jurisdiction of the Court to entertain the action due to 1st Plaintiffs' lack of standing to institute same.

8. By Application dated 19th September, 2011 and filed on 20th September, 2011, the 1st and 2nd Defendants sought for extension of time to file their defence and for deeming the attached statement of defence as duly filed and served.

9. On 20th September 2011, the 1st and 2nd Defendants filed a notice of Preliminary Objection to the Court's jurisdiction dated 19th September 2011 on the 1st Plaintiff's lack of standing to institute the action.

10. The Plaintiffs filed two counter affidavits, dated 20th October 2011, in opposition to the Preliminary Objections raised by the 1st and 2nd Defendants and by the 3rd - 5th Defendants respectively.

11. Both parties made written submissions on the issues raised in the preliminary objection and, in view of the nature of the issues canvassed, decision on the preliminary objection was deferred to be taken at final judgment stage.

12. On 28th December 2011, the Amnesty International filed an *Amiscus Curae* brief pursuant to the inherent jurisdiction of the Court.

13. On 17th February 2012, the Plaintiff filed an Application pursuant to Article 43 of the Rules to call witnesses.

14. On 11th December 2012, the 3rd - 5th Defendants filed a motion for leave to call witnesses.

15. On 12th February 2014, the 1st and 2nd Defendants filed an Application to withdraw their Preliminary Objections dated 19th September 2011.

16. On 3rd March 2014, Plaintiffs filed their final address.

17. On 28th March 2014, the 1st and 2nd Defendants filed a motion for extension of time to file their final address and for deeming the attached final address duly filed and served.

18. On 14th April 2014, the 3rd - 5th Defendants filed an Application for extension of time to file their final written address and for deeming the attached address duly filed and served.

FACTS AS PRESENTED BY PLAINTIFFS

19. The Plaintiffs' case is that the Rivers State Government, with the complicity or support of the Federal Government, was planning a large-scale demolition of the City's waterfront settlement without adequate consultation with affected communities.

20. In July 2008, Rivers State announced that all waterfronts will be demolished and the Njemanze Waterfront, a community close to Bundu Ama, was demolished in August 2009. It is estimated that between 13, 800 and 19, 000 people were forcibly evicted from their homes. These evictions were carried out without adequate prior consultation with the residents and without giving adequate notice, compensation, alternative accommodation or legal remedies. Thousands of people, including children, women and the elderly, were left homeless and vulnerable to other human rights violations.

21. Also, on the morning of 12 October, 2009, government authorities, accompanied by security agents, wearing regular Army camouflage uniforms and camouflage head gear; camouflage uniforms and red berets; Mobile police uniforms; Mobile police uniform and "RSVG" flack jackets, police uniforms and "S.O.S"/swift Ops. Squad flack jackets, and plain clothes agents wearing "JTF" flack jackets', went to Bundu water front community to conduct an enumeration and assess the value of building structures earmarked for demolition.

22. An enumeration had been attempted a few days earlier, on 6 October, but residents had gathered together at the entrance of the community. The security forces did not enter and the enumeration was not

conducted. The Community Vice-Chairman, who was among those who had gathered to protest the enumeration, told Amnesty International he was manhandled by the security officers and threatened with lethal force.

23. Residents had learned of the second planned enumeration the day before and, on 12 October, a crowd gathered at the entrance to the community, next to the City's prison, to protest against the enumeration and the proposed demolitions. Those present at the protest described it as peaceful, with many women and children singing and chanting songs. At around 8.30am, two Mobile police (MOPOL) armoured personnel carriers approached the entrance of the community and parked next to the prison. At 9:00 am, a convoy of approximately 10 police agents and Army vehicles approached the prison junction. A small armoured vehicle leading the convoy, drove into the crowd.

24. Without any warning, the soldiers started shooting. They first fired shots in the air and drove their vehicles to the end of the road. Members of the community who were leading the protest told people not to run because, at the time, they believed that the government would not shoot to kill. The soldiers started shooting again, but this time, they fired shots into the crowd. Tamuno Tonye Ama, a 34 year-old man who took part in the protest, was shot on his left thigh and the bullet is still lodged in his flesh.

25. The protesters tried to run away but they were chased and fired upon by the security agents, who fanned out through the community. Apart from those who were shot in their homes, most people were shot from behind, as they ran.

26. As people ran away, members of the security forces followed them into the waterfront, shooting as they went. According to witnesses, security forces continued right through the waterfront up to the waters' edge. There were bullet holes in buildings and structures along the route that the security forces used.

27. After the shooting, members of the security forces accompanied enumerators into the waterfront to continue with their work.

28. The Plaintiffs contend that the above highlighted human rights, economic, social and cultural rights as well as civil and political rights, are recognized and guaranteed by the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and other relevant human rights treaties to which Nigeria is a State party.

29. They thus ask the Court for the following reliefs:

    a. A **Declaration** that the indiscriminate shooting into a crowd of unarmed protesters is unlawful and unjustifiable under any circumstance and a violation of international human rights obligations and commitments;

    b. A **Declaration** that the indiscriminate shooting was unlawful and a violation of the right to life and dignity of the human person, the right to security and health;

    c. That the **failure** of the Defendants and their agents to investigate and prosecute the perpetrators of the incident is unlawful;

    d. An **Order** of injunction restraining the Defendants and their agents from implementing any plan to carry out any enumeration in preparation for the "urban renewal" as non-conformity to the requirements under international human rights law would lead to further violation of the Plaintiffs guaranteed human rights;

    e. An **Order** directing the Defendants and their agents to promote, respect, secure, fulfill and ensure the rights of the 2nd - 11th Plaintiffs previously listed;

    f. An **Order** directing the Defendants and their agents to pay adequate monetary compensation in the sum of $100,000,000 (one hundred million dollars) to the Plaintiffs, for violation of

their rights, and to provide other forms of reparation which may take the form of restitution, satisfaction or guarantees of non-repetition.

DEFENDANTS' CASE

30. The 1st and 2nd Defendants, in their defence, denied all material allegation of facts in their statement of claim, except for paragraphs Bl, 2, 3, Di, ii, iii, vi, vii and viii, which were expressly admitted.

31. In addition, the 1st and 2nd Defendants raised a preliminary objection to the jurisdiction of the Court to hear the case on the following grounds that:

    a. The 1st Plaintiff lacks standing to institute the action;

    b. That under chapter iv Section 46(1) of the 1999 Constitution of the Federal Republic of Nigeria, it is the High Court of Nigeria that has the jurisdiction to hear this action.

32. The 3rd - 5th Defendants, in their defence, averred that the occupiers of the building at the said waterfront were mere squatters.

33. That though Rivers State Government had plans to carry out some Urban Development Projects, including the demolition of illegal structures and buildings in Port Harcourt, it never intended to demolish all waterfront settlements. Further, the waterfront settlements earmarked for demolition were those densely populated areas, including the Bundu waterfront, that were used as hideouts by hoodlums and miscreants, who have been deemed security risk to River State and other neighbouring States.

34. That before any demolition exercise was effected, the landlords of the waterfront were invited for meetings with the Defendants, to discuss issues on settlement of the inhabitants, payment of compensation or outright purchase of the buildings in order to ameliorate their sufferings. And that most of the landlords were in support of the demolition exercise on satisfactory terms.

35. That in the case of the Bundu waterfront, earmarked for demolition, the Special Adviser to the 3rd Defendant held meetings with the stakeholders and proposed alternative settlement or outright purchase and the stakeholders opted for outright purchase.

36. The Special Adviser then sent independent established Surveyors and Valuers to ascertain the number of structures at Bundu, to take census of its population, and calculate the value of the properties.

37. The Special Adviser with the surveyors visited 23 out of the 41 waterfronts in Rivers State, without any hindrance, successfully on the 6th day of October, 2009.

38. Having the same intention, they visited Bundu, but were harassed and beaten up by some hoodlums, who claimed that they had not been paid homage.

39. The Special Adviser, Mr. Theodore Georgewill, did an air broadcast to solicit for their understanding and to reassure them that what was being done was for the benefit of the owners of the squatter settlements and the government.

40. On the 12th of October, 2009, he went back to Bundu with another group of surveyors, as the first group of surveyors refused to go back due to the beatings.

41. On getting there, they found that the entrance to Bundu had been barricaded with cars, commercial buses owned by the Bundu residents and crowd.

42. While attempting to remove the barricade, they heard gun shots directed at them, emanating from all directions especially from one uncompleted building.

43. For security reasons, they went to the Bundu waterfront with some mobile policemen to protect the surveyors against the reoccurrence of the previous incident and, when the shots got very serious, they called for backup, who came and shot 5 canister of tear gas in the

direction of the shooting, which created pandemonium. As a result, people started running, resulting in some getting injured.

44. After the people ran away, the enumerators entered into the waterfront and carried out the exercise, as intended, in collaboration with the landlords of Bundu.

45. At about 4 pm, on the 12th of October, 2010, the date of the incident, the police, led by Mr. Oni Johnson, the Chief Security Officer to the Governor of Rivers State, and others who went for the valuation and enumeration exercise, were informed that some Bundu residents were killed by the policemen.

46. No dead bodies were produced by any Bundu residents, despite enquiries by the police or soldiers for the State Criminal Investigation Department to carry out post-mortem exercise.

47. Then, between the 20th and 26th of October, 2009, the Defendants saw publications in the "Weekly Star" and "Verite", containing photos of 2 dead people that were alleged to have been killed in the Bundu incident.

48. Defendants state that this was a set-up, as one of the dead persons had earlier died by drowning and his parents asked the police to release his corpse for burial and this was carried out.

49. That pursuant to the aforesaid Newspaper publications, the then Attorney General of Rivers State, Ken Chikere Esq., wrote the police asking for detailed investigation on the matter by the letter dated 9th November, 2009 and the police replied that the death occurred from the Bundu incident by the police report dated 23rd November, 2009.

50. The police invited and obtained statements from the publishers of the Newspaper, who denied knowledge of the publication and admitted that the authors of the publications did so without verifying the circumstances of the death of Onyebuchi Ngozi, the deceased who was allegedly killed in the Bundu incident, and the 2 publishers, Prince Okaranto and Owei Sikipi, were charged for the offences.

51. In addition, the 3rd to 5th Defendants raised a preliminary objection on the jurisdiction of this Court to entertain this action, on the following grounds:

    a. That the allegation of breach of rights by the Plaintiffs is misconceived and a deliberate ploy to interfere with the executive powers of the 3rd Defendant;

    b. That the 3rd - 5th Defendants are not proper parties to the suit, not being Member States;

    c. That the suit is an abuse of process, being a proliferation of similar suit pending before the National court.

ANALYSIS OF THE COURT

52. The Defendants raised preliminary issues for determination by this Court, which are summarized as follows:

    a. That the 2nd - 11th Plaintiffs, not being residents of Bundu, do not have sufficient interest in the dispute emanating from the planned demolition for urban renewal in that community and, as such, they lack the standing to institute and maintain the suit. For the 1st Plaintiff, the lack of standing is also based on the fact that it has not been affected in any way by the acts attributed to the Defendants and there is no public interest to legitimize the complaint;

    b. That the 3rd - 5th Defendants are not proper parties to the dispute because, not being ECOWAS Member States, they are not under the jurisdiction of the ECOWAS Court of Justice. Therefore, it is only a High Court in Nigeria that is competent to hear the case and, as such, this Court lacks jurisdiction to entertain same;

    c. That the Plaintiffs have not disclosed any cause of action against the 1st and 2nd Defendants.

53. It is expedient to first consider these issues before delving into the substance of the Plaintiff's case.

On objection to Plaintiffs' standing to sue

54. The Law of *locus standi* or standing to sue relates to the propriety of a litigant to institute an action. The standing focuses on the right of the party in the matter either in terms of injury suffered or special interest possessed which is worthy of protection.

55. The Plaintiffs' case, in a nutshell, is that because the Defendants were planning to demolish the Bundu waterfront without due process, they embarked on a peaceful demonstration during which the Defendants used armed security officers to disrupt the demonstration and, in the process, shot and wounded the 2nd - 11th Plaintiffs. They allege that the police use of live ammunition on peaceful demonstrators is unjustified and a violation of their fundamental rights.

56. The arguments put forward by the Defendants on Plaintiffs' lack of standing due to their non-residence at the waterfront is made without due regard to the totality of the averments in the Plaintiffs' pleadings and, so, misconceived. In situations such as those described in the instant case, residence or lack of it, is not a condition for standing to sue, as their claim is not based solely on the demolition but also on the alleged violation by the Defendants of the 2nd to 11th Plaintiffs' right to peaceful demonstration, through the use of force, such as shooting at the protestors. The 2nd to 11th Plaintiffs therefore have the standing to institute the present action.

57. As to the 1st Plaintiff, a Non-governmental Organization, the Defendants contend that there is no public interest in the matter as to warrant it to institute and maintain this action.

58. The Court acknowledges that, according to a strict literal construction, only those directly affected by an act or omission violating their human rights can enjoy status of victim and have standing to lodge a complaint against the perpetrators of the said violation. However,

even those jurisdictions which started embracing a strict literal interpretation of the concept of victim, for the purpose of human rights protection, have evolved into a more flexible approach in order to allow other persons, not directly affected by the alleged violation, to have access to the Court and seek justice, on behalf of the actual victim and to hold accountable the perpetrators. See this Court's Decision in **ECW/CCJ/RUL/01/14 Mrs. Stella ljeoma Nnalue & 20 Ors *v.* Federal Republic of Nigeria** delivered on 31st January, 2014.

59. In the African context and in the framework of the African Charter, to which this Court has to pay due regard, it is worthy to note that since its inception, the African Commission on Human and Peoples' Rights has not been raising any objection to Non-governmental organizations standing to lodge complaints on behalf of individuals who, for any reasons, are deprived of means to have access to justice. As recognized by the doctrine, *"Although the African Charter in Article 55, by referring to communications other than those of States Parties' does not specifically identify or recognize the role of NGOs in the filing of complaints regarding human rights violations, in practice the complaints procedure before the Commission has been used mainly by NGOs who have filed complaints on behalf of individuals or groups alleging violation of human and peoples' rights enshrined in the African Charter"* - **The African Charter On Human and Peoples' Rights, The System in Practice 1986-2000, page 257.**

60. The same favourable approach to the NGO's standing to lodge complaints for human rights violation, even when they are not direct victims, can be found in Rule 33, Section 1, paragraph (d) of the African Court on Human and Peoples' Rights Rules.

61. With the same purpose to ease access to Justice on Human Rights issues by the most vulnerable individuals and by impoverished communities, which, most of time, do not have means to lodge a complaint by themselves, in particular when the opposite party is a

very powerful entity, the ECOWAS Court of Justice has reiterated in many instances that, in case of serious human rights violation, a Non-Governmental Organization may enjoy standing to file a complaint on their behalf or to join them in the same complaint, even if the applicant is not been directly affected by the violations it is complaining of. See this Court's decision in **Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) *v.* The President of the Federal Republic of Nigeria & 8 Ors**.

62. In the light of the above, the objection on the standing of the Plaintiffs cannot therefore be sustained.

On whether the 3rd to 5th Defendants are proper parties and whether the Court has jurisdiction to entertain the case.

63. In considering whether the 3rd - 5th Defendants are proper parties before this Court, two issues need to be clarified. The first is the issue of involvement of the 3rd - 5th Defendants in the facts exposed by the Plaintiffs, while the second issue relates to the jurisdiction of this Court over the 3rd to 5th Defendants

64. In addressing the first issue, there is need to consider the facts alleged by the Plaintiffs, to make up their cause of action, which, in a nutshell, are the following: the Rivers State Government's plan to demolish the waterfront in Budun Community, where at least some of the Plaintiff resided; the readiness to conduct enumeration exercise and assess the value of buildings earmarked for demolition while there was a pending contention on compensation; the demonstration by the residents against the said demolition, without guarantee of being awarded just compensation; and, finally, the decision by the security agents to disperse the demonstration, resulting in the shooting and injuries to some of the Plaintiffs.

65. The above synopsis of the allegation by the Plaintiffs shows the involvement of the 3rd - 5th Defendants in the action complained about. The Defendants, who did not deny their involvement in the events,

justified the shooting of 5 canister of teargas by the security agents as a reaction to previous shot that had been fired by somebody placed at a building in the vicinity. In any case, they denied having wounded the Plaintiffs or any other protester.

66. The Plaintiffs, on their part, reiterate the allegation made in their pleadings, attributing to the security agents, acting under Defendants' order, the initiative to disperse a peaceful gathering through shootings at the protesters which resulted in injuries on some of them. Therefore, according to the Plaintiffs, both Rivers State and the Federal Republic of Nigeria are responsible for what they describe as violation of their human rights.

67. Based on the contentions of the parties, the issue of proper parties to stand as Defendant in this dispute and the Court's jurisdiction over them arises because, as this Court has consistently maintained, only States that are contracting parties to the ECOWAS Revised Treaty and to the African Charter on Human and Peoples' Rights and other similar Human Rights Treaties can be sued before it, for alleged violation of human rights occurring in their territory. See, among others, the decision in **Peter David v. Ambassador Uwechue**, reported in 2010 CCJELR, where the Court held that only ECOWAS Member States and Community Institutions can be proper parties in disputes for alleged human rights violation. See also, in **Suit N°: ECW/CCJ/APP/08/09 Registered Trustees of the Socio-Economic and Accountability Project *v.* The President of the Federal Republic of Nigeria & 8 Ors.** (supra).

68. Applying the above principles to the instant case, and taking into consideration that the Rivers State is neither an ECOWAS Member State, nor a contracting party to the African Charter on Human and Peoples' Rights or other similar human right Treaties whose enforcement is sought by Plaintiffs, the Court holds that it has no jurisdiction over that Defendant, for the same reasons put forth in Peter David, which also applies to 4th and 5th Defendants, who are mere officials of the said State. Therefore, those three Defendants are not proper parties to this suit.

69. With respect to the 1st Defendant, the Federal Republic of Nigeria, the situation is different, since it is a contracting party to ECOWAS Revised Treaty and related protocols, as well as to African Charter and other human rights treaties invoked by the Plaintiffs. In fact, by signing and ratifying those instruments, the Federal Republic of Nigeria solemnly accepted the jurisdiction of the Court over complaints lodged against it for alleged violation of human rights that occurs within its borders, no matter which entity is seen as responsible before the municipal law.

70. In fact, by virtue of Articles 9(4) and 10(d) of the Supplementary Protocol A/SP.1/01/05, this Court has jurisdiction to determine cases of violation of human rights that occurs in any ECOWAS Member State and is for the concerned State, as a sovereign country, to respond before the ECOWAS Court of Justice for alleged breach of its international obligations arising from 3 treaty to which it is a party.

71. In its judgment in the action between **Private Alimu Akeem and Federal Republic of Nigeria Judgment Nº: ECW/CCJ/RUL/05/11**, this Court stressed that its jurisdiction cannot be in doubt once the facts adduced are related to human rights violation, as indicated by its own case law of Judgment **Nº: ECW/CCJ/RUL/02/10 of 14 May, 2010 APP/07/08**, **Hissein Habre *v.* Senegal**, **paragraphs 53, 58 and 59; Judgment Nº: ECW/CCJ/JUD/05/10 of 8th November, 2010**, in the case **ECW/CCJ/APP/05/09 of Mamadou Tandja *v.* Niger paragraph 18(1)(b)**.

72. As has been consistently held by this Court, the mere allegation that there has been 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 had been given opportunity to present their case, with full guarantees of fair trial.

73. The Federal Republic of Nigeria contends that the competent court to adjudicate on the dispute between the parties is a domestic court, more precisely the Rivers State High Court, where the case is pending.

74. However, that argument seems to be misconceived, because when the complaint is based on allegations of human rights violations, as it is in the instant case; the Community Court of Justice cannot give up its jurisdiction in favour of a domestic court, on the assumption that local remedies shall be exhausted, since this is not a requirement imposed on the victims to have access to the ECOWAS Court of Justice. In fact, what the Protocol on the Court establishes, in Article 10 Section (d) Subparagraph (ii), as an impediment to the Court's jurisdiction is the fact that **"the same matter has been instituted before another international court for adjudication".**

75. Therefore, the circumstance that the matter is already pending not before an international court, but before a national court, cannot be taken as an obstacle to the ECOWAS Court jurisdiction. See, among several cases, the decision in **Suit N°: ECW/CCJ/APP/07/11 Valentine Ayika *v.* Republic of Liberia.**

76. In applying the above decisions to the present case, the Court holds that pendency of the suit before a domestic court cannot oust its jurisdiction to determine this case on alleged human rights violation.

ON DEFENDANTS OBJECTION ON THE CAUSE OF ACTION

77. A cause of action can be described as the reason or the facts that entitle a person to sue or bring his case to the court, or a factual situation that entitles one person to obtain from the court a remedy against another person. (**Letang *v.* Cooper**) [1960] 2 All ER 929.

78. According to the facts alleged by Plaintiffs in their pleadings, the reason why they bring the case against the Defendant, the Federal Republic of Nigeria, is that a public entity was planning to demolish a waterfront in Bundu Community for urban renewal purpose, without giving the residents previous assurance of being awarded just

compensation. For that reasons, the Plaintiffs and other residents decided to embark on a peaceful demonstration to express their opposition to that exercise. According to Plaintiffs' narration, that peaceful demonstration had been dispersed by security agents, who shot at the demonstrators injuring some of them, namely the Plaintiffs. Considering that the planned demolition and the action by the security agents, who dispersed their peaceful demonstration with the use of force, substantiate a violation of their human rights, whose enjoyment the Federal Republic of Nigeria is under international obligation to ensure, they decided to bring that Defendant to the Court to seek justice and remedy for the said violation.

79. We are thus persuaded that the Plaintiffs, by alleging facts from which can be inferred, at least *prima facie*, a remote possibility that the Defendants may have violated their human rights, have established in their pleadings an arguable cause of action.

ON THE MERITS

80. Having dealt with all preliminary objections raised by the Defendants, it is now time to move into the merits of the case.

81. In the bid to establish their case, the Plaintiffs called five witnesses who testified on the facts alleged in their pleadings. Through the witness testimonies, Plaintiffs also tendered documentary evidence that were admitted by the Court for further consideration.

82. PW 1, in his evidence, stated that, on 12 October, 2009, he was on his way to work when he saw many people, children, women and men protesting at Bundu Junction; that be saw amoured cars and Hilux vehicles loaded with military and police men moving towards the crowd; that the security men started shooting at the protestors who started running away; that in the process he was shot. He was taken to a hospital where he was operated upon and the bullet removed. He tendered the medical report. Under cross examination, he admitted not knowing the type of gun the bullet came from but maintained he was shot by the police.

83. PW 2 told the court that, on 12 October 2009, the community town crier announced that residents should all go to Bundu to protest against the proposed demolition and so they all went with placards, singing and dancing. That he saw an armoured car driving towards the protesters, followed by some Hilux vehicles loaded with soldiers who then jumped down and started shooting at the protesters. He was running when he felt an impact on his left-side and blood rushing out of him. He realized he was shot and shouted for help at one Tanye Ama, who was running in front of him, before he passed out, and later recovered consciousness m a hospital, where he had been admitted and treated. He was discharged from hospital on 18th October, 2009. He tendered his medical reports. He concluded by saying that the injury has affected his work as a bricklayer and, as a result, his income has greatly reduced due to his inability to perform strenuous masonry jobs.

84. PW 3 testified that she is from Bundu waterfront and was shot while at home. That she had earlier heard gunshots, went outside and learnt soldiers were shooting. She was in the house when the bullet hit her on the leg and she was taken to Teme Clinic, where her leg was operated on. She was admitted for about four days and discharged while the iron they put in her leg was left inside for about 6 months. She said she was a student and lost a school-year due to the injury.

85. PW 4 told the Court that on 12th October 2009, he, in company of others, walked to Bundu to join the people about the protest; That when he arrived at the Bundu waterfront, he saw two APC armoured tankers and about 7 to 10 Hilux vehicles filled with soldiers and policemen parked close to the prison and he called the Director of CMAP, Michael Umemedimo, and told him what was happening; That the armoured car was manned by a man in Army camouflage uniform; That the armoured tanker driver drove towards the protestors and started shooting at the protestors while the security officers in the Hilux vehicles also jumped down and started shooting at the protestors; That he observed two people shot before he ran into the NPA Quarters for safety; That he then called one Ankio

Briggs and Lucy Freeman and told them what was happening and, also, sent text messages to Senator George Sekibo, Barrister John Kalipa, a Member of House of Representatives, as well as the Governor to inform them of the happenings and ask for their intervention. He also narrated the steps he took to send the injured to hospital for treatment. He also stated that he recorded some of the events of that day with his camera. Under cross-examination, the witnesses confirmed that some of the people whose houses were demolished in another settlement were compensated but insisted that not all the people were compensated. He affirmed that it is the responsibility of the 3rd - 5th Defendants to embark on the development of the state. He agreed that he is not a resident in Bundu but was involved in organizing the protest.

86. PW 5 told the Court how he was alerted by PW4 of the happenings on the 12th of October, 2009 and the part he played. He tendered a video clip of some of the events recorded by PW4 and himself. Under cross-examination he stated that he contributed materials for the Amnesty International report but that he is not a staff of Amnesty International. He stated that he learnt that someone was killed, as contained in two newspaper reports but that he has no medical report of the death. He admitted that the Governor refuted the incident of the 12th of October but stated that he verified the governor's statement and found them to be false. He admitted not discussing with the Governor, as he did not consider it necessary.

87. The 1st and 2nd Defendants called no witnesses, while the 3rd to 5th Defendants called one witness.

88. DW1 states that he is the Special Adviser to the Governor of Rivers State on Waterfront Development. He based his evidence on the video clip tendered by PW5, as well as the briefing he got from field staff. He stated that the video clip did not show that any of the Plaintiffs suffered injuries at the hands of the Defendants. He tendered the master plan of the Urban Renewal Project of the waterfronts and maintains that it is the Federal Government that controls the

police and military in Nigeria. Under cross-examination, he admitted that the protest was peaceful and, as such, there was no need to call for security reinforcement.

89. It is trite that an evidence that is uncontroverted is taken as admitted. The statements made by the Plaintiffs' Witnesses, which were not in any way challenged by the Defendant, the Federal Republic of Nigeria, provide this Court with enough grounds to establish as truth the allegation that, on 12th October, the 2nd to 11th Plaintiffs were taking part in a peaceful demonstration against the proposed demolition of Bundu waterfront settlement by the Rivers State Government, when in a bid to disrupt the protesters the military personnel shot and injured some of the Plaintiffs. No serious reason has been given, no evidence has been led or read during the trial to justify the decision taken by the security forces to disrupt that peaceful demonstration and to shoot at the demonstrators injuring some of them. Even the single witness called by the Defendant, the Rivers State, confirmed under cross-examination that the demonstration was peaceful and that there was no need to call for reinforcement of security agents. He went further to state that in the Federal Republic of Nigeria, police and military are under Federal Government control. The Federal Republic of Nigeria did not challenge that testimony in any way.

90. This Court also takes judicial notice of the fact that in Nigeria, the Police and Armed Forces, are under the exclusive control of the Federal Government. The police and army are thus agents of the Federal Government.

91. Article 11 of African Charter on Human and Peoples' Rights provides that ***"every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedom on others".***

92. Article 21 of International Covenant on Civil and Political Rights also guarantees the same right, in the following terms: ***"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public 0rder (order public), the protection of public health or morals or the protection of the rights and freedoms of others"***.

93. According to a definition given by OSCE Guidelines, ***"freedom of peaceful assembly is a fundamental right that can be enjoyed and exercised by individuals and groups, unregistered associations, legal entities and corporate bodies. Assemblies may serve many purposes, including the expression of diverse, unpopular or minority opinions. The right can be an important strand in the maintenance and development of culture, such as in the preservation of minority identities. The protection of freedom to peacefully assemble is crucial to creating a tolerant and pluralistic society in which groups with different belief, practices or policies can exist peacefully together."*** **- Guidelines on Freedom of Peaceful Assembly, p. 15.**

94. In the words of some experts, ***"the purpose of the right to peaceful assembly is to allow people to come together and express, discuss, and protect their common interest"*** **(Harris, O' Boyle and Warbrick, Law of the European Convention on Human Rights , Oxford University Press, 2009, p. 417).**

95. For INTERIGHTS ***"The freedoms of peaceful assembly and association provides space for the development of civil and political society, an arena for people to express different views, values and interest, and a platform for such views, values and interests to be heard"***.

- INTERRIGHT, Freedom of Peaceful Assembly and Association under the European Convention on Human Rights, a Manual for Lawyers, July 2010, p. 2.

96. The Federal Republic of Nigeria is a contracting party to both the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights and, as such, is under strict obligation to ensure the free enjoyment of the right to peaceful assembly by all individuals living in its territory.

97. By failing to prevent the violation of the Plaintiffs' right to peaceful assembly or to carry out a thorough investigation on the violation of that right, in order to hold accountable those responsible for the unlawful disruption of that peaceful demonstration that took place in Bundu Community on 12 October, 2009, and to provide remedy for the victims of the arbitrariness of the security agents acting under public Authority control, the Federal Republic of Nigeria has breached its international obligation arising from the African Charter on Human and Peoples' Rights and the ICCR and shall be held accountable, accordingly.

98. The Court has reiterated in many instances that, in case of serious violation of Human Rights, the victim may be awarded an equitable compensation. In the instant case, taking into consideration all circumstances surrounding the events, namely the injuries and distress suffered by the Plaintiffs, equitable reparation shall be awarded to them.

99. Plaintiffs Jonathan Gbokoko, Joy Williams and Mark Bomowe presented documentary evidence of injuries suffered and the reduction in their earning capacity as a result of the actions of the security forces of the Federal Republic of Nigeria.

DECISION

For these reasons,

The Court **adjudicating** in a public hearing, and after hearing both parties and after deliberations, hereby:

a) **Holds** the Application filed by the Plaintiffs admissible;

b) **Declares** that it has no jurisdiction over the 3rd to 5th Defendants, which are not proper parties in the suit;

c) **Holds** the Defendant, the Federal Republic of Nigeria, in violation of its obligation to guarantee the Plaintiffs' right to peaceful assembly, as provided by Article 11 of the African Charter on Human and Peoples' Rights and Article 21 of the International Covenant on the Civil and Political Rights;

d) **Orders** the Defendant, the Federal Republic of Nigeria, to pay to each of the 2nd to 11th Plaintiffs, an equitable compensation of N500,000.00 (Five hundred thousand naira) for the violation of their rights to peaceful assembly;

e) **Orders** the Defendant, Federal Republic of Nigeria, to pay an equitable compensation for injuries suffered and distress endured to the following Plaintiffs:

i. Jonathan Gbokoko, the sum of N 3,000,000. 00 (Three Million Naira);

ii. Joy William, the sum of N 2,000,000.00 (Two Million Naira);

iii. Mark Bomowe, the sum of N 1,000,000.00 (One Million Naira).

f) **This Court Orders** the Federal Republic of Nigeria to bear the Cost of this proceedings.

DELIVERED IN OPEN COURT ON THE DATE ABOVE MENTIONED.

- **Hon. Justice Benfeito M. RAMOS** - *Presiding;*
- **Hon. Justice Clotilde N. MEDEGAN** - *Member;*
- **Hon. Justice Eliam M. POTEY** - *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 AT ABUJA, NIGERIA

TUESDAY THE 10TH DAY OF JUNE 2014.

SUIT NO: ECW/CCJ/APP/30/11
JUDGMENT NO: ECW/CCJ/APP/17/14

BETWEEN

1. **DEYDA HYDARA JR.**
2. **ISMAILA HYDARA**
3. **INTERNATIONAL FEDERATION OF JOURNALISTS AFRICA**

} *PLAINTIFFS*

AND

REPUBLIC OF THE GAMBIA - *DEFENDANT*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE AWA NANA DABOYA** - *MEMBER*
3. **HON. JUSTICE ANTHONY A. BENIN** - *MEMBER*

ASSISTED BY:

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

REPRESENTATION TO THE PARTIES:

1. **OLUJOKE ALIU (MRS.)** *&*
   D. D. KILLI (ESQ.) - *FOR THE PLAINTIFFS*
2. **MESSRS. B. V. P. MAHONEY** *&*
   S. A. ABI - *FOR THE DEFENDANT*

- Effective investigation - Human rights violation - Right to life - Freedom of expression - Press freedom - Burden of proof

SUMMARY OF FACTS

By an application filed on the 2nd November 2011, at the registry of this court, the Plaintiffs alleged a violation of the right to life of their father, the late Deyda Hydara who was a reputable journalist and devoted his life to protecting the media freedom.

The Plaintiffs aver that some weeks preceding his death, the deceased received several death threats in connection with his journalist work and that on the day of his demise, he was placed under a constant surveillance by a person suspected to be an operative of the State Security Service.

The Plaintiffs allege that the state authorities have failed to carry out an effective investigation to ascertain the circumstances of the murder. That no public scrutiny of the investigation was allowed and the family of the deceased were not involved in the investigation. They further state that the Defendant has tolerated a climate of impunity and has failed to provide redress to the victims.

The Defendant rejected the entire claim by the Plaintiff and in response state that they carried out effective and diligent investigation into the murder of the deceased. That the deceased did not make any disclosure to the state about any threats of his life or seek protection from the state. The Defendant denied tolerating any culture of climate of impunity.

LEGAL ISSUES:

1. *Whether or not the Defendant is responsible for the violations as alleged*

2. *Whether or not the Defendant conducted diligent and effective investigation into the murder of the deceased.*

DECISION OF THE COURT

The Court held:

1. *That there is no direct linkage between the Defendant and the murder of the deceased.*

2. *That the Defendant is liable for the apparent lack of effective investigation into the murder and that the NIA was not an impartial body to conduct the investigation.*

3. *That having failed to lead evidence in rebuttal of the allegation of impunity and violation of freedom of expression, finds the Defendant liable for the violation.*

4. *Awarded compensation in the sum of Fifty Thousand U.S. Dollars ($50,000.00) to the Plaintiffs for the prejudice suffered.*

JUDGMENT OF THE COURT

Parties and Representation

The first and second Plaintiffs are nationals of the Republic of The Gambia who now live in exile in the United Kingdom and the USA respectively as political refugees, following the death of their father, the late Deyda Hydara, Sr. The third Plaintiff is Africa chapter of the International Federation of Journalists, an NGO. The Defendant is a Member State of the Economic Community of West African States (ECOWAS). The Plaintiffs were represented by Olujoke Aliu (Mrs.) and D. D. Killi Esq. whilst the Defendant was represented by Messrs Basiru V. P. Mahoney and Simeon Ateh Abi both of the office of the Attorney-General of The Gambia.

The Application

The basis for this case is neatly summed up in the originating application filed in this Court on 23rd November 2011. It provides that 'this case concerns the continued failure by the state authorities to conduct an effective investigation into the killing of Mr. Deyda Heydara in Banjul in December 2004, in violation of the right to life, freedom of expression and press freedom guaranteed by Articles 1, 4 and 9 of the African Charter on Human and Peoples' Rights and Article 66 of the Revised Community Treaty.

The argument is made on the following grounds:

A. Failure to effectively investigate the murder of Deyda Hydara.

The state is required to conduct a thorough, rigorous, and independent investigation into the violent death of Mr. Deyda Hydara that is capable of ascertaining the circumstances of the murder, as well as of identifying and punishing the intellectual and material perpetrators of the act.

B. Tolerance of a climate of impunity.

The state contributed to Mr. Deyda Hydara's death by tolerating and causing a climate of impunity in the country as a result of its systematic failure to condemn, effectively investigate, and secure conviction:

C. Violation of freedom of expression.

The late Deyda Hydara was the co-founder, publisher and editor of The Point newspaper in The Gambia. He was a reputable journalist. According to the Plaintiffs the deceased devoted his life to protecting media freedom in The Gambia. The Plaintiffs averred that in the weeks preceding his death the deceased received several death threats in connection with his journalistic work. They contended that on the day of his demise a person suspected to be an operative of the state security service placed the deceased under constant surveillance. He was murdered in a drive by shooting on the night of 16th December 2004 whilst in the company of two employees of The Point newspaper.

It is the Plaintiffs' case that the defendant failed to carry out effective investigation into the murder of Deyda Hydara Sr; they also averred that the Serious Crimes Unit of The Gambia police as well as the National Intelligence Agency (NIA) did not do any thorough investigations. They claimed that these investigative organs of state failed to investigate eye-witness evidence; crime scene evidence; ballistic evidence; death threats to Mr. Hydara; apparent Government surveillance of Mr. Hydara on the day of the incident; potential suspects as well as any motive other than personal revenge. The Plaintiffs claimed that no public scrutiny of the investigations was allowed. And the government was quick to prosecute seven journalists for sedition when they spoke out against the failure to investigate the murder. Likewise, the family of the deceased was not involved in the investigations.

On the claim founded on a climate of impunity, the Plaintiffs averred that the defendant tolerated attacks against journalists, among others. They cited specific instances of such abuse which the State did not care to investigate and prosecute the perpetrators. According to the Plaintiffs by

failing to effectively investigate multiple attacks against the media stretching for several years prior to the Hydara assassination, the Gambian authorities created and tolerated a climate of complete impunity that did nothing to deter and inevitably contributed to the on violation of freedom of expression, the Plaintiffs' case was that the failure to investigate the murder of Deyda Hydara and the tolerance of the culture of impunity has profound effect on freedom of expression, affecting all journalists in The Gambia.

The final leg of the claim is based on a failure to provide redress. We repeat the material averments here: ***"International law requires that there are legal remedies for violations of rights. However, both the legal system and the failure by the authorities to effectively investigate Mr. Hydara's murder have prevented his family from effectively bringing civil proceedings for compensation for his death. The Gambia has failed to provide any compensation or redress to the first two Applicants for the murder of their father and violation of his right to freedom of expression, and has not provided them with any opportunity to claim such compensation. Furthermore, the failure to effectively investigate the murder and to identify the perpetrators has prevented the applicants from claiming compensation from any third party, if a private actor was indeed responsible for the murder".***

Reliefs and orders sought by the Plaintiffs

1. A **declaration** that the Defendant's failure to effectively investigate; and hold accountable those responsible for the 16 December, 2004 assassination of Deyda Hydara is in violation of his right to life as guaranteed by Articles 1 and 4 of the African Charter.

2. A **declaration** that the defendant is in contravention of Articles 1 and 4 of the African Charter, by virtue of creating and tolerating a state of systemic impunity in The Gambia for violent attacks against media practitioners and other government critics.

3. A **declaration** that the defendant's failure to effectively investigate the unlawful killing of Mr. Hydara is in violation of his rights to

freedom of expression and the press guaranteed by Article 9 of the African Charter and Article 66 of the Revised Community Treaty.

4. General and special **damages** for pecuniary and non-pecuniary loss to be paid to the first two applicants, and other heirs to Mr. Hydara, as compensation for the violation of their father's human rights to lite and freedom of expression to be quantified at the appropriate stage in the proceedings.

5. An **order** that the defendant pay the Applicants' costs of this action, in accordance with Article 66 of the Court's Rules of Procedure.

The Defence

In a statement of defence filed on 18th September 2012, the Defendant rejected the entire claim by the Plaintiffs. In particular the Defendant made the following material averments. That they carried out effective and diligent investigations into the murder of Deyda Hydara. That the deceased did not make any disclosure to the State about any threats to his life, let alone to seek protection from the State. The Defendant denied contributing in any way to the death of Hydara, for contrary to what the Plaintiffs averred, the Defendant did not tolerate any culture or climate of impunity in the country. The killers are still at large and they are still unknown. The State owes no obligation to provide redress to the Plaintiffs for the murder of Deyda Hydara, the defence averred.

Consideration by the Court

The pleadings as well as both counsels' addresses have been taken into account in the ensuing consideration of the case by the Court.

The Application is based on the ACHPR, in large measure, Articles 1, 4 and 9 thereof. These read:

1. The Member States and parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

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 his life.

9. (i) Every individual shall have the right to receive information.

(ii) Every individual shall have the right to express and disseminate his opinion within the law.

The Plaintiffs also relied on Article 66 of the Revised Treaty of ECOWAS.

It provides:

1. In order to involve more closely the citizens of the Community in the regional integration process, Member States agree to co-operate in the area of information.

2. To this end they undertake as follows:

a) to maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources;

b) to facilitate exchange of information between their press organs, to promote and foster effective dissemination of information within the Community;

c) to ensure respect for the rights of journalists;

d) to take measures to encourage investment capital both public and private, in the communication industries in Member States;

e) to modernize the media by introducing training facilities for new information techniques; and

f) to promote and encourage dissemination of information in indigenous languages, strengthening co-operation between national press agencies and developing linkages between them.

These provisions guarantee the right to life and also freedom of expression. The right to life imposes an obligation on States to investigate all acts of crime and bring perpetrators to book. A State will be neglecting its obligation under international law and treaty if it does not carry out effective investigations into crimes committed on its territory. A State also will be in breach of international law and treaty obligations if it fails to protect media practitioners including those critical of the regime. For freedom of expression also includes the freedom to criticize the government and its functionaries subject to limitations imposed by the domestic laws. Article 2(3)(a) of International Covenant on Civil and Political Rights is equally applicable to the Defendant to ensure effective investigations into the murder.

The Plaintiffs claim the Defendant has violated both the right to life and the freedom of expression as provided for in the ACHPR and the Revised Treaty. We propose to examine the issues now in the same way that they were set out in the application.

To begin with, the Plaintiffs claim the Defendant did not conduct diligent and effective investigations into the murder of Deyda Hydara Senior. It is a question of fact whether or not the Defendant conducted effective investigations. We must point out that there are no hard and fast rules as to what constitute proper, effective or diligent investigations, or by whatever name one may choose to call it. However, from an objective standpoint and given the circumstances of each case, one should be able to say that the investigative agencies have performed their duty as required. Subjective analysis will not be proper.

In this case the State Police was the first to commence the investigations. Subsequently the NIA took over the investigations and issued a report on or about 21 February 2005, some two months after the murder. Since then no other investigations have been carried out. But one striking feature of the investigation which is baffling is the fact that the investigations carried out no ballistic tests on the bullets on the victims' body and on the weapons recovered from one of the suspects Wally Hakim who was invited for interrogation. Here is a murder committed with a gun so common sense

will dictate that every gun recovered will be examined *vis-a-vis* the bullets recovered from the victim to see whether the bullets could have been fired from the gun recovered. Without a ballistic examination one could not conclude that a proper investigation had been carried out. In the circumstances of this case every gun recovered from every suspect was bound to be subjected to thorough and critical examination to assure the victims' family and the general public that the investigations were not seeking to protect anybody.

Besides when the two eye witnesses were on admission in hospital the report indicates there was an attempt to interrogate them by persons who bore or carried no identification; they also asked for the passports of these victims; for what purpose one does not know. There was yet another attempt to interrogate the victims at the hospital in Banjul which failed because the police officers refused the request by the hospital authorities for a formal request. This request by the hospital authorities was reasonable having regard to the fact that the victims were the target of assassination and having regard to the fact that some unidentified persons had attempted to see the victims without disclosing their identity. Why would security go on duty without identification, especially given the fact that these victims had been the target of assassination just a few days ago. It is common knowledge that security personnel on mission have to identify themselves 'if requested by the appropriate persons, in this case the medical authorities, if only to prevent impersonation. If the motive was really to interrogate the eye witnesses why would they refuse to disclose their identity and show some form of identification? Why would they refuse a harmless request by the hospital authorities for official communication to them.? It seems to us these events must have scared the eye witnesses to flee the country and it was reasonable and a wise precaution to take in the circumstances. With the eye witnesses out of the way no effective and conclusive investigations could be conducted into the murder. Notwithstanding the fact that eventually they gave statement to the Police in Dakar, Senegal, that was the end of the investigations, for the NIA did not get back to them let alone to investigate the details of their statements especially the threats the deceased recounted to them.

It is also to be noted that the two surviving victims of the shooting incident had expressed their fears to the police about the involvement of the NIA in threats to their own lives. Ida Jagne told the police that some personnel from the NIA had followed them even to Senegal in order to eliminate her. So, there was no way they would ever return to The Gambia, she made it clear to the Police. And yet this was the same body NIA that was given the task to take over the investigations from the police. Who could blame the eye witnesses for refusing to return to the country? Be that as it may justice would not seem to be done in this case as the very body which was accused of complicity was the very one charged with the responsibility to investigate. The NIA was not an impartial body in the circumstances. The duty to conduct investigations imposed on a State involves the duty to be impartial, fair and just. One cannot be a judge in his own cause, so too can one not investigate a crime when it is itself the accused.

We are satisfied that any investigations that did not take into account a critical examination of wea pons found on any of the suspects for a possible conclusion as the murder weapon was no investigation; it was a fluke. One need not even talk about the conduct of the officers who went to the hospital which in our view genuinely scarred the eye witnesses off. The NIA was not an impartial body to conduct these investigations in view of the concerns raised by the victims of the shooting. This claim is sufficiently established on the facts so we uphold it.

The next claim based on what the Plaintiffs called the climate of impunity in the defendant territory. This will be dealt with together with the third issue which is the alleged attack on freedom of expression in the country. This is also a question of fact and the burden of producing evidence rested with the Plaintiffs. On the threat to freedom of expression in the country the Plaintiffs cited specific instances in the country among them were cases involving **Chief Ebrimah Manneh *v.* Republic of The Gambia** (2004-2009) CCJELR 181 and **Musah Saidykhan *v.* Republic of The Gambia**, decided on 16 December 2010. Both Plaintiffs sued the Defendant before this Court with success. Those cases involved journalists

who suffered at the hands of State operatives in the course of performing their legitimate functions.

Impunity is defined in Black's Law Dictionary, 9th Edition, page 826 to mean **'exemption from punishment, immunity from the detrimental effects of one's actions...'**

The Plaintiffs cited specific instances where state operatives have been involved in misdeeds against journalists but no action was taken against them. At least this Court's previous decisions in two such cases support what the Plaintiffs had claimed. The Defendant was thus bound to lead evidence in rebuttal, but this was not forthcoming. Article 66 of the ECOWAS Revised Treaty imposes an obligation on Member States to assure a safe and conducive atmosphere in the practice of journalism. And in the situation where attacks by State operatives against journalists are not investigated, let alone to prosecute the suspects, the State will be in breach of its obligation under the Treaty and also the ACHPR, as such impunity has the effect of denying the journalists the right to function and thus stifling freedom of expression. These two claims also succeed on the facts.

The last issue is the failure to provide redress. The Plaintiffs claim the Defendant has not provided the deceased's family with any redress or compensation for his death and the violation of his freedom of expression; and that the failure to effectively investigate his death and identify the perpetrators has prevented them from seeking compensation themselves.

Since February 2005 no attempt has been made to conduct any meaningful investigations into the murder of the deceased. The eyewitnesses spoke about threats to the deceased which the deceased recounted to them in his lifetime. The NIA did not contact these witnesses for any details as to those threats. The personal safety of these witnesses who genuinely feared for their lives was not guaranteed to enable them assist in the enquiries. The NIA was quick to put the docket away knowing full well that the eyewitnesses had been scared off. However, we have failed to find a direct linkage· of the Defendant to the murder of the deceased. The

Defendant is held responsible for the apparent lack of effective investigations into the murder. The linkage of the climate of impunity and abuse of freedom of expression to the murder is also difficult to conclude as there is no iota of evidence as to who carried out the murder. A list of suspects was thrown up most of who are private persons with no connection to the Defendant. So whatever award that will be made will only take into account the Defendant's failure to conduct effective and impartial investigations into the murder.

DECISION

For reasons already explained this Court upholds the claims by the Plaintiffs and grants all reliefs and orders sought except special damages for none was proven in evidence. The Court accordingly enters Judgment for the Plaintiffs against the Defendant. The Plaintiffs are awarded compensation in the sum of fifty thousand U.S. dollars (US$50,000.00) for the prejudice suffered as a result of the Defendant's failure to investigate the assassination of Deyda Hydara Sr. Costs or ten thousand U.S dollars (US$10,000.00) is awarded in favour of the Plaintiffs against the Defendant.

This Judgment has been read at a public sitting at the seat of Court in Abuja.

BEFORE THEIR LORDSHIPS:

1. **Hon. Justice Hansine N. DONLI** - *Presiding;*
2. **Hon. Justice Awa Nana DABOYA** - *Member;*
3. **Hon. Justice Anthony A. BENIN** - *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 AT ABUJA, NIGERIA

THIS FRIDAY 31ST OF JANUARY, 2014

SUIT NO: ECW/CCJ/APP/14/13
RULING NO: ECW/CCJ/RUL/02/14

BETWEEN

1. **THE REGISTERED TRUSTEES OF AVOCAT SANS FRONTIERES FRANCE**
2. **THANKGOD EBOHS**

} *PLAINTIFFS*

AND

1. **FEDERAL REPUBLIC OF NIGERIA**
2. **EDO STATE GOVERNMENT**

} *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE BENFEITO RAMOS** - *MEMBER*
3. **HON. JUSTICE MEDEGAN NOUGBODE** - *MEMBER*

ASSISTED BY:

ABOUBAKAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **NOAH AJARE, KOLAWOLE OGUNBIYI** *AND* **ANGELA UWANDU** - *FOR THE PLAINTIFF/APPLICANT*
2. **T. A. GAZALI, O. ADETOYE (MRS), T. AFOLABI ONI (MISS), A.A. RUFAI (MRS)** *AND* **B. HAMEED** - *FOR 1ST DEFENDANT;*
3. **A. O. OKUNGBOWA** - *FOR 2ND DEFENDANT;*

- Preliminary Objection - Interim Injunction - Provisional Measure - Notice of Appeals - None Exhaustion of Local Remedies and Human Right Violations.

SUMMARY OF FACTS

The 1st and 2nd Plaintiffs field an Application before the Court for violation of the 2nd Plaintiff's right to fair hearing through and appeal process, right to life and urged the court to grant an interning injunction against the execution of the 2nd Plaintiff, pending the hearing of his appeal by the Court of Appeal in Nigeria. The 1st Defendant in its counter affidavit, opposed the grant of the motion for interim Injunction on grounds that the Plaintiff's affidavit contravened the law on how the fact of the affidavit should be deposed to and that, when the deposed facts are faulted, same should be struck out. The Defendant also contended that, there was no valid and substantive appeal at the Court of Appeal, Kaduna division. That this Court cannot sit on appeal on cases decided upon by national court. That the Plaintiff would not be prejudiced if the Application for interning injunction is refused.

LEGAL ISSUES

- *Whether paragraphs 16, 17, 24, 26, 27, 28, 30 and 32 of the Plaintiff's affidavit dated 5th and 6th November 2013, contravened the law on how the facts of the affidavits should be deposed to.*

- *Whether a motion seeking for an extension of time to file an appeal can be said to hold as a substantive notice of appeal.*

- *Whether this Court can sit on appeal on cases decided upon by the national court.*

- *Whether or not the Plaintiff would be prejudiced if the Application for interning injunction is refused.*

DECISION OF THE COURT

The court held as follows:

1. *That the Application for Intern Injunction is the same as application for intern measures.*

2. *That whether it was a motion for extension of time to appeal to the Court of appeal or substantive subsisting appeal, there is an indication that the 2nd Plaintiff is desirable to appeal against his conviction and sentence to death should operate to tilt in favor of the 2nd Applicant that to hold otherwise.*

3. *That when necessary to avoid irreparable damage to persons, the court shall adopt such provisional measures as it deems pertinent in a matter of this nature.*

4. *That to avoid irreparable damage to the 2nd Plaintiff, the Court shall grant the interim measure/injunction by ordering that the Defendants shall suspend the death sentence until the case before the Court is determined.*

5. *That an Application as in this case for alleged violation of human rights under Article 9 (4) of the Supplementary Protocol is within the jurisdiction of this Court and does not amount to an appeal from the decision of the national court albeit the robbery and firearms tribunal of Nigeria.*

6. *That the 2nd Applicant/Plaintiff succeeds in his Application for interim measures against the 1st and 2nd Defendant albeit suspension of death sentence and the removal of the 2nd Plaintiff's name from death row, pending the determination of the substantive Application filed before this Court.*

RULING OF THE COURT

PARTIES

1. The 1st Plaintiff is the Registered Trustees of Avocat Sans Frontieres France;

2. The 2nd Plaintiff is Thankgod Ebohs;

3. The 1st Defendant is the Federal Republic of Nigeria;

4. The 2nd Defendant is Edo State Government;

5. The 2nd Plaintiff, a Nigerian and a Community Citizen is among the people who are on the death row in Nigeria having been sentenced to death by a Tribunal constituted under the Military government in 1995. Without allowing the 2nd Plaintiff to exhaust his right of Appeal, the Defendants threatened to execute him pursuant to his conviction and sentence to death with all other persons on the death row in Nigeria.

6. The Plaintiff contend that the 1st and 2nd Defendants' threat of execution of the 2nd Plaintiff while his case is reportedly pending in appeal amounted to a violation of his Rights to life; to due process of law; access to justice and judicial independence; fair hearing and effective remedy.

7. The 2nd Plaintiff further contended that the Defendant's action violates the resolutions adopted by both the African Commission on Human and Peoples' Right and the UN General Assembly requiring countries to adopt Moratorium on execution of the Death penalty.

8. The Resolution also asked AU Member States who still have capital punishment, including the Federal Republic of Nigeria to fully comply.

9. with their obligation under the African Charter on Human and Peoples' Rights, and guarantee to every person accused of crime

for which capital punishment is applicable, fair trial standards; which shall include in their periodic reports, information on the steps they are taking to move toward the abolition of death penalty in their countries.

10. The Plaintiffs contend that the trial of the 2nd Plaintiff did not meet due process safeguards as required by the African Charter on Human and Peoples' Rights and other relevant international standards having been tried by a Tribunal even when the offence could be tried by a regular Court.

11. The Plaintiffs contend that unless the relief sought is granted, the Defendants will continue to be in breach of the International Human Rights Obligations and Commitment, as highlighted above.

12. The 1st Plaintiff contend that unless the relief sought are granted and 2nd Defendants may proceed by 2013 to secretly execute the 2nd Plaintiff, thereby violating the Requirements of transparency.

SUBJECT MATTER OF THE ORIGINATING PROCESS

11. Violation of the human rights, right to life, to due process of law, to access to justice and judicial independence, to fair hearing to right of appeal, and to effective remedy in the threat of a possible secret execution of the 2nd Plaintiff herein by the 1st and 2nd defendants.

12. The recent development in Edo State where inmates were hurriedly executed after the judgment of the Federal High Court without room for appeal against the judgment is an indication that there are no appropriate safeguards to 2nd Plaintiff with regards to fair hearing, right to life, right to appeal and access to justice. With the above substantive application lodged, the Plaintiffs flied two separate applications by way of motions seeking for accelerated hearing of the substantive application and a motion on notice for interim injunction and supported by an affidavit deposed to by Okoroafor John Esq., Male, Christian, and a Nigerian citizen of No. 29 1st Avenue, Kado Street, Abuja wherein he stated on oath as follows;

13. That he is a Legal Practitioner with Avocat Sans Frontieres France; By virtue of his position, and being conversant with the facts of this case, and with the consent of his principal he deposed to this Affidavit, this Suit was filed at the Registry of this Honourable Court on the 17th day of July, 2013, and the 2nd Plaintiff who was convicted and sentenced to death by The Robbery and Firearms Tribunal sitting at Kaduna State with Charge No. KD/ART/490, and Judgment which was delivered by Honourable Justice J. S. Abiriyi on the 30th day of April 1995, convicted and sentenced him to death under the Robbery and Firearms Tribunal Act and repealed against decision.

14. He stated that Robbery and Firearms Act as amended Cap W16 LFN 1990 would allow room for appeal as the Nigerian Constitution guarantees the 2nd Plaintiffs right of appeal. The 2nd Plaintiff has a valid and subsisting appeal at the Court of Appeal Kaduna Division with Appeal CA/K/274/M/2013. A copy of the Notice of Appeal is already before the Honourable Court and the 2nd Plaintiffs right to life is about to be permanently violated with the impending death execution which is irreversible.

15. The 2nd Plaintiff who was taken to the gallows for execution on the 24th June, 2013 and would have been executed but he was taken back to prison cell because the gallows did not work. He stated that he the 2nd Applicant equally witnessed the execution of the other four death row inmates in Edo State prison whose appeals were pending at the Court of Appeal with Appeal No. CA/L/797/M/2012 to wit, **Godwin Pius and Others *v.* Governor of Abia State and 36 others**.

16. He stated that despite the pendency of the matter the 2nd Plaintiff filed at the Federal High Court and the Court of Appeal Kaduna Division, the Defendants had gone ahead to place the 2nd Plaintiff on death row and on a waiting list of those about to be executed. He stated records show that the Defendants did not usually take cognizance of pending appeals as most of the rime they proceed with execution despite the pendency of several appeals and referred

to Documents showing such attitude. He stated that where there is no urgent pronouncement by this Honourable Court, the Defendants will proceed with the execution of the 2nd Plaintiff/Applicant. He further stated that the 2nd Plaintiff has the right to approach all courts and explore all available options that would prevent the violation of his right to life.

17. He referred to the 1st Defendant's averment that no Court can inquire into the validity of the Robbery and Firearms Tribunal Act and stated in reply that the averment was wrong and a misconception of law, including the 1st Defendant's assertion that the Plaintiff's reliefs need a Constitutional amendment was equally wrong and misleading. He also stated that the provisions of the Robbery and Firearms Tribunal Act denying Applicant's right of appeal is inconsistent with the Constitution which is the grand norm.

18. He recognized that due to the difficult position that the 2nd Applicant finds himself there *is* an urgent need to approach this Honourable Court.

19. He stated that if the Defendants are not urgently restrained by this Honourable Court, the 2nd Plaintiff will be executed and thereby rendering void any attempt to challenge his conviction and sentence under the Robbery and Firearms Tribunal Act. The Plaintiffs contended that the Nigerian President's declaration of June 16, 2013 is a clear indication that execution is imminent, and that the President of Nigeria, Goodluck Jonathan himself called on governors to sign warrants of execution to decongest prisons on June 16, 2013: whereby he said:

> *"In the case of capital punishment, the state governors will sign. Even governors sometimes find it difficult to sign and I have been telling governors that they must sign because that is the law. The work we are doing has very sweet part and very ugly part and we must perform both. No matter how painful it is) it is part of their responsibilities"*

this quote was widely reported in the media and referred to documents showing this report.

20. The second Plaintiff further stated that he narrowly escaped execution on the 24th of June, 2013, following the signing of the warrants of execution by Edo's Governor, Mr. Adams Oshiomole, four inmates on death row who were taken to the gallows for execution while second Plaintiff was also taken along. At the point of hanging him, the Sheriff discovered that he was to be executed by firing squad as provided in the judgment which sentenced him to death. He stated that he now faces the psychological trauma for the experience he had in the gallows every day and with the threat from the prison's authority.

21. The second Plaintiff contended that he has an Originating Motion on Notice dated 26/6/2013 pending before the Federal High Court in the Abuja Judicial Division for the enforcement of his fundamental right to appeal against his conviction and sentence. Therefore, executing him would result in a violation of his right to appeal his conviction as guaranteed by the African Charter Article 7.

22. He the Plaintiffs further contended that the executions of Chima Ejiofo, Daniel Nsofor, Osarenmwinda Aiguokhan and Richard Igagu were done while their appeals were pending, which showed that, while on death row, second Plaintiff can be executed at any moment with no consideration of the pending proceedings.

23. The Defendant alleged that the second Plaintiff filed a suit at the Federal High Court seeking the same reliefs as those pending before this Court and the Plaintiffs contended that no exhaustion of remedies is required before the ECOWAS Court.

24. The Plaintiffs further contended that there is no requirement regarding domestic remedies before an individual can bring a claim to the ECOWAS Court of Justice, pursuant to the provisions of the Supplementary Protocol of 19th January, 2005 which was applied in the case of **Koraou *v.* Niger** (27th October, 2008) where the Court

stated that, ***"the rule of exhaustion of local remedies is not applicable before the Court***and in the case of **Essien *v.* The Republic of The Gambia** (17th March 2007), the Court ruled that, ***"the objection regarding the non-exhaustion of local remedies has no bearing with the requirement in bringing this action before this Court."***

25. The Plaintiff further averred that in June 24, 2013 in another matter while the appeals instituted at the Court of Appeal in Lagos by five inmates on death rows and on behalf of all inmates on death rows in Nigeria against Abia State governor and others were pending and also, the appeal filed at Court of Appeal in Benin, in **Olu Fatogun & Others *v.* Governor of Edo State** which had been served on A.G. Edo State and the Controller of Prisons in Edo State, the executions of the said 4 inmates were still carried out in Benin Central Prisons.

26. The Plaintiffs further contended that the first Defendant's allegations and that of the second Plaintiffs condemnation by the Robbery and Arms Tribunal was said to be a final judgment and that consequently, the ECOWAS Court would allegedly have no jurisdiction to adjudicate on violations of human rights resulting from the said decision of a Nigerian Military Tribunal but the 2nd Plaintiff refuted same and stated that the said allegation is a misconception.

27. He stated that the ECOWAS Court can adjudicate on any human rights violation as provided by the Supplementary Protocol, Article 3 that:

> *"The Court has competence to adjudicate on any dispute relating to the following: d) The failure by Member States to honour their obligations under the Treaty, Conventions and Protocols…".*

He referred to Article 9(4) of the Supplementary Protocol that:

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

He further stated that the ECOWAS Court can adjudicate in respect of a continuing violation of human rights regarding the second Plaintiff's complaint and referred to the observation of the African Commission that the denial of a right to appeal amounts to a violation of right as envisaged by Article 7 of the African Charter on human and peoples' rights. In the case of **Egyptian Initiative for Personal Rights and Interrights *v.* Egypt** (May 2011) case no. 334/06 that Court stated,

> ***"The foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates Article 7 (1) (a)".***

28. The Plaintiffs further contended that since the second Plaintiff was sentenced to death by the said military tribunal and had been deprived of his right to appeal from the date of his sentence till now, the 2nd Plaintiff has continued to suffer violations of his fundamental rights. That the Plaintiff averred that since the second Plaintiff was sentenced to death on the 30th May, 1995 by a Nigerian Military Tribunal which created the said Court, the tribunal adopted unusual procedure that resulted in the charging, convicting and sentencing thereon.

29. He referred to the high standards required in such trials and quoted thus: ***"it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies"*** and referred to European Court of Human Rights, **Salduz *v.* Turkey (2008)**. The Plaintiffs stated that sentence by Nigerian military tribunals violates Article 4 and Article 7 of the African charter as an arbitrary deprivation of the right to life.

30. He stated that It is clear case law from the African Commission that proceedings before Nigerian military tribunals violate fair trial standards as provided by Article 7 of the African Charter: ***"Applying fair trial principles to special tribunals, the African***

Commission has held that they "violate Article 7(1) (d) of the African Charter because their composition is at the discretion of the executive branch". 334/06 **Egyptian Initiative for Personal Rights and Interrights *v.* Egypt** (May 2011), where it stated in these words, ***"Given that the trial which ordered the executions itself violates Article 7 (fair trial standards), any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4 (right to life)"*** International Pen, Constitutional Rights Project, Interights on behalf of **Ken Saro-Wiwa Jr. and Civil Liberties Organisation *v.* Nigeria**; **Nos 137/94, 139/94, 154/96 and 161/97 (1998)**.

31. That the Plaintiffs contends that taking the view that the imposition of death penalty following an unfair trial is a breach not only of procedural standards but also of the right to life. The UN Human Rights Committee in the case **Reid *v.* Jamaica and the Inter-American Commission;** in the case **Graham *v.* United States [Case 11.193, Report No. 97/03**, **Inter-Am C.H.R., OEA/Ser./L/V.II.114 Doc. 70 rev. 2 at 705 (2003)**], also, considered that a violation of due process invalidates a conviction and sentence. Therefore, military courts should not in any circumstances whatsoever have jurisdiction over civilians and Special Tribunals should not try offences that fall within the jurisdiction of regular Courts.

32. That the Plaintiffs further stated that in addition, no appeal of the sentence rendered by the Nigerian military tribunals is possible by virtue of Section 11 (4) of Robbery and Firearms (Special Provision) Act. That until now, inmates sentenced to death by Nigerian military tribunal have been continuously denied the· rights to appeal against their conviction. He stated that the 2nd Plaintiffs is therefore, in imminent danger of being executed and urged that it will be in the interest of justice to grant this application because the Defendants would not be prejudiced if the application succeeds.

33. Having set out the summary of the facts of the substantive case, and the pleas in law regarding same, we move to consider the instant

application of interim injunction, restraining the Defendants from executing the death penalty on the 2nd Plaintiff pending the hearing and determination of the substantive matter, to this effect, the Plaintiffs' Counsel filed a 37 paragraph affidavit to support the motion on notice dated 6th November 2013 wherein he deposed to the facts that he was convicted by the Robbery and Firearms Tribunal Kaduna State, and sentenced to death but that he filed an appeal against the conviction and sentence to the Court of Appeal, Kaduna Division which appeal is still pending for hearing.

34. He deposed that going by the practice in the Nigerian Prisons, a person convicted and sentenced to death may be executed while his appeal is still pending for hearing. Based on the fact that his rights to appeal to the Court of Appeal may be violated upon by the defendants, he sought for an interim injunction to ensure that he is not put to death before his appeal to the Court of Appeal is heard.

PRELIMINARY POINT RAISED BY THE 1ST DEFENDANT

35. However 1st Defendants counsel filed a counter affidavit of 20 paragraphs and an additional counter affidavit opposing the grant of the motion for interim injunction on the grounds that paragraphs 16, 17, 24, 26, 27, 28, 30 and 32 of the Plaintiffs affidavit dated 5th and 6th November, 2013 contravened the law on how the facts of the affidavit should be deposed to, and that when the deposed facts are faulted, same should be struck out. He also deposed in paragraph 6 of the affidavit that there was no valid and substantive appeal at the Court of Appeal Kaduna Division with Appeal No. CA/K/274/M/2013 pending for hearing and same was a motion seeking for an extension of time to file an appeal against a substantive appeal and also in the additional counter affidavit, he deposed to facts that a motion for extension of time to file a Notice of Appeal cannot be said to hold as a substantive Notice of Appeal. He stated that the application for interim injunction should be refused and the substantive case determined. He stated this Court cannot sit on appeal on cases decided upon by the National Court and he further deposed that the

Plaintiff would not in this case be prejudiced if the application is refused.

36. The 2nd Defendant filed a motion on notice dated 28th January 2014 for extension of time to file a defence against the Plaintiffs' claim.

ANALYSIS OF THE PRELIMINARY POINT

Having considered the facts deposed to by the 2nd Plaintiff and the 1st Defendant's counsel on the application for interim injunction, it is pertinent to consider the preliminary objection made by the 1st Defendant in respect of the admissibility of paragraphs 16, 17, 24, 26, 27, 28, 30 and 32 of the 2nd Plaintiffs affidavit dated 5th and 6th November 2013, which allegedly contravened the provisions of the Evidence Act of the Federal Republic of Nigeria that facts deposed to in an affidavit should contain facts and not law and that same should not be argumentative or conclusions and that the source of information in an affidavit should be stated to justify its admissibility.

37. Each paragraph complained of in the instant case had been examined to see whether it fell below the standard required in accordance with the provisions of the Evidence Act - Laws of the Federal Republic of Nigeria. After such examination, we found that the paragraphs were not too conclusive, argumentative or amounting to legal arguments. Similarly, some paragraphs in the counter affidavit of the 1st Defendant are not also fully in consonance with the said requirements of the Evidence Act.

For the purpose of clarity on the issue of admissibility of the said paragraphs, Section 115 of the Evidence Act of the Federal Republic of Nigeria 2011 may provide the answer. It states that:

(1) Every affidavit used in the Court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

(2) An affidavit shall not contain extraneous matter, by way of objection, prayer or legal argument or conclusion.

(3) When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.

(4) When such belief is derived from information received from another person, the name of his information shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstance of the information.

38. The question is whether the paragraphs in the affidavit complained of, by the 1st Defendant contravened the above requirement of a valid affidavit. The totality of the 1st Defendant's objection as to the said affidavit centered on Section 115 (2) above as to whether the affidavit contained extraneous matters, by way of objection, prayer or legal argument or conclusion. We are not in doubt that the said paragraphs are prayer or legal argument and or conclusion, therefore the objection by the 1st Defendant is sustained. The next question is, even if the said paragraphs are discountenanced would the remaining paragraph sustain the application for interim injunction?

ANALYSIS ON THE APPLICATION FOR INTERIM INJUNCTION

39. Article 20 (21) of Protocol (A/P.1/7/91) on the Community Court of Justice states that the Court, each time a case is brought before it, may order any provisional measure or issue any provisional measure or issue any provisional instructions which it may consider necessary or desirable. Also, Article 79 of the Rules of this Court provides that an application under Article 20 of the Protocol shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for.

40. It follows that even though the said provision of the Protocol and the Rules of the Court mentioned interim measures, the effect of the relief sought in the motion/ application of the 2nd Plaintiff would mean the same thing. Whether the application used the words, interim injunction, interim measures or provisional measures, the relief is the same and within the purview of Article 20 of the said Protocol and Article 79 of the Rules of this Court.

41. It is now well established practice in law regarding applications for interim measures that some factors should be considered before the grant of same. The Court ought to consider whether the reasons given in the affidavit show the situation of the Applicant to be of extreme gravity and urgency, and also whether it would be necessary to avoid irreparable damage of persons by granting the interim order. As suggested in the cases referred to herein before, the Court should adopt such provisional measures as it deems pertinent in the given circumstance of each case.

42. In other Regional and International jurisdictions particular the International American Human Rights Court, Article 63 (2) states:

> *"In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the court shall adopt such provisional measures as it deems pertinent in matters it has under consideration…."*

In **Peace Community of San Jose de Apartado** Case (Colombia) the Court ordered States to adopt measures to protect specifically named persons and on special occasions it requested that a group of unnamed persons be protected when they are at grave risk. See Provisional Measures in the Case Law of Human Rights by Clara Burbano Herrara. Also, in **Suarez Roseto** Case (Ecuador), **Loayza Tomayo** Case (Peru), **Gallardo Rodriguez** Case (Mexico) and **Cesti Hurtado** Case (Peru) and reported on page 4 of the book mentioned above, the Court ordered sometimes that some beneficiaries toregain their freedom and that newly organized trails

have led to a reduction of the death penalty sentence to a prison term of the person or persons concerned, see the case of **Suarez Rosero supra**.

43. In the instant case the reasons or grounds relied upon by the 2nd Plaintiff is that;

    1. The 2nd Plaintiff was convicted and sentenced to death by the Robbery and Firearms Tribunal sitting at Kaduna State with charge No. KD/ART/490 and judgment was delivered by Honourable Justice J. S. Abiriyi on the 30th day of April, 1995.

    2. The Robbery and Firearms Tribunal Act has been repelled and or amended and that what is operational at present is Robbery and Firearms Act as amended in Chapter W16 Laws of the Federation of Nigeria 1990.

    3. The Nigerian Constitution 1979 as amended guarantees the right of appeal which the 2nd Plaintiff utilised to appeal to the Court of Appeal Kaduna Judicial division with appeal No. CA/K/274/M/2013 and a copy was annexed thereto in the motion.

    4. The 2nd Plaintiffs right to life is about to be permanently violated with the impending death penalty and if the interim injunction/interim measures is not made, the execution would proceed and the action irreversible.

44. In paragraph 11 to 21 of affidavit of the 2nd Plaintiff of 6th November 2013 and marked document No. 6 by the Court are indicative of the facts that despite the pending appeal of the 2nd Plaintiff, the Defendant has gone ahead to place him (the 2nd Plaintiff) on death row and awaiting execution, and that without an urgent pronouncement by the Court, the Defendant will proceed with the execution and render void the attempt to challenge the conviction and sentence under the Robbery and Firearms Tribunal Act.

45. Furthermore, there is an urgent need for the Court to make a pronouncement by way of the relief sought in this case. In connection with the 2nd Defendant in paragraph 22 of the affidavit of the 2nd Plaintiff, he deposed that he (the 2nd Plaintiff) narrowly escaped execution on the 24th of June 2013 following the signing of the warrant of execution by Edo State Government of Nigeria, Mr. Adams Oshiomhole and that executing him would result to the violation of his right to appeal guaranteed by Article 7 of the African Charter on Human and Peoples Rights. He further stated that he the 2nd Plaintiff filed a case at the Federal High Court seeking the same reliefs as before this Court as no exhaustion of local remedies is required before, this Court.

46. The case of **Koraou *v.* Niger** delivered on the 27th October 2008 on the exhaustion of local remedies was relied upon on the question of local remedies as a prerequisite of bringing actions before an international Court, like this Court. However, it was made clear that the question of local remedies was inapplicable in bringing actions of human rights before this Court. He also stated that the sentence in question alleged the violation of Articles 4 and 7 of the African Charter if a convict is executed without exhausting the avenues for appeal and that it would also amount to an arbitrary deprivation of right to life. He also mentioned that the circumstances of the 2nd Plaintiff disclosed imminent danger. This Court cannot but consider the urgency of the matter and as in other international courts and their practices which this Court referred to above; the application ought to be granted in order not to render the substantive case before us nugatory and void.

47. On the other hand, the 1st Defendant stated in his paragraph 6 dated 7th November, 2013 of his counter affidavit, that the 2nd Plaintiff has no valid and subsisting appeal at the Court of Appeal Kaduna Division with Appeal Nº. CA/IC/274/M/2013 and that the letter "M" in the appeal number *is* indicative that the 2nd Plaintiff filed a motion for extension of time to file an appeal, which did not amount to a substantive appeal. In paragraph 5 of the additional counter affidavit

the 1st Defendant stated that he orally confirmed from the Registrar of the Court of Appeal, Kaduna Judicial Division, Surajo Gusau that what the 2nd Plaintiff filed before the Court of Appeal is a motion for extension of time to file a Notice of Appeal and not a substantive Notice of Appeal.

48. When this Court considers the substance of the facts in the affidavit on one hand and those facts in the counter affidavit and additional counter affidavit, it would be apparently clear that the dispute of the parties relates to whether there was a valid appeal pending before the Court of Appeal Kaduna Division in respect of the intention and other act on the 2nd Plaintiff to challenge this conviction and sentence to death by the Robbery and Firearms Tribunal Kaduna.

49. There is no doubt that the 2nd Plaintiff indicated clearly his intention to appeal against his conviction and sentence to death whether by way of a motion for extension of time to appeal or by a substantive notice of appeal. The two options stated above did not reduce the fact that the 2nd Applicant has shown his desire to appeal against the conviction and sentence of death given by the trial Judge, Justice J.S. Abiriyi, on the 30th day of April 1995. Even though the period of conviction and sentence appeared to be very long, the notice for extension filed by the 2nd Plaintiff made it difficult not to look on the side of justice, on such grievous matter as life and death.

50. The question of whether the Court can sit on appeal in respect of cases decided upon by the National Court is not a material point for a decision, because this Court, times without number made it clear in its jurisprudence that its jurisdictional powers did not extend to hearing appeals from the decision of national Courts *see* **Keita *v.* Republic of Mali** delivered on 22nd March 2007 and **Alimu Akeem** delivered on 27th January 2014. The originating application indicated a prima facie violation of human rights of the 2nd Plaintiff under Articles 4 and 7 of the African Charter on Human and Peoples Rights, Article 9 (4) of the Supplementary Protocol 2005 of Community Court of Justice and International Instruments.

51. These grounds upon which the 2nd Plaintiff lodged the action are based on violation of human rights and not on grounds of appeal against the conviction and sentence. Article 4 of the African Charter on Human and Peoples Rights states that, *"Human beings are inviolable rights. 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"* Where an Applicant is deprived of the process of an appeal after conviction and sentence of death, it may be an action of arbitral deprivation of the right to life as envisaged by the Article 4 of the said Charter.

52. Moreover Article 7 of the African Charter on Human and People Rights states:

"Every individual shall have the right to have his cause heard.

(a) The right to an appeal to competent national organ against acts violating his fundamental rights as recognized and guaranteed by conventions, laws regulations and customs in force...".

In light of the facts stated herein before the application by the 2nd Plaintiff satisfied the requirements for a grant of interim injunction or measures as provided in Article 20 of the Protocol and Article 79 of the Rules of Procedure of this Court. We therefore hold that the 2nd Plaintiff's application succeeds and it is granted accordingly.

53. **Decision**

1. **Whereas** the 2nd Plaintiff filed an application for interim injunction;

2. **Whereas** the Application for interim injunction is the same as application for interim measure;

3. **Whereas** the 2nd Applicant who was convicted and sentenced to death, filed an appeal to the Court of Appeal of the Federal

Republic of Nigeria and whether it was a motion for extension of time to appeal to the Court of Appeal or a substantive subsisting appeal, there is an indication that the 2nd Plaintiff desirable to appeal against his conviction and sentence to death should operate to tilt in favor of the 2nd Applicant than to hold otherwise;

4. **Whereas** analysis of the jurisprudence on the provisional measures indicates that in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the court shall adopt such provisional measures as it deems pertinent in a matter of this nature;

5. **Whereas** a conviction and sentence hanging on the 2nd Plaintiff when his intention to appeal against the conviction and sentence is in the Court's estimation is of extreme gravity and urgency and to avoid irreparable damage to the 2nd Plaintiff, the Court shall grant the interim measure/injunction by ordering that the defendants C, shall suspend the death sentence until the case before the Court is determined;

6. **Whereas** an Application as in this case for alleged violation of human rights under Article 9 (4) of the Supplementary Protocol is within the jurisdiction of this Court and does not amount to an appeal from the decision of the National Court albeit the Robbery and Firearms Tribunal of Nigeria and the jurisprudence of this Court is long settled by plethora of judicial decisions evidenced by the authorities of **Keita *v.* Mali supra** and **Alimu Akeem supra**;

7. **Whereas** the 2nd Applicant/Plaintiff succeeds in his Application for interim measures against the 1st and 2nd defendants albeit suspension of death sentence and the removal of the 2nd Plaintiff's name from death row, pending the determination of the substantive application filed before this Court.

COSTS

54. The cost of this action shall be borne by the 1st Defendant, the Federal Republic of Nigeria for the Applicant.

This Ruling is read in public in accordance with the Rules of this Court this 31st of January 2014.

- **Hon. Justice Hansine N. DONLI** - *Presiding;*
- **Hon. Justice Benfeito RAMOS** - *Member;*
- **Hon. Justice Medegan NOUGBODE** - *Member.*

Assisted by **Aboubakar Djibo DIAKITE (Esq.)** - *Registrar.*

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

HOLDEN AT ABUJA, NIGERIA

THIS 31ST DAY OF JANUARY, 2014

SUIT NO: ECW/CCJ/APP/14/13
JUDGMENT NO: ECW/CCJ/JUD/18/14

BETWEEN

1. **THE REGISTERED TRUSTEES OF AVOCAT SANS FRONTIERES FRANCE**
2. **THANKGOD EBOHS**

} *PLAINTIFFS*

AND

1. **FEDERAL REPUBLIC OF NIGERIA**
2. **EDO STATE GOVERNMENT**

} *DEFENDANTS*

COMPOSITION OF THE COURT:

1. **HON. JUSTICE HANSINE N. DONLI** - *PRESIDING*
2. **HON. JUSTICE BENFEITO RAMOS** - *MEMBER*
3. **HON. JUSTICE MEDEGAN NOUGBODE** - *MEMBER*

ASSISTED BY:

ABOUBACAR DJIBO DIAKITE (ESQ.) - *REGISTRAR*

REPRESENTATION TO THE PARTIES:

1. **NOAH AJARE, KOLAWOLE OGUNBIYI** *AND* **ANGELA UWANDU** - *FOR THE PLAINTIFFS*
2. **T. A. GAZALI, O. ADETOYE (MRS), T. AFOLABI ONI (MISS), A.A. RUFAI (MRS)** *AND* **B. HAMEED** - *FOR 1ST DEFENDANT;*
3. **A. O. OKUNGBOWA** - *FOR 2ND DEFENDANT;*

- Jurisdiction - Provisional measures
- Exhaustion of local remedies - Burden of proof

SUMMARY OF FACT

The 1st Plaintiff, AVOCATS SANS FRONTIERE France by an Application dated 17th July 2013 brought an action before the Court on behalf of the 2nd Plaintiff, Thankgod Ebohs who is a Nigerian national, and an ECOWAS Community citizen, alleging that he was detained and put on the death list in the Federal Republic of Nigeria. That the Defendants threatened to execute the 2nd Plaintiff by firing squad, following the death sentence pronounced on him, as well as on the other persons on the death list. The 1st Plaintiff alleged that the threat made by the Defendants to execute the 2nd Plaintiff, whereas his case was pending at the appeal, constitutes a violation of his right to life amongst others.

Furthermore, that the Defendants' action violates the Resolutions adopted by both the African Commission on Human and Peoples' Rights and the UN General Assembly, enjoining Member States to adopt a moratorium on death sentence. The Resolution equally enjoins African Union Member States that continue to apply death sentence, including the Federal Republic of Nigeria, to respect, fully their obligations under the African Charter on Human and Peoples' Rights, and to guarantee to every person, who is accused of a crime, and on whom death sentence is pronounced, fair hearing. Also, that the trial of the 2nd Plaintiff did not follow the normal judicial procedure as enshrined under the African Charter on Human and Peoples' Rights, and other relevant international instruments, because he was tried by a Special Tribunal instead of the normal Courts. Plaintiffs further claimed that, unless the orders sought are addressed, the Defendants would continue to violate their obligations under international instruments on human rights protection and will secretly execute the 2nd Plaintiff by firing squad. That there is no need to

exhaust any local remedy before bringing a case before the ECOWAS Court of Justice relying on the provisions of Article 9 (4) of the Supplementary Protocol on the ECOWAS Court.

In response, the 1st Defendant opposed the order sought by Plaintiff/ Applicant for provisional measure relating to stay of enforcement on the death sentence. He premised his opposition on the grounds that some paragraphs of Plaintiff's Affidavit are at variance with the rule on filing of Affidavit, and, in case of false declaration, the request conveyed in such Affidavit should be rejected. He equally stated that there is no valid and pending appeal registered in the Appeal Court in the Kaduna Division. He urged the Court to reject the Application for provisional measures on stay of action on the enforcement of the death sentence, and the case be examined on merit. Also, that the ECOWAS Court of Justice cannot constitute itself into an appeal court against the Judgments delivered by the national courts of Member States, adding that no prejudice would be done to Plaintiff if the orders sought were rejected.

LEGAL ISSUES

- *Whether or not the Application for provisional measures is justified.*

- *Whether or not the Application contains the Burden of Proof.*

- *Whether or not the Court has jurisdiction to sit as an appellate court over national courts.*

DECISION OF THE COURT

The Court held that the Application for provisional measures has satisfied the conditions set out for the granting of provisionary injunction or measure, pursuant to Article 20 of the Protocol, and Article 79 of the Rules of Court. Consequently, the Court admitted

the Application filed by the 2nd Plaintiff seeking provisional measures, and adjudicates on same.

The Court also found that there is an existence of an indication from the part of the 2nd Plaintiff/Applicant to file an appeal against the judgment wherein he was sentenced to death, and this should be retained as the most important consideration; The Court ordered the Defendants to stay action on the enforcement of the death sentence, pending the determination of the case filed before the Appeal Court. Also, that Article 9 (4) of the Supplementary Protocol falls squarely under the jurisdiction of the Court, and does not constitute, in anyway whatsoever, an appeal against the decision rendered by any national court, even if such is created to examine cases of armed robbery; the issue bordering on the jurisdiction of the Court was already settled in a plethora of its judicial pronouncements.

The Court therefore, ordered the Defendants to remove his name from the list of detainees on the awaiting list to be executed, pending the determination of the Application filed before the Court on its merit.

As to costs, the Court ordered the 1st Defendant, which is the Federal Republic of Nigeria to bear the costs, and awarded damages in favour of the 2nd Plaintiff/Applicant.

JUDGMENT OF THE COURT

PARTIES

1. The 1st Applicant is **AVOCATS SANS FRONTIERE France**;

2. The 2nd Applicant is **THANKGOD EBOHS**;

3. The 1st Defendant is **The Federal Republic of Nigeria**;

4. The 2nd Defendant is the **Government of Edo State of Nigeria**;

5. The 2nd Applicant, who is a Nigerian national, and an ECOWAS Community citizen is among the detainees, who are on the death list in the Federal Republic of Nigeria, as pronounced by a Special Tribunal put in place by the Military Government of Nigeria in the year 1995. Without allowing him to exhaust all local remedies, the Defendants have threatened the 2nd Applicant to execute him by firing, following the death sentence pronounced on him, as well as on the other persons on are the death list in Nigeria.

6. The main Applicant claims that the threat made by the Defendants to execute the 2nd Applicant, whereas his case was pending at the appeal, constitutes a violation of his right to life, his right to the guarantee for useful legal procedure, his right to access to justice, to fair hearing, as well as his right to effective remedy.

7. Furthermore, the 2nd Applicant argues that the Defendants' action violates the Resolutions adopted by both the African Commission on Human and Peoples' Rights and the UN General Assembly, enjoining Member States to adopt a moratorium on death sentence.

8. The Resolution equally enjoins African Union Member States that continue to apply death sentence, including the Federal Republic of Nigeria, to respect, fully.

9. Their obligations under the African Charter on Human and Peoples' Rights, and to guarantee to every person, who is accused of a crime, and on whom death sentence is pronounced, fair hearing, and to include in their Periodic Reports, the measures taken seeking the abolition of death sentence in their countries.

10. Plaintiffs/Applicants claim that the trial of the 2nd Plaintiff did not ensure the guarantees for normal judicial procedure as enshrined under the African Charter on Human and Peoples' Rights, and other relevant international instruments, because he was tried by a Special Tribunal, whereas the offences for which he was convicted could be tried by the normal Courts.

11. Plaintiffs/Applicant further claim that, unless the orders sought are addressed, the Defendants would continue to violate their obligations under international instruments on human rights protection, as is demonstrated above.

12. The 1st Plaintiff claim that unless the orders sought are addressed, the 1st and 2nd Defendants will secretly execute, by firing, the 2nd Plaintiff/Applicant, in 2013, in violation of the exigencies of transparency

SUBJECT-MATTER OF THE LITIGATION

11. Violation of the right to life, the right to guarantees for normal judicial procedures, the right to access to justice and the right to an independent judiciary, the right to fair hearing, the right to have one's cause heard and the right to effective remedy against a high probability of secret execution by firing of the 2nd Applicant by the 1st and 2nd Defendants.

12. The recent events in Edo State of Nigeria relating to hurried execution of detainees, after the judgments delivered by the Federal High Court, without offering the detainees the possibility of appealing against such judgments constitutes proof of lack of guarantee for the 2nd Plaintiff/ Applicant in the instant case to exercise his right to fair hearing, the

right to life, the right to have one's cause heard and the right to justice. Apart from the initiating Application, Plaintiff/Applicants introduced two motions, each seeking, on the one hand, to expedite action on the examination of the case as to merit, and on the other hand, to get provisional measures in form of orders, all these on the strength of an Affidavit filed by Barrister Okoroafor John. Male, Christian, and Nigerian by nationality, with address at N°. 29, First Avenue Kado Street, Abuja, in which he declares as follows: -

13. He is a Lawyer by training, and a staff of the Association known as Avocats Sans Frontières, France. He avers that, by virtue of his job, he was made to be aware of the facts of the case; that he had got the nod of his Employer to file the affidavit; that the initiating Application was filed at the Court Registry on 17th July 2013; that the 2nd Plaintiff/Applicant was found guilty and sentenced to death by the Tribunal in charge of cases of theft and armed robbery, which sat in Kaduna in the procedure of the **case N°. KD/ART/490**, wherein Justice J.S. Abiriyi entered a judgment on 30th April 1995, pursuant to the Law on the Fire Arm Tribunal. He added that he contested the decision.

14. He declares that the Law on Fire Arm and Armed Robbery which was amended in its Chapter W16 LFN of 1990, allowed for appeal to be filed against judgments, since the Nigerian Constitution provides for the 2nd Plaintiff/Applicant the right to effective appeal. The 2nd Plaintiff/Applicant had an appeal pending before the Court of Appeal in Kaduna, which was registered under Case N°. CA/K/274/M/2013. A copy of the said appeal was notified on the Court, and the 2nd Plaintiff/Applicant runs the risk of having his right to life violated, permanently, with the probable and irreversible execution in sight.

15. The 2nd Plaintiff/Applicant was sent to the gallows on 24th June 2013, and was almost executed before he was returned to his cell, because on that day, the gallows were not functioning properly. He declares that he witnessed the execution of four (04) other persons sentenced to death, who were detained at the prison in Edo State, whose appeal

was still pending before the Appeal Court, especially the case of **Godwin Pius *v.* the Governor of Abia State and 36 others**, registered under Case N°. CA/L/797/M/2012.

16. He avers that despite the existence of the case pending before the Federal High Court and the Appeal Court in Kaduna, the Defendants hurriedly placed the 2nd Plaintiff/Applicant on the list of those sentenced to deaths, and awaiting execution. He also avers that the facts of the case have clearly demonstrated that, generally, the Defendants do not take cognizance of pending appeals, because their agents proceed to immediate execution, despite the existence of various cases on appeal. He supported this claim by relevant documents, as proof. He pleads that without an intervention by the Honourable Court, the Defendants would proceed to the execution of the 2nd Plaintiff/Applicant. Furthermore, he affirms that the 2nd Plaintiff/Applicant has the right to file his case before all competent courts, and to explore all available options, in order to avert the violation of his right to life.

17. He refers to the argument of 1st Defendant that no court can examine the validity of the Law on Armed Robbery and Miscellaneous Fire Arms Tribunal, and declares that this was an erroneous declaration, which proceeds from a wrong interpretation of the Law. He equally cited another declaration of 1st Defendant that the orders sought by the main Plaintiff/Applicant could only be granted following an amendment to the Constitution, as this also is as erroneous as misleading. He equally posits that the provisions of the Law establishing the Armed Robbery and Miscellaneous Fire Arms Tribunal, which deprive Plaintiffs/Applicants of their rights to effective appeal are unknown to the Constitution of the Federal Republic of Nigeria, which is the Fundamental Law.

18. He recognizes that owing to the very precarious situation of the 2nd Plaintiff/Applicant, there is an urgent need to refer the instant case to the Honourable Court, for adjudication.

19. If the Honourable Court fails to intervene, urgently, to put an end to the actions of the Defendants, the 2nd Plaintiff/Applicant will be executed. A situation that would make any attempt by him, to prove his innocence, and to contest the death sentence placed on him, pursuant to the provisions of the Law on the *Armed Robbery and Miscellaneous Fire Arms Tribunal*, in vain. Plaintiffs/Applicants declared that the statement made by the President of Nigeria Goodluck Jonathan, himself, on 16th June 2013, when he called on the State Governors to sign death penalty orders, with a view to depopulating the Nigerian Prisons, thus: ''***regarding death sentences, State Governors must sign Orders on Death Penalty. Sometimes, even the Governors find it difficult to sign such orders, and I always enjoin to sign, because they are protected by Law. Our jobs comprise two aspects; the negative and the positive aspects, and we must take congnisance of these two aspects. No matter the difficulties, this falls within their responsibilities.***'' This statement was widely relayed on media. The relevant documents to this statement is filed within the framework of the present procedure.

20. Furthermore the 2nd Plaintiff/Applicant claims that he escaped being executed, by whiskers, on 24th June 2013. Indeed, following the signing of death sentence Orders, by the Edo State Governor, Mr. Adams Oshiomole, four (04) convicted were sent to the gallows and executed, together with the 2nd Plaintiff/Applicant. At the point of hanging him, the Hangman realized that he was first to have been fired by a squad, as provided for in the death sentence judgment, by the Tribunal that pronounced it. He declares that he has been passing through a permanent psychological trauma, owing to the experience he had at the gallows, together with the threat exerted on him by the Penitentiary Administration.

21. The 2nd Plaintiff/Applicant claims that he filed an appeal dated 27/06/2013, before the Federal High Court, Abuja Division, to exercise his fundamental right of appeal against the death sentence pronounced on him. Consequently, his execution by firing squad

would lead to the violation of his right to appeal against his sentencing, as guaranteed under Article 7 of the African Charter on Human and Peoples' Rights.

22. Moreover, Plaintiffs/Applicants argue that the execution of Chima Ejiofo, Daniel Nsofor, Osarenwimda Aiguokhan and Richard Igagu was carried out, while their case was still pending at appeal, this shows that as the 2nd Plaintiff/Applicant was also on the death list, he too could be executed at any moment, without regard to any likely appeal filed by him against his sentence, which was still pending before the competent Courts.

23. The Defendant argues that the 2nd Plaintiff/Applicant filed before the Federal High Court, the same orders he is seeking before the Honourable Court. But Plaintiffs/Applicants countered that argument by averring that there is no need to exhaust any local remedy before bringing a case before the ECOWAS Court of Justice.

24. Furthermore, Plaintiffs/Applicants aver that to bring a case before the ECOWAS Court of Justice, complainants do no need to exhaust any local remedy, pursuant to the provisions of the Supplementary Protocol of 19th January 2005 on the ECOWAS Court of Justice. This position was held by the Court in its Judgment of 27th October 2008, in the case of **Hadidjatou Mani Koraou *v.* Republic of Niger**, where the Court declares that: ***"...It therefore follows that the rule of exhaustion of local remedy is not applicable before the ECOWAS Court of Justice"***, and in the case of **Essien *v.* The Republic of The Gambia** (17th March 2007), wherein the Court held that: ***"...Consequently, the objection herein regarding the non-exhaustion of local remedy has no bearing with the requirements in bringing this action before this Court."***

25. Moreover, Plaintiff/Applicant contends that while the appeal lodged at the Court of Appeal in Lagos, by five (05) convicted persons, who were sentenced to death, and on behalf of all convicted persons sentenced to death in Nigeria, against the Governor of Abia State

and others, was still pending, and despite the appeal filed in the case of Olu Fatogun and others versus the Governor of Edo State, before the Court of Appeal in Benin City and notified on the Attorney General of Edo State, as well as the Comptroller of Prisons in Edo State, the four (04) detainees in the Benin Central Prisons were executed.

26. Plaintiffs/Applicants further contend that the allegations made by 1st Defendant that the decision to convict the 2nd Plaintiff by the *Armed Robbery and Miscellaneous Fire Arms Tribunal* is final, and, therefore the ECOWAS Court of Justice lack jurisdiction over human rights violation issues determined by a Special Military Tribunal in Nigeria constitute a fallacious declaration that is rejected by 2nd Plaintiff.

27. He claims that the Community Court of Justice, ECOWAS has jurisdiction over human rights violation cases. Under the substituted Article 3 of the Supplementary Protocol: *''The Court has competence to adjudicate on any dispute relating to d) the failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS''* He equally cites Article 9 (4) of the Supplementary Protocol on the ECOWAS Court, which provides that*: ''The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.*''

Arguing further, Plaintiff contends that the ECOWAS Court of Justice holds jurisdiction to examine the continuous violation of the rights of 2nd Plaintiff, and refers to the Observation of the African Commission, which held that the denial of the right to appeal is a violation of Article 7 of the African Charter on Human and Peoples' Rights. The African Commission adjudged, in **Case Nº. 334/06 of Interights Initiative for Personal Rights *v.* Arab Republic of Egypt (May 2011)** that:

> ***"The foreclosure before the national courts of Member States, of all appeals against decisions rendered within the framework of criminal***

***proceedings, and which results into severe punishments than the death penalty constitutes a violation of Article 7 (1) (a) of the African Charter on Human and Peoples' Rights.*"**

28. Plaintiffs/Applicants further argue that since the date of the death sentence placed on 2nd Plaintiff/Applicant, by a Special Military Tribunal (which thus deprives him from exercising his right to appeal), up till now, makes 2nd Plaintiff/Applicant to still be subjected to the continued violation of his fundamental human rights. Plaintiffs/Applicants claim that since the death sentence was pronounced on 30th May 1995, by a Special Military Tribunal, created by the ***Law on the Armed Robbery and Miscellaneous Fire Arms Tribunal***, the said Tribunal has been functioning on the basis of an illegal procedure, which boils down to accusation, conviction and sentencing to death.

29. While referring to the required superior norms in similar circumstances, he cites the jurisprudence of the EU Court on Human Rights, in the case of **Salduz *v.* Turkey** of 2008, wherein it is declared that: ***"These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies."*** Plaintiffs/Applicants declare that the death sentence handed down by the Nigerian Military Tribunals violate the provisions of Articles 4 and 7 of the African Charter on Human and Peoples' Rights, as they are an arbitrary deprivation to the exercise of the right to life.

30. The 2nd Plaintiff/Applicant argues that it clearly results from the jurisprudence of the African Commission that the procedures before the Nigerian Military Tribunals violate the requirements of fair hearing, as enshrined under Article 7 of the African Charter on Human and Peoples' Rights, which provides that: "*By applying the principles of fair hearing through Special Tribunals, the African Commission adjudged that such is a 'violation of Article 7 (1)*

(d) of the African Charter, because their composition is at the discretion of the Executive Arm." *See also* **Case N°. 334/06 of Interights Initiative for Personal Rights *v.* Arab Republic of Egypt (May 2011)**, wherein the African Commission held that: **"*Since the composition of the Panels that gave hand down the death sentence judgments is in itself a violation of Article 7 (by disregarding the requirements of fair hearing), the ulterior enforcement of such judgments leads to the resultant effect of deprivation of life arbitrary , as it violates the provisions of Article 4 (on the right to life.)*"** The same position was held in Cases N°. 137/94, 139/96 and 161/97 (1998) between International Pen, Constitutional Rights Project & Interights filed on behalf of Ken Saro Wiwa Jr. and Civil Liberties Organisation against Nigeria.

31. Plaintiff/Applicant argues that the application of death penalty, following an unfair hearing, is, not only a violation of the procedural requirements of fair hearing, but also the violation of the right to life. Both the UN Human Rights Commission in the case of **Reid *v.* Jamaica**, and the Inter-American Commission on Human Rights in the Case of **Graham *v.* USA** [Case 11, 93, Report N°. 97/03, Inter – Am CHR., OEA/Ser./L/V/II.114 Doc. 70 rev. pp 2 - 705 (2003)] also held that the violation of the normal procedural requirements invalidates the declaration of culpability and conviction. Consequently, under no circumstance shall Military Tribunals examine cases involving the civilians, and Special Tribunals must not adjudicate on crimes that can be examined by ordinary tribunals.

32. Plaintiffs/Applicants state that no appeal can be interjected against the death sentence decision handed down by the Nigerian Military Tribunals, under Article 11 (4) (Special Provisions) of the Law on Armed Robbery. They claim that all detainees, who were convicted by the Nigerian Military Tribunals have been denied their right to appeal against their sentences. The main Plaintiff/Applicant therefore submits that the 2nd Plaintiff/Applicant is running an imminent risk of being executed, and declares that it will be in the interest of justice,

to do justice to the instant case, especially when the Defendant's interests will not be impacted negatively, if this case is well received by the Court.

33. After the summary presentation of the facts of the case, as to merit, as well as the pleas-in-law, the Court will now examine the order sought, as provisional injunction on the Defendants to stay action on the enforcement of the death sentence handed down on the 2nd Plaintiff/Applicant. In this regard, Counsel to Plaintiff filed a 37-page - Affidavit, dated 6th November 2013, in support of this plea. In the said Affidavit, he declares that the 2nd Plaintiff/Applicant was found guilty by the Armed Robbery and Miscellaneous Fire Arms Tribunal in Kaduna, and was sentenced to death, but he interjected appeal against this judgment before the Appeal Court in Kaduna, where the said appeal is still pending.

34. He avers that, judging by the current practice in the Nigerian prisons, any convicted person, who is sentenced to death could be executed at any moment, whereas his appeal against such decision may still be pending before a court of competent jurisdiction. As he is conscious of the fact that his right to appeal before the Appeal Court in the Kaduna Division, could be violated by the Defendants, he sought from the Honourable Court a provisional order, to ensure that he is not executed, before the determination of his case on appeal.

ON PRELIMINARY OBJECTIONS RAISED BY DEFENDANTS

35. However, in its reply, Counsel to the 1st Defendant filed a 20-paragraphs Supplementary Affidavit, on opposition to the order sought by Plaintiff/Applicant on provisional measure relating to stay of enforcement of the death sentence. He premised his opposition on the grounds that paragraphs 16, 17, 26, 28, 30 32 of Plaintiff/Applicant's Affidavit dated 5th and 6th November 2013 are at variance to the rule on filing of Affidavit, and, in case of false declaration, the request conveyed in such Affidavit should be rejected.

He equally stated in paragraph of the Affidavit that there is no valid and pending appeal registered under N°. CA/K/274/M/2013 in the Appeal Court in the Kaduna Division. Rather, there was an Application for extension of legal time-limit, to enable the filing of an appeal against the decision of the Tribunal. In the Supplementary Affidavit, he posits that an Application seeking extension of legal time-limit, to file an Appeal should not be taken to a pending appeal, in the real sense of the word. He seeks a rejection of the provisional measures on stay of action on the enforcement of the death sentence, and the case be examined on merit. He argues that the ECOWAS Court of Justice cannot constitute itself into an appeal court against the judgments delivered by the national courts of Member States, and adds that no prejudice would be done to Plaintiff/Applicant if his order sought were rejected.

36. The 2nd Defendant filed an Application dated 28th January 2014, in which he sought an extension of time-limit to file a supplementary Memorial in Defence against the grievances brought by Plaintiffs/ Applicants.

LEGAL ANALYSIS OF THE PRELIMINARY OBJECTIONS RAISED.

After analyzing the summary of facts presented by the 2nd Plaintiff/ Applicant as well as the objections raised by Counsel to 1st Defendant, relating to the order sought as the provisional measures, it is important to now analyse the objections raised by the 1st Defendant concerning the admissibility of the proof contained in paragraphs 16, 17, 24, 26, 27, 28, 30 and 32 of Plaintiffs/Applicants' Affidavit dated 5th and 6th November 2013, which may be a violation of the provisions of extant laws of Nigeria on the matter. The said extant laws provide that an Affidavit must state the facts of the case, and not issues as to the merit of the case. The facts must not be argued nor be presented in form of conclusions. Plaintiff/Applicant must reveal, in the Affidavit, the sources of his information, to justify the admissibility of his request as contained in the Affidavit.

37. Every paragraph is examined as it was formulated, in order to find if it is not written in a way as to be at variance to the required norms as enshrined in the relevant provisions of the Laws of the Federal Republic of Nigeria on the Burden of Proof. Following this analysis, the Court finds that the proof as contained in these paragraphs are not conclusive enough, they are neither argumentative, and do not represent legal arguments. Also, some paragraphs as contained in the Affidavit filed by the 1st Defendant are not perfectly in harmony with the said requirements of the Law on Burden of Proof.

    In a bid to shed light on the issue of admissibility of these paragraphs, Article 115 of the Law on the Burden of Proof of the Federal Republic of Nigeria of 2011 can provide an insight. Article 115 of the said Law provides as follows:

    1) Every Affidavit filed in a law court can contain, only the summary of facts, and the circumstances of Plaintiff, which is as a result of his personal knowledge or the facts he believes to be true.

    2) An Affidavit must not contain extrinsic proof in the form of objections, prayers, legal arguments or conclusions.

    3) When a person makes a deposition on the strength of what he believes, and his belief emanates from another source, different from his personal knowledge, he must indicate, expressly, the facts and the circumstances that form the basis of his belief.

    4) When such belief is sourced from an information he receives from another person, the name of his information must be declared, and the reasonable details must be furnished on the informant, the time, the venue and the circumstances of the information.

38. The issue to determine here is to find if the attacked paragraphs by the 1st Defendant are in contradiction with the above-referred requirements of a valid Affidavit. All the points that form the basis of the objections raised by the 1st Defendant relate essentially to Article

115 (2) mentioned above, that is to find out whether the Affidavit contains extrinsic proofs in the form of objections, prayers, legal arguments or conclusions. There is no doubt for the Court to find that these paragraphs relate to prayers, legal arguments or conclusions, consequently, the objection raised by 1st Defendant is upheld. The next issue for determination is to find out if, apart from these paragraphs, the other paragraphs could justify the orders sought as provisional measures!

LEGAL ANALYSIS ON THE APPLICATION FOR PROVISIONAL INJUNCTION

39. Under Article 20 of Protocol A/P.1/7/91 on the Community Court of Justice, ECOWAS *"The Court, each time a case is brought before it, may order any provisional measures or issue any provisional instructions which it may consider necessary or desirable."* Moreover, Article 79 of the rules of Court provides that: "*An application under Article 20 of the Protocol shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for.*"

40. Thus, it can be deduced that even if the said provisions of the Protocol and the Rules of Court refer to provisional measures, the reparation solicited in the 2nd Plaintiff/Applicant's initiating Application would have the same effect. Whether Plaintiff/Applicant uses, in its Application, the words provisional injunction, provisional measures, or provisional instructions, the relief sought remains the same and is encapsulated within the spirit of Articles 20 of the Protocol, and 79 of the Rules of Court.

41. Regarding the application of provisional measures, it is thus established in law that certain factors must be taken into consideration, in granting such measures sought. First of all, it is for the Tribunal to determine whether the reasons adduced in the Affidavit show that the situation of the Plaintiff/Applicant needs an urgent attention, and carries

extremely serious consequences to the extent it is necessary to prevent irreparable prejudices for the concerned person, to grant provisional measures. As stated in the above cases, the Court will adopt provisional measures as it deems as necessary within the specific circumstances of each case brought before it.

42. This fact is confirmed by other Regional and International Human Rights protection Courts, especially the Inter-American Court on Human Rights, in its Article 62, which provides that: "*When cases of extreme urgency and serious gravity are filed before it, and when it is necessary to prevent irreparable prejudices to persons, the Court can order provisional measures that it deems necessary…*" In the case of **Peace Community of San Jose de Apartado (Colombia)**, the Court ordered the USA to adopt measures in order to protect, specifically, the names of person, or, during special occasions, the names of groups of persons, when they are run serious risks. See the book titled: **Provisional Measures in The Case Law of Human Rights**, by Clara Burbano Herrera. *See also* the jurisprudence in the cases of **Suarez Rosero** *(Equator)*, **Loayza Tomayo** *(Peru)*, **Gallardo Rodriguez** *(Mexico)*, and **Cesti Hurtado** *(Peru)*, as reported at page 4 of the said book, where the Court often ordered the release of some detainees, who are convicted, and the new reform led to the commutation of death sentences to life imprisonment, for the concerned person(s), see the afore-mentioned ***case of Suarez Rosero***.

43. In the instant case, the reasons or grounds invoked by the 2nd Plaintiff/ Applicant are as follows:

    1. The 2nd Plaintiff/Applicant was found guilty and was sentenced to death by *the Armed Robbery and Miscellaneous Fire Arms Tribunal* Holden in Kaduna, within the framework of the procedure in the case registered under N°. KD/ART/490, and the sentence was pronounced by Justice J. S. Abiriyi on 30th April 1995.

2. The *Law on the Armed Robbery and Miscellaneous Fire Arms Tribunal* was abrogated, and the one in force currently carries the amendments carried out on the Laws of the Federal Republic of Nigeria of 1990.

3. The Constitution of the Federal Republic of Nigeria guarantees the right to appeal for the 2nd Plaintiff/Applicant, which the latter tried to exercise by filing an appeal against the death sentence judgment before the Appeal Court before the Appeal Court in the Kaduna Division, registered under Case N°. CA/K/274/M/2013. Copy of this appeal case is attached as exhibit to the Affidavit, by the 2nd Plaintiff/Applicant.

4. The 2nd Plaintiff/Applicant risks to have his right to life being violated, finally, with the highly probable execution, and if the provisional injunction/provision sought is not granted and issued, the death sentence would be irreversibly enforced.

44. It is clearly stated under paragraphs 11 to 21 in the Affidavit filed by the 2nd Plaintiff/Applicant dated 6th November 2013, and marked as document no. 6 by the Court that despite the existence of the appeal pending before the higher courts, the Defendant hurriedly placed the 2nd Plaintiff/Applicant on the death list, awaiting execution, and, if there is no urgent intervention by the Court, the Defendant shall proceed to the execution of the 2nd Plaintiff/Applicant, a situation that will make any attempt by the 2nd Plaintiff/Applicant to contest his conviction in vain, all under the provisions of the *Law on the Armed Robbery and Miscellaneous Fire Arms Tribunal*.

45. Moreover, there is an urgent need for the Honourable Court to make a pronouncement on the order sought by the 2nd Plaintiff/Applicant. Regarding his relationship with the 2nd Defendant, the 2nd Plaintiff/Applicant declares, at paragraph 22 of his Affidavit that he escaped execution on 24th June 2013, by whiskers, following the death warrant signed by the Governor of Edo State, Mr. Adams Oshiomole, and that his execution would lead to the violation of his right to appeal

against the death sentence pronounced on him, as enshrined under Article 7 of the African Charter of Human and Peoples' Rights. He further that he filed another appeal before the Federal High Court, seeking the same orders, as he has done in the present case, since access to the ECOWAS Court of Justice, is not conditioned by prior exhaustion of local remedies.

46. In support of his claim in the instant case, he cites the jurisprudence of the Court in the case of **Hadidjatou Mani Koraou** of 27 October 2008 on exhaustion of local remedies, before accessing an international court of competent jurisdiction, as the ECOWAS Court of Justice.

However, it was clearly indicated that the rule of exhaustion of local remedies does not apply before the ECOWAS Court, if there is a human right violation case filed before it. He equally declares that the death sentence under reference violates the provisions of Articles 4 and 7 of the African Charter, as it is an arbitrary deprivation of the right to life. He further recalls that the circumstances of the case reveal that the 2nd Plaintiff/Applicant is in real and imminent danger. Consequently, the Honourable Court can only find the urgency under reference, and, like the other international Courts it has referred to, as well as the best practices therein, to declare the instant case admissible, in order to avoid annihilating the competence of the Court, by striking out the merits of the case before Court.

47. Moreover, the 2nd Defendant declares at paragraph 6 of its Affidavit filed on 7th November 2013 that the 2nd Plaintiff/Applicant did not file any valid appeal before the Court of Appeal, in the Kaduna Division, registered under Case No. CA/K/274/M/2013, and that the letter ''M'' that features in the case number means that it was a "Motion" filed by the 2nd Plaintiff/Applicant, seeking an extension of legal time-limit to file a supplementary appeal, and not the appeal itself. At paragraph 5 of its Supplementary Affidavit, the 1st Defendant claims that he contacted, orally, one Mr. Suraju Gusau, the Chief Registrar at the Court of Appeal, in the Appeal Division of Kaduna,

who told him that what was pending before the Court of Appeal was an Application seeking an extension of legal time-limit to enable Applicant file an appeal, and not the appeal itself.

48. When the Court examines, on the one hand, the facts as exposed in the Affidavit, and, on other hand those as exposed in the Affidavit and the Supplementary Affidavit filed in reply to the grievances made by Plaintiff/Applicant, it clearly seems that the heart of the litigation between both parties is to determine if there was the existence of an appeal pending before the Appeal Court in Kaduna, which may thus justify the intention, or a likely action by the 2nd Plaintiff/Applicant, with a view to contest the death sentence pronounced on his person by *the Armed Robbery and Miscellaneous Fire Arms Tribunal* Holden in Kaduna.

49. There is no doubt about the fact that the 2nd Plaintiff/Applicant indicated his intention to interject appeal against the sentence hanging on his head, whether through an Application seeking an extension of legal time-limit, or through a Notice on the case as to merit. The two options mentioned above do not, in anyway whatsoever, reduce the fact that the 2nd Plaintiff/Applicant really demonstrated his wish to appeal against the death sentence pronounced by the judge at the Tribunal of First Instance, Justice J. S Abiriyi, on 30th April 1995. Even if there seem to have been a long period of time between the time of the declaration of culpability and the time the death sentence judgment was delivered, the request for extension of legal time-limit submitted by the 2nd Plaintiff/Applicant makes germane that it would be impossible, not to examine the issue, from the angle of law, more so, as it has to do with a very important issue as life and death.

50. The issue to determine whether the Honourable Court can become a Court of appeal on decisions rendered by the national courts of Member State is not relevant in the instant case, the ECOWAS Court has severally, and clearly held that its jurisdictional powers do not make it an appeal court for appeal filed against the judgments of the national courts, to be brought before it. See the judgments in the

cases of **Moussa Léo Keita against the Republic of Mali** delivered on 22nd March 2007, and **Alimu Akeem** delivered on 27th January 2014. At first sight, the initiating Application shows the violation of the 2nd Plaintiff/Applicant's human rights, as enshrined under Articles 4 and 7 of the African Charter on Human and Peoples' Rights, and Article 9 (4) of the Supplementary Protocol on the Community Court of Justice, ECOWAS and other international instruments.

51. All these arguments that the 2nd Plaintiff/Applicant invokes, to file his Application are human right violation related arguments, and not grounds for appealing against the judgment that convicts him, nor the death sentence itself. Article 4 of the African Charter on Human and Peoples' Rights provides thus: "*Human beings are inviolable. Every human being shall have respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*" When a person was convicted and sentenced to death, is not allowed to file an appeal against that judgment, this could constitute an arbitrary deprivation of the right to life, as enshrined under Article 4 of the said Charter.

52. Moreover, Article 7 of the African Charter on Human and Peoples' Rights provides that:

"*Every individual shall have the right to have his cause heard. This comprises:*

a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, rules and customs in vogue…"

From the facts presented above, the Application filed by the 2nd Plaintiff/Applicant has satisfied the conditions set out for the granting of provisionary injunction or measure, pursuant to Article 20 of the Protocol, and Article 79 of the Rules of Court. Consequently, the Court admits the Application filed by the 2nd Plaintiff/Applicant seeking provisional measures, and adjudicates on same.

53. DECISION

1. **Having regard** to the fact that the 2nd Plaintiff/Applicant filed an Application seeking provisional injunction;

2. **Considering** that the Application seeking provisional injunction is synonymous to an Application seeking provisional measures;

3. **Having regard** to the fact that the 2nd Plaintiff/Applicant was found guilty and sentenced to death. Considering that the Application filed by him sought an extension of legal time-limit, to enable him file an appeal, or it was an appeal, in the real sense of the word, the Court finds that there is an existence of an indication from the part of the 2nd Plaintiff/Applicant to file an appeal against the judgment wherein he was sentenced to death, and this should be retained as the most important consideration;

4. **Considering** that the analysis of the jurisprudence on provisional measures indicates that in case of extreme gravity and urgency, and when it becomes absolutely necessary to prevent irreparable prejudices to persons, the Court grants provisional measures sought, as it deems necessary, in a procedure of this nature.

5. **Considering** that the death sentence that is hanging on the head of the 2nd Plaintiff/Applicant, whereas his intention of appealing against the death sentence pronounced on his person, as the Court holds, in its wisdom, is of extreme gravity and springs from an urgency, and for the purposes of preventing irreparable prejudice to the 2nd Plaintiff/Applicant, the Court hereby grants the provisional injunction/measure, by ordering the Defendants to stay action on the enforcement of the death sentence, pending the determination of the case filed before the Appeal Court.

6. **Considering** that in a procedure like the instant one, which relates to an alleged human rights violation, under Article 9 (4) of the Supplementary Protocol falls squarely under the

jurisdiction of the Court, and does not constitute, in anyway whatsoever, an appeal against the decision rendered by any national court, even if such is created to examine cases of armed robbery; the issue bordering on the jurisdiction of the Court was already settled in a plethora of its judicial pronouncements, as can be attested to by those in cases of Moussa Léo Kéita versus Mali, and Alimu Akeem referred to above.

7. **Considering** that the Application filed by the 2nd Plaintiff/ Applicant seeking provisional measures was declared as admissible, the Court hereby orders the Defendants to stay action on the enforcement of the death sentence delivered on the person of the 2nd Plaintiff/Applicant, and to remove his name from the list of detainees on the awaiting list to be executed, pending the determination of the Application filed before the Court on its merit.

On Costs

54. The Court decides to order the 1st Defendant, which is the Federal Republic of Nigeria to bear costs, and award damages in favour of the 2nd Plaintiff/Applicant.

Thus made, adjudged and pronounced in a public hearing, at the seat of the Court, at Abuja, pursuant to the Rules of Court on the 31st day of January 2014.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

Hon. Judge Hansine N. DONLI - *Presiding;*

Hon. Judge M. BENFEITO RAMOS - *Member;*

Hon. Judge MEDEGAN NOUGBODE - *Member.*

Assisted by **Aboubacar Djibo DIAKITE (Esq.) -** *Registrar.*

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