

040/2016
21/03/2018
(000415 - 000398) RM,

000415

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

MARIAM KOUMA AND OUSMANE DIABATÉ

V.

REPUBLIC OF MALI

APPLICATION No. 040/2016

JUDGMENT

21 MARCH 2018



SUMMARY

SUMMARY	ii
I. THE PARTIES	2
II. SUBJECT OF THE APPLICATION	2
A. THE FACTS	2
B. ALLEGED VIOLATIONS	4
III. SUMMARY OF THE PROCEDURE BEFORE THE COURT	5
IV. PRAYERS OF THE PARTIES	6
V. ON THE COURT'S JURISDICTION	6
VI. ON ADMISSIBILITY	7
A. On the allegation that the domestic procedure has been unduly prolonged	8
B. On the alleged inefficiency of the remedies before the Court of Appeal	11
C. On the allegation regarding the inefficiency of the civil remedy	13
VII. COSTS	14
VIII. OPERATIVE PART	15

The Court composed of: Sylvain ORÉ, President, Ben KIOKO, Vice-President, Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa BEN ACHOUR, Angelo V. MATUSSE, Ntyam O. MENGUE, Marie-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Judges; and Robert ENO, Registrar.

In the Matter of

Mariam KOUMA and Ousmane DIABATÉ

represented by:

- i) The Institute for Human Rights and Development in Africa (IHRDA)
- ii) The Association for the Advancement and Defense of Women's Rights (APDF)

versus

REPUBLIC OF MALI

represented by:

- i) Mr. Youssouf DIARRA, Director of State Litigations
- ii) Advocate Harouna KEITA, Lawyer at the Bar of Bamako
- iii) Mr. Daouda DOUMBIA, Sub-Director for Criminal Matters

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. The Applicants, Mrs Mariam Kouma and her son Ousmane Diabaté, are citizens of Mali.
2. The Respondent State is the Republic of Mali which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October, 1986, and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 25 January, 2004. The Respondent State also, on 19 January, 2010, deposited the declaration prescribed under Article 34 (6) of the Protocol recognizing the Court's jurisdiction to receive cases directly from individuals and Non-Governmental Organizations. It is also a Party to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as the "Maputo Protocol") since 25 November, 2005, and to the African Charter on the Rights and Welfare of the Child (hereinafter referred to as "the Charter on the Rights and Welfare of the Child ") since 29 November, 1999.

II. SUBJECT OF THE APPLICATION


3. The Application was filed by APDF and IHRDA on behalf of Mariam Kouma, a merchant in Bamako, and her son Ousmane Diabaté, and invokes the violation of the Applicants' right to a fair trial by the Respondent State.

A. THE FACTS

4. In January 2014, Mariam Kouma sold a monkey to Boussourou COULIBALY for the sum of nine thousand (9,000) CFA Francs. The next day, Boussourou came to ask Mariam to take back her monkey and return his money, stating that his mother did not want the domestication of the monkey. Faced with Mariam's

refusal to take the animal back, Boussourou left the monkey in the latter's compound and went away. However determined at all cost to have his money, he returned almost every day to the residence of his contracting partner to demand the return of his money.

5. On the night of 13 February, 2014, when he returned to Mariam's house, she ordered him *never to set foot* in her house again. Furious, Boussourou rushed to the home of a neighbouring family, fetched a machete, rushed back into Mariam's living room and repeatedly struck her on the head and feet until she fell unconscious.
6. Ousmane Diabaté, Mariam's son, who came to the rescue of his mother, was also wounded by Boussourou during the scuffle. It was then that the neighbors, alerted by the cries of Ousmane, apprehended Boussourou and handed him over to the Police.
7. Following an investigation ordered by the Public Prosecutor's Office, Bousourou was charged with the offense of inflicting simple bodily harm. The case was forthwith brought before the Court of First Instance of Bamako District V.
8. At the public hearing of 20 February, 2014, the Public Prosecutor asked for the accused to be released on grounds of dementia.
9. On 27 February, 2014, the trial court dismissed the plea of the Public Prosecutor and sentenced Boussourou to one year imprisonment for the offence of inflicting simple bodily harm. The Court however reserved ruling on damages on the ground that the complainant had not yet produced evidence of the alleged incapacity to work.
10. Counsel for Boussourou appealed against that decision on the same day.
11. In its judgment of 24 March, 2014, the Court of Appeal, considering that the Trial Judge left the case inconclusive for having not taken a decision on civil damages,



decided to refer the matter back to the Court of First Instance of Bamako District V.

12. As at the time of referral to this Court by the Applicants on 1 July, 2016, proceedings were pending before the Court of First Instance of Bamako District V.

B. ALLEGED VIOLATIONS

13. The Applicants allege that the Mali national courts, seized of the dispute between them and Boussourou, did an incorrect classification of the facts of the case. They assert that the fact of classifying the acts of their aggressor as assault rather than attempted murder with premeditation resulted in the violation of their dignity and rights under international human rights instruments, in particular:

- i. "The right to dignity and the right to protection from all forms of violence and torture as provided under Article 3 of the Maputo Protocol, Article 5 of the Charter, Article 7 of the ICCPR and Article 5 of the Universal Declaration of Human Rights (UDHR);
- ii. Ousmane's right to education as provided under Article 17 of the Charter and Article 11 of the African Charter on the Rights and Welfare of the Child;
- iii. Mariam's right to work as provided under Article 15 of the Charter;
- iv. The right to health as provided under Article 16 of the Charter, Article 14 (1) of the Maputo Protocol and Article 14 of the African Charter on the Rights and Welfare of the Child;
- v. The right of access to justice and the right to reparation as provided under Article 7 of the Charter and Article 6 of the Maputo Protocol"

14. The Applicants contend, lastly, that the Respondent State is liable for all the afore-mentioned violations for having failed in its obligation to conduct an in-depth and impartial investigation leading to a fair classification of the offence

committed by their aggressor, adding that this constitutes a violation of Article 3 (4) of the Maputo Protocol.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

15. The Application was received at the Court Registry on 1 July, 2016 and served on the Respondent State on 26 July, 2016. The Respondent State was requested to forward its Response to the Application within sixty (60) days, pursuant to Rules 35 (4) and 37 of the Rules of Court (hereinafter referred to as "the Rules").
16. On 18 October, 2016, the Registry transmitted the Application to the other States Parties and entities as mentioned in Rule 35 (3) of the Rules.
17. On 28 November, 2016, the Respondent State filed its Response to the Application, which was transmitted to the Applicants on 13 December, 2016.
18. On 1 February, 2017, the Applicants filed their Reply to the Respondent State's Response which was forwarded to the Respondent State on 2 February, 2017.
19. On 21 February, 2017, the Registry notified the Parties that the Court would close the written procedure and set down the case for deliberation.
20. On 28 February, 2017, the Respondent State transmitted to the Court an application for leave to file additional pleadings in accordance with Rule 50 of the Rules of Court. At its 44th Ordinary Session held from 6 to 24 March, 2017, the Court accepted the application; and on 20 March, 2017, the Registry notified the Respondent State that it has been allowed thirty (30) days to file its submissions.
21. On 5 April, 2017, the Respondent State filed its Rejoinder and this was served on the Applicants on 10 April, 2017.



22. At its 47th Ordinary Session held from 13 to 24 November, 2017, the Court decided to close the written procedure and to set the case down for deliberation. The Parties were notified of this decision on 22 February, 2018.

IV. PRAYERS OF THE PARTIES

23. In the Application, the Court is requested to:

“

- i. “hold the Respondent State liable for failing in its obligation to carry out a thorough and impartial investigation in pursuance of Article 3(4) of the Maputo Protocol, Article 1 of the Charter and Article 16 of the African Charter on the Rights and Welfare of the Child;
- ii. declare that the Respondent State has violated their rights guaranteed and protected by Articles 5, 7, 15, 16, et 17 of the Charter; 3, 6 and 14 of the Maputo Protocol; 11 and 14 of the African Charter on the Rights and Welfare of the Child; 7 of the ICCPR and 5 of the UDHR;
- iii. Order the Respondent State to pay Mariam Kouma and Ousmane Diabaté, the sums of 110,628,205 Francs and 70,026,000 Francs respectively in reparation for the prejudices suffered”.

24. In its defence, the Respondent State prayed the Court to:

“

- i. With respect to the form, declare the Application inadmissible on grounds of failure to exhaust the local remedies,
- ii. On the merits, dismiss the Application as groundless”.

V. ON THE COURT'S JURISDICTION

25. In terms of Rule 39(1) of its Rules: “The Court shall conduct preliminary examination of its jurisdiction...”

26. The Court notes that its material, personal, temporal and territorial jurisdiction is not in contention between the Parties.

27. The Court also notes that, in the instant case, there is no doubt as to its material, personal, temporal and territorial jurisdiction given that:

- i. the Applicants are raising the issue of violation of the rights guaranteed by international human rights instruments ratified by the Respondent State¹;
- ii. the Respondent State is a Party to the Protocol and has deposited the declaration prescribed by Rule 34(6) enabling individuals and NGOs to directly bring cases before the Court by virtue of Article 5(3) of the Protocol;²
- iii. the alleged violations occurred subsequent to the entry into force of the international instruments, as concerns the Respondent State³; **and**
- iv. the facts of the case took place on the territory of the Respondent State

28. In view of the foregoing considerations, the Court holds that it has jurisdiction to hear the case.

VI. ON ADMISSIBILITY

29. According to Article 6 (2) of the Protocol: "The Court shall rule on the admissibility of a case taking into account the provisions of Article 56 of the Charter."

30. The Respondent State invokes only one inadmissibility objection based on Rule 40 (5) of the Rules of Court which stipulates that, "to be admissible, Applications shall be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

¹ See para 2 of this judgment.

² See para 2 of this judgment.

³ Idem.



31. In its Response, the Respondent State, citing Rule 34(4) of the Rules, contends that the Applicants did not exhaust local remedies prior to bringing the case before the Court, and prayed this Court to declare the Application inadmissible.

32. On this point, the Applicants themselves admit that they have not exhausted the local remedies before seizing this Court. They however refer to the provisions of Rule 40(5) of the Rules of Court, and indicate that:

- i. the case pending before the Bamako Court of Appeal has been unduly prolonged;
- ii. the Appeal is not efficient, and
- iii. the civil claim, for its part, is already void of its substance because the acts committed by Boussourou, their aggressor, have been underestimated.

33. The Court will now examine the three arguments advanced by the Applicants in support of the objections to the rule of prior exhaustion of local remedies.

A. On the allegation that the domestic procedure has been unduly prolonged

34. The Applicants point out that the case has been pending before the Bamako Court of Appeal for two years and two months; and that a case that was adjudicated in less than a week at the criminal court cannot reasonably take more than two years before the Appeal Court. They therefore prayed the Court to find that the procedure has been unduly prolonged and to accept the exception to the rule of exhaustion of local remedies as provided under Article 56(5) of the Charter and reiterated in Rule 40(5) of the Rules of Court.

35. The Respondent State, in response, contends that at the time this Court was seized, the case had not yet been definitively closed at domestic level; adding that the prolongation was due to procedural difficulties. It further argues that if Mali did not dispose of the case, it was because the judge was still awaiting the

Counsel for the parties in the civil case, who requested that the rights of his clients be reserved till production of a final medical report; that on three occasions, that is, on 12 and 27 October, 2016, and 30 November, 2016, the Applicants failed to show up at the court hearing on the issue of reparation. The Respondent State infers that it is in no way involved in procedural intricacies.

36. In their Reply to the Respondent State's Response, the Applicants point out that the public hearings of 12 and 27 October, 2016 and that of 30 November, 2016 at which they did not appear, were subsequent to the referral to this Court. They further stated that the abnormality of the duration of the procedure should be assessed from the time the case was referred to this Court.

37. The Court reaffirms that, to determine whether or not the duration of a procedure is reasonable, it must take into account the circumstances of the case and of the procedure; and as such the, "determination as to whether the duration of the procedure in respect of local remedies has been normal or abnormal should be carried out on a case-by-case basis depending on the circumstances of each case."⁴

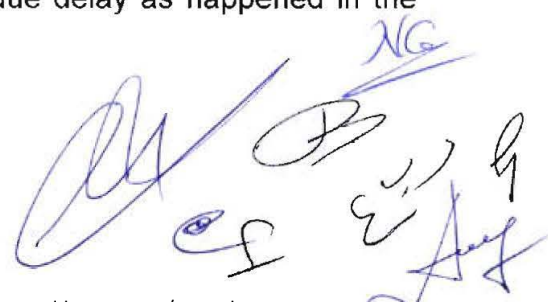
38. On this point, the Court's analysis takes into account, in particular, the complexity of the case or the related procedure, the behaviour of the Parties themselves and that of the judicial authorities to determine if the latter "has been passive or clearly negligent."⁵

39. In the instant case, the questions at issue are whether the domestic procedure in respect of the Applicants' case is complicated or whether the Parties helped to speed up the said procedure; and more still, whether the judicial authorities showed proof of negligence or inadmissible delays.

⁴ See Application No. 013/2011, Judgment of 28/3/2014. *Beneficiaries of The Late Norbert Zongo and Others v. Burkina Faso*, § 92 <http://www.african-court.org>

⁵ See Matter of Dobbertin v. France, Judgment of 25 February, 1993, Série A, No. 256-D § 44. <http://hudoc.echr.coe.int>

40. The evidence on file shows that when the offence was committed, the Police alerted by the neighbours arrested Mr Boussourou, kept him in custody and prepared an investigation report; that this report was later transmitted to the State Counsel at the Court of First Instance of Bamako District V; that the latter, for his part, then seized the Criminal Court for immediate court hearing after placing the culprit under detention.
41. The Court notes that the facts described above do not contain any element of fact or of law which could render the case and, still less, the procedure, so complicated as to justify a relatively lengthy hearing.
42. The Court further notes that the Court of First Instance of Bamako District V which was seized on 20 February, 2014, rendered its judgment on 27 February, 2014, that is, eight (08) days later. As for the Appeal Court which examined the case on 27 February, 2014, the latter gave its decision on 24 March, 2014, that is, within twenty-five (25) days. The Court finds that such a time frame is not lengthy enough for it to declare the procedure unduly prolonged.
43. The two (2) years and two (2) months delay that the Applicants are complaining about is the duration of the proceedings before the Court of First Instance of Bamako District sitting as a referral court which is expected to dispose of its case by making a ruling on the Applicants' claim for civil damages.
44. On this point, as it could be seen from the evidence on file, the defence brief in particular, that the Applicants themselves contributed in delaying the procedure because at the hearing of 20 February, 2014, their Counsel prayed the Court to reserve the rights of the civil parties; and besides, the Applicants had not produced the final medical report concerning Mariam Kouma. The Applicants did not contest this fact.
45. The Court holds that the expeditiousness of a procedure requires the necessary cooperation of the Parties in the trial to avoid undue delay as happened in the



case between the Applicants and the Public Prosecutor's Office in the national courts, particularly the Court of First Instance of Bamako District V, since the case was referred to the latter so that it could be disposed of, as regards civil damages.

46. In the instant case, the Court notes that the time that elapsed between 24 March, 2014, and 1 July, 2016⁶, the date on which the case was brought to it, corresponds to the period when the Court was awaiting the Applicants' medical evidence so as to assess the harm and quantify the reparation.

47. Considering the above elements, the Court holds that the Applicants have contributed to the delay in the proceedings they allege are unduly prolonged.⁷ They should have helped to speed up the proceedings by producing early enough, the evidence for reparation of the damages they are claiming.

48. The Court therefore dismisses the Applicants' contention that local proceedings have been unduly prolonged.

B. On the alleged inefficiency of the remedies before the Court of Appeal

49. The Applicants also contend that the remedy before the Court of Appeal is insufficient given that it offers no prospect of re-classification of the offence as a case of attempted murder with premeditation rather than assault and battery; that the State Prosecutor's Office should first have sought medical evaluation to determine the level of incapacitation to work suffered by the victims before proceeding with classification of the facts.

⁶ Date on which the Court of Appeal referred the case back to the Court of First Instance Bamako District V.

⁷ See Application No. 001/2012, Judgment of 28 /03/ 2014: *Frank David Omary and Others v .United Republic of Tanzania*, § 133 to 135. <http://www.african-court.org>

50. The Respondent State contests the Applicants' claims, arguing that this case had been properly managed in local courts contrary to the claims in the Applicants' submissions. It maintains that the sentencing of Boussourou to one year imprisonment term by the Court of First Instance of Bamako District V is proof of the fact that the case, at criminal level, has been expeditiously managed with maximum strictness.

51. The Court notes that the Applicants limit themselves to arguing that they did not exercise the remedy of re-classification of the offence based on the facts because there is no prospect of obtaining any such re-classification.

52. As the Court already stated in previous cases, "It is not enough for the Complainants to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences"⁸ as a way to discharge themselves of the obligation to exhaust the local remedies. In the final analysis, "it is incumbent on the Complainant to take all necessary steps to exhaust or, at least, attempt the exhaustion of local remedies".⁹

53. In the instant case, the Court notes that the Applicants have no proof to show that the remedy of re-classification could not lead to another ruling, different from that of the examining magistrate; they contented themselves with casting doubt on the sufficiency of a remedy available to them¹⁰ and which they have deliberately refused to use.

⁸ See Application No. 003/2012, Ruling of 28/32012, *Peter Joseph Chacha v. United Republic of Tanzania*, §. 143; Application No. 001/2012, Judgment of 28/03/2014: *Frank David Omary v. United Republic of Tanzania* § 127. <http://www.african-court.org>

See also ACHPR Communication No. 263/02: *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v. Kenya*, in 18th Activity Report July-December 2004, § 41;

ACHPR, Communication No.299/05 *Anuak Justice Council v. Ethiopia*, in 20th Activity Report January – June 2006, para 54.

⁹ See Application No. 003/2012, Ruling of 28/03/2012, *Peter Joseph Chacha. v. United Republic of Tanzania*, §144 *op.cit.*

54. Therefore, in the absence of proof on the part of the Applicants that the indictment chamber would not produce the expected results, the Court dismisses the Applicants' argument in this respect.


C. On the allegation regarding the inefficiency of the civil remedy

55. The Applicants contend that the Respondent State's justice system, by classifying the offense as simple assault and battery without awaiting the opinion of the physician in charge, "shut the door" to the claims to compensation for 60% incapacitation suffered by Mariam Kouma, as well as the loss of opportunities due to the incapacitation; that Mariam was thus rendered incapable of claiming the cost of her surgery and medicines, and of the physiotherapy she underwent for treating the injuries inflicted on her by Boussourou.

56. The Applicants also argue that the fact that the State Prosecution had avoided conducting the appropriate criminal proceedings but rather undertook correctional proceedings, while ignoring young Ousmane Diabaté's status of victim – all represents proof that the local courts failed in their obligation to conduct thorough and impartial investigations.

57. The Applicants conclude that the local procedures hold no interest for the victims who are seeking a proper classification of the offence, punishment of the culprit commensurate with the crime committed and compensation that takes into account the sufferings endured by the Applicants.

58. The Respondent State refutes all the Applicants' allegations and states that it is because the Appeal Court took into account the civil claims of the Applicants that it referred the case to the trial Judge.



59. The Court notes that it is in considering the civil interest of the Applicants that the Bamako Court of Appeal on 27 February, 2014 held that the Trial Court Judge failed to dispose of the case by not deciding on the civil aspects, and accordingly decided to refer the matter to the latter.
60. Moreover, the Court notes that, at the present stage of the domestic procedure, the Applicants can lodge an appeal only after the trial judge's decision on civil damages. It is therefore premature to prejudge the inefficiency of the remedy before the Court of Appeal.
61. Consequently, the Court dismisses the Applicants' contention that the local remedy is inefficient, ineffective and insufficient.
62. The Court finds that the Applicants have not exhausted the local remedies as required under Article 56 of the Charter and Rule 40(5) of the Rules.
63. The Court notes that, according to Article 56 of the Charter, the conditions of admissibility are cumulative and, as such, when one of them is not fulfilled, the Application cannot be admissible. This is the case in the instant matter. The Application therefore must be declared inadmissible.

VII. COSTS

64. The Court notes that in the instant case, the Parties have not made any claim as to costs.
65. In terms of Rule 30 of the Rules, which provides that "unless otherwise decided by the Court, each party shall bear its own costs", the Court decides that each party shall bear its own costs.



VIII. OPERATIVE PART

66. For these reasons

THE COURT,

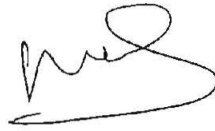
unanimously:

- i.* Declares that it has jurisdiction;
- ii.* Upholds the objection based on non-exhaustion of local remedies;
- iii.* Declares that the Application is inadmissible; and
- iv.* Declares that each Party shall bear its own costs.

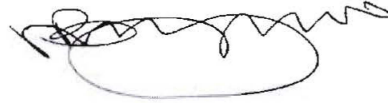


Signed:

Sylvain ORÉ, President



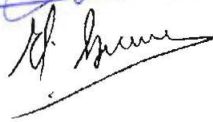
Ben KIOKO, Vice-President



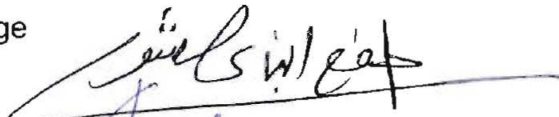
Gérard NIYUNGEKO, Judge



El Hadji GUISSÉ, Judge



Rafâa BEN ACHOUR, Judge



Angelo V. MATUSSE, Judge



Ntyam O. MENGUE, Judge



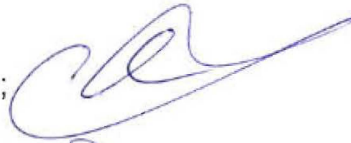
Marie-Thérèse MUKAMULISA, Judge



Tujilane R. CHIZUMILA, Judge



Chafika BENSAOULA, Judge;



and Robert ENO, Registrar.



Done at Arusha, this Twenty-First Day of March in the year Two Thousand and Eighteen, in English and French, the French text being authoritative.

