

# ECW/CCJ/JUD/05/07 Etim Moses Essien v. The Gambia

In the Community Court of Justice of the Economic Community of West African States (ECOWAS)  
Holden at Abuja, Nigeria

Between

Professor Etim Moses Essien - Applicant

v.

1. The Republic of The Gambia - Defendant
2. University of The Gambia - Defendant

## Composition Of The Court

Hon. Justice Hansine N. Donli - Presiding

Hon. Justice Aminata Mallé Sanogo - Member

Hon. Justice Anthony a. Benin - Member

Hon. Justice Awa Daboya Nana - Member

Hon. Justice El Mansour Tall - Member

## Assisted by

Tony Anene-Maidoh Esq. - Chief Registrar

## Counsel to the Parties

1. Mr. James A. Kanyip - for the Plaintiff
2. Mr. Emmanuel O. Fagbenle Mrs Awa Bah, A.G Chambers, The Gambia. - for the Defendants

## **Judgment of the Court**

1. The Applicant, Professor Etim Moses, is a citizen of the Community, of Nigerian nationality. The 1<sup>st</sup> Defendant, the Republic of Gambia is a Member State of the Community. The 2<sup>nd</sup> Defendant is a University of the said Member State.
2. The Applicant, who resides at Estate Housing D58, Eket, Uyo, Akwa Ibom State, Nigeria, is represented by his Counsel, James Kanyip. Albert & Co., Suite B58, Abuja Shopping Mall, Zone 3, Wuse:
3. The Defendants were represented by their Counsel, Dr. O. Olulana (DCIL) and Miss Nyalomy Sarr (SC), as well as Attorney-General and the Department of State for Justice, Marina Parack, Banjul, Gambia.
4. The Applicant complained of the violation of his human. The Defendants raised a Preliminary Objection of inadmissibility of the action, for lack of competence of the court. The court adjudicated and joined the

preliminary plea on the competence of the Court to the merits of the case, in accordance with Article 87 of the Rules of Procedure.

## **Presentation of the Facts and Procedure**

**5.** The Applicant, who was a Lecturer at the University of Gambia filed his Application on 18<sup>th</sup> November, 2005 at the Registry of the Community Court of Justice. He states therein that by a letter referenced FCTC/GTA/ASD/GAB/77 dated 24<sup>th</sup> September, 2001, he was recruited by the Commonwealth Secretariat, through the Commonwealth Fund for Technical Co-operation (FCTC), as a Technical Consultant, on a two-year lectureship contract at the University of Gambia, for the State of Gambia. The said employment consisted of giving lectures at the Medical School of the above University. The Applicant accepted the employment and exercised his fin 7<sup>th</sup> February, 2002 to 4<sup>th</sup> February, 2004.

**6.** As his contract was coming to an end, the Defendants approached the Applicant and proposed to him to continue with his services, promising him the renewal of his contract by the Commonwealth Secretariat.

**7.** The Applicant thus continued to exercise his functions to the benefit of the University of Gambia without being paid, and this situation persisted till the 13<sup>th</sup> day of October, 2004, when he addressed a letter to the University of Gambia claiming his salary arrears.

**8.** The University of Gambia then replied that the steps taken towards the renewal of his contract by the Commonwealth did not succeed, and as such, his salaries could not be paid to him upon the Commonwealth salary scale, but rather on the scale applicable to the University Lecturers, i.e. in Dalasis (the Gambian currency).

**9.** The Applicant stood against it, and the University of Gambia terminated his employment by notifying him of the non-renewal of his contract as from 26<sup>th</sup> January, 2005.

**10.** On 14<sup>th</sup> February, 2005, the University of Gambia wrote a letter to the Applicant concerning the settlement of the salary arrears, calculated in Dalasis, plus an amount of US\$ 6,000 representing an additional salary.

**11.** The Applicant received the amount of US\$ 6,000 and rejected the sums of money in Dalasis. On 18<sup>th</sup> November, 2005, he filed his Application at the Community Court of Justice, seeking from the Court the following orders:

(a) A Declaration that the action and conduct of the Republic of Gambia and the University of Gambia, in engaging him (the Applicant) for the services of a Technical Consultant, from 5<sup>th</sup> February, 2004 to January 26<sup>th</sup>, 2005 (1 year), without equal salary for the said services, amounts to economic exploitation and a violation of his right of being paid for equal work.

(b) A Declaration that the Applicant is entitled to equal payment for equal work or services rendered to the Republic of Gambia and the University of Gambia, during the period from 5 February 2004 to 26 January 2005, upon the same terms and conditions as was recruited by the Commonwealth Secretariat.

(c) A Declaration that the action and conduct of the University of Gambia as described in the facts of the case, violate Article 5 and 15 of the African Charter on Human and Peoples' Rights as well as Article 23(2) × 2. Everyone, without any discrimination, has the right to equal pay for equal work.

and (3)

× 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

of the 1948 Universal Declaration of Human Rights, both texts having been signed and acceded to by the Republic of Gambia.

(d)The issuing of an Order of payment to the Republic of Gambia and the University of Gambia compelling them, by obligation, to pay to the Applicant such sums as claimed in Pounds Sterling or Dollars, plus the sum of US\$ 100,000.00 in damages US\$ 10,000 in judicial processing fee.

**12.** The Defendants raised a Preliminary Objection, contending as follows:

(a) That the Application is inadmissible, for having omitted to summon the Commonwealth Secretariat as a party to the Case.

(b) That the Application is inadmissible before the Court, on the grounds that the Applicant omitted to exhaust local remedies as stipulated in Article 56(5) of the African Charter on Human and Peoples' Rights.

(c) That the Application is inadmissible, on the ground Applicant's claim is based on non-renewable contract employment, counter-offers and offers based on *quantum meruit*, which do not constitute fundamental rights positively established by statute or by contract.

(d) [sic]

(e) That the Court lacks jurisdiction to adjudicate upon the Case, because the facts thereof do not constitute a human right violation.

13. In its Interim Ruling No. 1 of 14<sup>th</sup> March, 2007. The Court decided on the Preliminary Objection, by declaring it inadmissible upon its first two points, and joined the preliminary plea to the merits as regards the 3<sup>rd</sup> and 4<sup>th</sup> points. This was done in accordance with Article 87 of the Rules of Procedure.

Indeed, the Court ruled as follows:

1. ***"The Preliminary Objection raised by the Defendants regarding non-exhaustion of local remedies has no relationship with the procedure for accessing the Court; red hence, it is inadmissible".***
2. ***"Whereas the Defendants argued that the Court is devoid of its competence to determine this case without the joinder of the Commonwealth Secretariat; the Court decides that it is competent to hear the substantive case on its merit despite the non joinder of the Commonwealth Secretariat and that the Commonwealth Secretariat is not a necessary party which must be joined by the Plaintiff".***
3. ***"Whereas the Defendants argue that the main application was not properly instituted under the human rights violations and that the complaints of the Plaintiff are not justiciable as human rights violations, the Court decides that the issues stated herein touch on the substantive case which by Article 87(5) of the Rules of Procedure of this Court shall be taken in the substantive action".***

14. When the Case was called for hearing on the merits, the Defendants and their lawyers did not appear in Court. They however wrote a letter, dated 26<sup>th</sup> April, 2007, to the President of the ECOWAS Commission to express their displeasure with the Decision made by the Community Court of Justice, and to request the President of the Commission to intervene, in order for them to file an appeal.

15. Following this letter, the Court, in an Interim Ruling No. 2, indicated for the purposes of the Defendants, that at the current stage of its procedural texts, provision has not been made for appealing against its decided cases, except the possibility of requesting for a revision.

The Court recalled in *extensor* the provisions of Article 15 paragraph 4 and Article 76 paragraph 2 of the Revised Treaty, and Article 19 paragraph 2 of the 1991 Protocol on the Court, where it is set out as follows:

Article 15(4) of the Revised Treaty: ***Judgments of the Court of Justice shall be binding on the States, the Institutions of the Community and on individu corporate bodies.***

Article 76(2) of the Revised Treaty: ***Failing this, either party or any other Member State Authority may refer the matter to Court of the Community whose decision shall be final and shall not be subject to appeal***

Article 19(2) of the 1991 Protocol on the Court: ***Decisions of the Court shall be read in open Court and shall state the reasons on which they are based. Subject to the provision on review contained in this Protocol, such decisions shall be final and immediately enforceable.***

**16.** Then the Court adjourned the Case to a later date, June 18<sup>th</sup> 2007, to reserve further proceedings and ask the Court Registry to effect service of notice on the Defendants in due and lawful manner. Even though properly served, the Defendants did not appear in Court, but wrote a second letter, dated 25<sup>th</sup> May 2007, to the president ECOWAS Commission with a copy to the Court, in which they stated that: ***"... the Defendants will not participate in any Court session of the Community Court of Justice, until issue of competence is effectively resolved by, institution of an independent Appeal Court; Respondents (i.e. the Defendants) will neither participate in the session scheduled for 18<sup>th</sup> June 2007 nor any other, until the Commission finds a solution to this problem."***

**17.** At its Court hearing of 18<sup>th</sup> June, 2007, the Court actually took note of the non-appearance of the Defendants, and in taking the contents of the above-cited letter into consideration, the Court deliberated on the Case, after a last hearing of the Applicant.

**18.** The Case now comes before the Court for final decision on the merits, and upon the issues underlying the arguments submitted by the Parties.

### **Recapitulation of the Arguments of the Parties**

**19.** The Applicant alleges the violation of his fundamental rights by the Defendants. He maintains that he has been economically exploited by the Defendants on the grounds that he carried out the same services as before, for the Commonwealth Secretariat, for a period of one year (1 year) without being paid with the same value of money. That this conduct on the part of the Defendants constitutes a violation of his right to equal salary for equal work. The Applicant cites in support, Article 15(5) [sic] of the African Charter on Human and Peoples' Rights, and Article 23

x 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests.

of the 1948 Universal Declaration of Human Rights by the United Nations.

**20.** Besides, the Applicant indicates that since the Defendants did not advance any argument of testimony in defence, the Court must decide in favour of his claims, which do not suffer from any counter arguments by the Defendants. The Applicant urges the Court to grant his requests as contained in his Application, in regard to paragraph 13 of the 1998 Declaration of the International Conference of Tehran (Iran) on Human Rights, as well as, the Preamble of the International Pact relating to Civil Rights, and the Pact relating to Economic, Social and Cultural Rights of 1966 both of which derive from the 1948 Universal Declaration of Human Rights.

**21.** The Defendants, on their part, challenge the competence of the Court in the instant Case. They contend that the rights claimed by the Applicant are not positively conferred by statute or by contract, and that what is at stake is an issue of salary claims, for which the Applicant had already received part payment, and that as a result, his claims vitiate his action. The Defendants further state that the Applicant's claims are in respect *quantum meruit* and not in terms of rights positively set out in a contract. And that on this ground, one is not dealing with a human right so the Court is without jurisdiction to adjudicate on the Case.

**22.** From the foregoing, particularly, as regards the facts and arguments advanced by the Parties, the Court will have to answer the following questions:

1. Has the Applicant been exploited economically Defendants?
2. Have the Applicant's rights to equal work for equal salary violated?
3. Are the rights being claimed by the Applicant positively established by contract or statute?
4. Does the Court of Justice of ECOWAS have jurisdiction to adjudicate on the Case?

## The Court's Analysis

### Issue 1: Has the Applicant been exploited economically by the Defendants?

23. Article 5 of the African Charter on Human and Peoples' Rights provides: **"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"**.

One derives from this provision, the following concepts: human dignity; legal status; slavery; slave trade; physical or psychological torture; cruel, inhuman or degrading treatment.

24. In basing his Application on the concept of economic exploitation, the Applicant does not demonstrate in what sense his human dignity has been damaged. The Court does not see how he has lost his legal status, and much less can the Court find any elements of torture whatever. Indeed, as a general rule, and in labour law, we talk of economic exploitation **"when an individual, who is normally engaged on a remunerated work, is not remunerated at all, or if he is, the remuneration he receives is below the real value of the work done"** (Definition taken from Le Nouveau Petit Robert, 2008 edition; See page 984).

25. Do the facts in the instant Case agree with this definition? The work in question, done by the Applicant and to the benefit of the Defendants, from February 2004 to January 2005, was indeed remunerated, but only in a currency different from that for the same work done as before, certainly to the benefit of the same Defendants, which was hitherto remunerated by the Commonwealth. The fundamental question here is why the remuneration changed whereas the beneficiaries of the work done remained the same. It is simply because the relationship for executing the same job changed while, indeed, the Defendants, in being the beneficiaries of the work done, were not the *direct* debtors of the contract with the Commonwealth. They are the debtors for the case in contention, in this case, the fact that they offered the payment in a currency different from that of the Commonwealth, does not in itself, cause any damage to the dignity of the Applicant, nor does it deny him of his legal status. Neither does the payment proposed in Dalasis involve any elements of torture or cruel, degrading treatment. Both parties honestly believed the Commonwealth would accept to pay, but that did not materialise.

26. Finally, the Court recalls that the Applicant accepted to work, even securing a second contract with the Commonwealth, fully aware that the first contract had expired. He thus worked for one year without being paid, and when he considered that the time lapse was sufficient, he requested for his salaries. The Defendants offered to pay him his salary according to the same terms of payment as the Lecturers of his rank. The Court, on this particular point therefore, rejects the claim of economic exploitation as not sufficiently proved.

### Issue 2: Have the Applicant's rights to equal work for equal salary been violated?

27. In the terms of Article 15 of the African Charter on Peoples' Rights, **"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."**

In labour law, the concept of equal work for equal salary implies that two or several persons who carry out the same job occupy the same position in an organisation must earn the same remuneration and have the same prospects for promotion, except where the employer justifies a difference in treatment by objective factors not related to any form of discrimination. We hold that the objective of the principle of equal work for equal salary is to prohibit every form of discrimination between individuals who find themselves under the same condition.

28. Here, the Applicant is the worker and the Defendants are the employers. In advancing the principle of "equal work for equal salary", the Applicant is referring to the same work as was done for the Commonwealth. Now, the Court recalls the content of its interim Ruling No.1 of 14 March, 2007, where it ruled as follows: **"... the Court finds that it has jurisdiction to deliberate on the merits of the case without the joinder of the Commonwealth Secretariat, because the latter is not a necessary party to be summoned by the Applicant"**.

29. Consequently, the Court having already ruled that the Commonwealth is not a party directly involved in the litigation, it cannot apply the conditions of remuneration, by comparing them with those offered in the latter case in point, more so when the beneficiaries in the two situations are the same Defendants. The Court also recalls the principle derived from the law on obligations according to which **"obligations are binding only on those who freely contracted them"**, and states thereby that in the case in point, there has not been subrogation of the Commonwealth by the Defendants, and it shall not be binding on the latter to act as the Commonwealth did.

30. Indeed, the principle of equality of salary, which implies the elimination of salary discrimination based on whatever criteria that may relate to the person of the salaried worker, does not apply to the diversity of the sources of remuneration. Here, the salaries proposed by the Defendants are to be paid, not from the funds of the Commonwealth, but from the budget of the Defendants themselves. This was what was established as a principle, by Court of Justice of the European Union, in the 17<sup>th</sup> September 2002 Judgment on Lawrence and Regent Office Care Ltd. & Others (Report 1-07325-C.C.E.E.) when it stated that **"the principle of equal work, equal salary, does not apply when the observed disparities in remuneration cannot be attributed to a single source"**.

31. As it were, the Court emphasises the risk of possible discrimination between the Applicant and his other Lecturer colleagues in the same university, if he should be paid based on a different salary scale, for, the principle of "equal work, equal salary" also signifies that the employer is bound to offer the same remuneration "to the salaried workers placed under the same conditions". This is the principle upheld in Judgment No. 5274 of 15 December 1998 delivered by the Social Chamber of the Court of Cassation of Paris in Case Concerning S. A. Aubin v. Chatel, where it is stated that "this obligation is binding on the employer even in cases where the salaried workers are of different nationalities."

The issue is rather, that of finding out whether in the instant Applicant was a victim of under-payment vis-a-vis the other Lecturers of the same university, and whether such treatment could be described in terms of a violation of the principle of equal work for equal salary. But, as things are, the action of the Applicant does not target a comparison with his other colleague Lecturers, but with the salary system obtaining in the Commonwealth Secretariat. And so, on this point, the Court finds that the principle of equal work for equal salary does not apply, on the grounds that the sources of remuneration are not the same. Consequently, the Court decides that there was no violation that principle.

**Issue 3: Are the rights being claimed by the Applicant positively established by contract or statute?**

32. The Defendants submitted that the Application was based on the renewal of a contract of employment, and on offers and counter-offers, and on the grounds that the Application is based on *"quantum meruit"*. The Defendants further argued that the before the Court deals with relations between an employer and an employee, and that the employee having accepted one part salaries (*i.e. Six Thousand US Dollars = US\$ 6,000*) and rejected the other part, the question now boils down to finding out whether the Applicant's claim to the remaining amount of money to be paid him should be granted upon the salary scale of the Commonwealth or that of the Defendants. And as far as the Defendants are concerned, their refusal to pay the Applicant based on the Commonwealth scale does not constitute a violation of the Applicant's fundamental rights.

The Court finds, indeed, by the letter dated 16<sup>th</sup> April representing Exhibit No. A2 deposited in the Case-File, and letter dated 24<sup>th</sup> August, 2004 representing Exhibit No. A3 deposited in the Case-File, that in matters of commitment offer of service, the situation was no more than that of relations of fact having generated rights. The problem posed is how to put these rights into effect. The Court examined the nature

of such rights. Given that these rights were given birth to from the relations of fact between the Parties, i.e. constituted by the offers and counter-offers of payment arising from the working relations between employer and employee as acknowledged by the Defendants themselves, such rights are indeed constituted as salary entitlements. The Applicant's claim to salary is a right which the Defendants do not contest.

**33.** The international instruments on Human Rights classify salaries among Civil, Economic and Social Rights, which have been incorporated into the provisions of Article 7

× The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

of the 1966 International Pact on Civil, Economic and Social Rights, Article 10

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

of the Universal Declaration of Human Rights; and Article 15 of the African Charter on Human and Peoples' Rights.

**34.** Consequently, the Court adjudges that the claim for these rights, the even if in part, is justified, because they constitute fundamental human rights enshrined in texts and instruments adopted by on ECOWAS and ratified by the Member States.

#### **Issue 4: Does the Court of Justice of ECOWAS have jurisdiction to adjudicate on the Case?**

**35.** As to the rights invoked by the Applicant, namely, economic exploitation ( Article 5 of the African Charter on Human and Peoples' Human Rights, as well as Article 23(2))

× 2. Everyone, without any discrimination, has the right to equal pay for equal work.

of the Universal Declaration of Human Rights), having been treated already in the paragraphs above, the Court has already formed the view that the Applicant has not been economically exploited, nor has his right to equal salary for equal work been infringed upon. These two arguments by the Applicant have already been dismissed, even if the Court, in the instant Case, recognises that the fact that the Applicant was not remunerated according to the Commonwealth salary scale, might have caused him to suffer a reduction in revenue and some form of frustration; that per se would not amount to violation of his Human Rights.

**36.** The Applicant's claims based on economic exploitation and a claim for equal salary for equal work are recognised by Articles 5 and 15 African Charter on Human and Peoples' Rights. These provisions are applicable to this Court by virtue of Article 4(g) of the Revised Treaty, and Article 10(d)

× 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;

of the Court's Supplementary Protocol.

**37. Consequently,**

1) Whereas the Court does not find in the facts, elements amounting to the economic exploitation of the Applicant;

2) Whereas the Court has held that the principle of the right to equal salary for equal work does not apply in the instant Case, on the grounds that the sources of finance for the remuneration Applicant are not the same as those of the Commonwealth; therefore, there has not been a violation of this principle;

3) Whereas the claims made by the Applicant have been found to be rooted in the inherited rights of the salaried worker, and thus recognisable as fundamental rights derived from relations of established between the Parties; but, whereas these human, civil, economic and social rights have not been violated, either;

4) Whereas, ultimately, in terms of the Supplementary protocol, the Court is competent to adjudicate in matters of Human Rights violation; whereas in the instant Case, the Court does not find any element of human rights violation whatsoever of the Applicant's right, within the meaning of the Articles cited above.

## **Holding**

### **38. For these Reasons**

- 1) The Community Court of Justice, ECOWAS, adjudicating in open Court, after hearing both Parties, in respect of Human rights violation, in first and last resort;
- 2) Having regard to the Revised Treaty of ECOWAS;
- 3) Having regard to the 1948 Universal Declaration of Human Rights;
- 4) Having regard to the 1966 International Pact on Civil, Economic, Social and Cultural Rights;
- 5) Having regard to the 1981 African Charter on Human and Peoples' Rights;
- 6) Having regard to the 1991 Protocol and 2005 Supplementary Protocol relating to the Court;
- 7) Having regard to the Rules of Procedure of the Court of 28<sup>th</sup> August, 2002;
- 8) The Court's earlier Preliminary Decisions of 14<sup>th</sup> March, 2007, and of 7<sup>th</sup> May, 2007;

- Adjudges that there is no Human Rights violation of the Applicant, and consequently, dismisses the Application made by the Applicant and his other claims;

### **39. As to Costs**

- Adjudges that each Party, shall bear their own costs in accordance with Article 66(4) of its Rules of Procedure;

Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS, on the day, month and year above;

**40. And the Members have appended their signatures as below:**

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

**Hon. Justice Aminata Malle SANOGO** - Member

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

**Hon. Justice Awa Daboya NANA** - Member

**Hon. Justice El-Mansour TALL** - Member

Assisted by **Tony Aneneh-MAIDOH** Esq. - Chief Registrar

#\* Editor's Note: Article 15 of the African Charter does not have a sub-article (5).