

COMMUNITY COURT OF JUSTICE,
ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO

TRIBUNAL DE JUSTIÇA DA COMUNIDADE,
CEDEAO



No. 10 DAR ES SALAAM CRESCENT,
OFF AMINU KANO CRESCENT,
WUSE II, ABUJA - NIGERIA.

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

HOLDEN AT ABUJA, NIGERIA

This 12th day of June 2012

SUIT NO: ECW/CCJ/APP/13/11

JUDGMENT NO: ECW/CCJ/RUL/12/12

BETWEEN

ALIYU TASHEKU

APPLICANT

AND

FEDERAL REPUBLIC OF NIGERIA

DEFENDANT

BEFORE THEIR LORDSHIPS

HON. JUSTICE BENFEITO MOSSO RAMOS

PRESIDING

HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ

MEMBER

HON. JUSTICE ELIAM POTEY

MEMBER

Assisted by Mr. Athanase Atannon

Registrar

REPRESENTATION

APPLICANT:

Agent: No Appearance

Lawyers: Chino Edmund Obiagwu Esq.

Counsel: No Appearance

DEFFENDANT:

Agent: No Appearance

Lawyers: F. F. Bebu Esq. and T. A. Gazali Esq.

Counsel: No Appearance

Delivers the following Judgment:

ON PRELIMINARY OBJECTIONS

PROCEDURE

1. By Application dated 10 June 2011 and received at the Registry on 13 June 2011, Mr. Aliyu Tasheku, through his Counsel, Chino Edmund Obiagwu, lawyer registered with the Nigerian Bar, brought a complaint against the Federal Republic of Nigeria, for violation of Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights.
2. He asked the Court for:
 - (i) A declaration that his arrest and detention since 20 September 2010, without regard for the order of release made by the Presiding Judge of the Abuja Magistrate Court, is arbitrary, illegal and illicit; and that they constitute a violation of his right to personal liberty and freedom of movement as guaranteed by Articles 6 and 12 of the Charter;
 - (ii) A declaration that the denial of medical care during his detention and the bad conditions in which he was detained constitute a threat to his fundamental right to health and a violation of his right to human dignity as guaranteed by Articles 4 and 5 of the said Charter;
 - (iii) An order that the Federal Republic of Nigeria must release him forthwith;
 - (iv) An order that the Federal Republic of Nigeria must pay to him the sum of Ten Million Naira (N 10,000,000) as damages, for the violations suffered.
3. The Federal Republic of Nigeria, through its Counsel, F. F. Bebu Esq., lawyer registered with the Nigerian Bar, lodged at the Registry of the Court, on 23 January 2012, its Defence, whereby it contended that the Plaintiff's Application was inadmissible on the grounds that it was ill-founded and inconsistent with the requirements of *res judicata*. Further on, on 22 February 2012, he raised, on preliminary grounds and in a separate pleading, the lack of jurisdiction of the Court to adjudicate on the case brought before it, by virtue of the force of *res judicata*.

4. The Plaintiff Counsel filed on 21 February 2012, his written submissions in respect of the Preliminary Objections raised by the Federal Republic of Nigeria.
5. The Court heard the Parties on 23 February 2012 on the Preliminary Objections raised by the Federal Republic of Nigeria in respect of lack of jurisdiction.

ARGUMENTS OF THE PARTIES

As regards the Federal Republic of Nigeria

6. Counsel for the Federal Republic of Nigeria maintained that the Court lacks jurisdiction to adjudicate on the case, by virtue of the force of *res judicata* arising from the judgment of the High Court of Abuja (FCT). He contended, in that regard, that Plaintiff lodged an application before the said High Court which is similar in every respect to the Application brought before the instant court. He argued further that on 19 May 2011, the judge of the said High Court granted Plaintiff's requests and awarded him damages in the amount of Five Million Naira (N 5,000,000). He pleaded that the Application brought by Plaintiff was lodged on 13 June 2011, well after the judgment delivered by that High Court. He therefore concluded that the instant Court is compelled by the force of *res judicata* to refrain from examining the Application by Plaintiff.

As regards the Applicant

7. Plaintiff Counsel, on his part, maintained that the Court has jurisdiction to adjudicate on the case and asked the Court to use its own discretion as to the force of *res judicata*.

ANALYSIS OF THE COURT

8. The Application before the Court deals with human rights violation, notably violation of Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights. The Court has indicated on several occasions that it has jurisdiction to adjudicate on a case once the matter brought relates to human rights violation and where the subject-matter of the application is to ask the Court to find that such violation has occurred in a Member State (cf. *Hissein Habré v. Senegal*, Judgment of 14 May 2010, paragraphs 53, 58 and 59; *Case Concerning Alhaji Muhammad Ibrahim Hassan v. Gombe State and Nigeria*, Judgment of 15 March 2012, paragraph 38). Consequently, the case

brought before the Court falls indeed within its scope of competence as provided for by the new Article 9(4) of its Protocol, as amended by the 19 January 2005 Supplementary Protocol, which provides: “*The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.*” The Court is therefore competent to sit on the Application brought by Mr. Aliyu Tasheku.

9. In the light of foregoing, the objection concerning *res judicata* as raised by Counsel to the Federal Republic of Nigeria, must be examined, in the view of the Court, as an objection regarding the inadmissibility of the Application, and it is evident that such objection is typically examined at the preliminary stage of the proceedings.
10. The Court notes that Counsel to the Federal Republic of Nigeria annexed to its memorial on preliminary objections, the judgment dated 19 May 2011 and delivered by the High Court of the Federal Capital Territory, relating to an action instituted by the Society Against Discrimination and Other Related Intolerance and Mallam Aliyu Tasheku against the Nigeria Police. In the terms of the said judgment, the Applicants substantially sought the following reliefs from the court:
 - (i) A declaration that Mr. Aliyu Tasheku’s arrest on 18 September 2010 is illegal, unconstitutional and violates his fundamental rights, as provided for by Articles 34, 35, 36 and 41 of the 1999 Constitution of Nigeria;
 - (ii) A declaration that the continuing detention of Mr. Aliyu Tasheku without release, the granting of bail or the preference of charges against him, is illegal, unconstitutional and violates his right to dignity and freedom, as provided for by Articles 34, 35, 36 and 42 of the 1999 Constitution;
 - (iii) An order for Mr. Aliyu Tasheku to be released or to enjoin the Nigeria Police authorities to send him before a competent court, as required by Article 35 of the Constitution of Nigeria and Articles 4, 5 and 12 of the African Charter on Human and Peoples’ Rights;
 - (iv) An order for the payment of the sum of Ten Million Naira (N 10,000,000) as compensation for the violations and harm suffered.

11. The Court notes that from the exhibits filed in the case-file by Counsel to the Federal Republic of Nigeria, notably with reference to the Judgment of 19 May 2011 cited above, it can be observed that the reliefs sought by the Applicant were granted when the High Court judge:

1. Declared that there was violation of Articles 34, 35, 36, 41 and 42 of the Constitution of Nigeria;
2. Ordered that the Nigeria Police authorities must send Mr. Aliyu Tasheku before the High Court on 23 May 2011 at 2 p.m.; and,
3. Granted him a compensation of Five Million Naira (N 5,000,000) for unlawful detention; as evidenced below from the wording of the operative statement of the said decision:

“It is hereby ordered that the application succeeds and accordingly, the reliefs in the nature of declaration stated under (A) and (B) are hereby made pointing to the unlawfulness of detention till date since the arrest of the 2nd applicant on 18th of September, 2010.

In addition, it is hereby ordered that the respondents produce before this court the 2nd applicants forthwith as well as to pay the 2nd applicant, the sum of five million Naira (N 5,000,000) for unlawful detention (...).

The respondents are to produce before this court 2nd respondent forthwith or specifically on Monday 23rd of May 2011 at 2 p.m.”

12. In another Judgment of 26 May 2011 from the same court, the Nigeria Police authorities were ordered to enforce the decision to release Plaintiff on bail as previously made by the judge of the Magistrate Court in the decision of 28 March 2011, because, according to the High Court, the Nigeria Police authorities had no grounds for holding Mr. Aliyu Tasheku in detention. The operative statement of the said decision indeed states that:

“It is hereby ordered that the respondents should forthwith release the 2nd applicant on bail as granted the terms stipulated by the Chief Magistrate Court and which compliance has been made by the applicants; the respondent has no basis keeping in their custodianship, 2nd applicant; compliance with the order of the chief magistrate court should be made forthwith. It is so ordered.”

13. The Court is of the view that the argument concerning *res judicata* can only succeed when it is established that the Application brought before it is **essentially the same** as another one already satisfactorily decided upon before a competent domestic court.
14. The Court now seeks to find out whether, on the one hand, the allegations of violation of the Charter and the corresponding reliefs sought in the instant case are **essentially the same** as the alleged violations of the Constitution of Nigeria and the reliefs sought before the High Court judge and on the other hand, whether the Application, which is essentially the same, has been satisfactory dealt with before the domestic court.
15. One may ask whether an application seeking to safeguard fundamental human rights constitutionally recognized and guaranteed before a judge at the domestic court may be considered as analogous with another application seeking to safeguard human rights internationally recognised and guaranteed before the Court of Justice of the Economic Community of West African States (ECOWAS).
16. In that regard, the Court points out that by extending its jurisdiction to cover cases of human rights violation which occur in each Member State, ECOWAS sanctioned the guarantee, at the Community level, of the obligations subscribed to by its Member States at the African and international levels. This is apparent in Article 1, paragraph (h) of the 21 of December 2001 Protocol A/SP1/12/01 on Democracy and Good Governance, which came into force on 20 February 2008 and which provides that *“The rights set up in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual organization shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human rights, to ensure the protection of his/her rights.”* Even though it may not have had explicitly in view the guarantee of rights constitutionally set out in each Member State, the above-cited provision sanctioned the guarantee of human rights as a principle of constitutional convergence. **Hence, the Community Court’s function of safeguarding and protecting human rights is carried out with respect to the international human rights instruments and the**

African Charter on Human and Peoples' Rights, which are recognised by the Community and to which the Member States are signatory, in line with the laws, practices and national policies of the Member States. Consequently, even if formally, the source of the human rights cases triable before the Community Court is the African Charter on Human and Peoples' Rights and the international instruments, such human rights may substantially be considered as analogous to the fundamental human rights recognised and guaranteed by the Constitution of each Member State and vice-versa.

17. In this light, the Court notes that Articles 34, 35, 36, 41 and 42 of the Constitution of Nigeria sanctions respectively: (1) the right to human dignity (2) the right to personal liberty (3) the right to fair trial (4) the right to free movement (5) the right to non-discrimination. The Court equally notes that Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights sanctions respectively : (i) the inviolability of human beings and the prohibition to deprive same arbitrarily (ii) the right to respect for human dignity inherent in human beings and the recognition of legal status (iii) the right to liberty and security of person and the circumstances within which those rights may be curtailed, and finally (iv) the right to freedom of movement and choice of residence.
18. The Court notes finally that the Applicant **essentially** alleges violation of his right to liberty and freedom of movement contained *mutatis mutandi* in Articles 35 and 41 of the 1999 Constitution of Nigeria, and that he also alleges violation of his right to life and human dignity, sanctioned *mutatis mutandi* by Article 34 of the said Constitution. Thus, the human rights violations alleged before the Nigerian judge are **essentially the same** as the human rights allegations brought before the Honorable Court. Besides, the Applicant pleads before the Honorable Court, his release and the payment of Ten Million Naira as damages, requests which have equally been granted by the Nigerian judge.
19. The Court therefore deduces from the foregoing, that the Application brought by Mr. Aliyu Tasheku is **essentially the same** as the one filed before the Nigerian judge, which subject-matter has already been dealt with and which outcome the Applicant neither contested nor considered to be dissatisfactory since he did not appeal the judgment before any Nigerian

court. The Applicant did not also indicate that the Nigerian authorities refused to implement the decisions made by the judge at the High Court. Equally, he brought forth no new complaint or new application that may be entertained by the Honorable Court. The Court cannot retry a case on which a judgment of the domestic court of a Member State has already been delivered and against which no contestation has been raised. Consequently, the Court declares that the Application brought by Mr. Aliyu Tasheku is inadmissible.

DECISION

For These Reasons,

20. The Court,

Adjudicating publicly, after hearing both Parties, and after deliberating towards this ruling,

- Adjudges that the Court has jurisdiction to adjudicate on the case;
- Adjudges that in the instant case, the Application brought by Mr. Aliyu Tasheku is essentially the same as the one already decided upon by the Nigerian court;
- Adjudges, consequently, that the Application is inadmissible.

COSTS

21. In compliance with Article 66, paragraph 11 of the Rules of the Court, each Party shall bear its costs.

Thus made, declared and pronounced in English, the language of proceedings, at 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.

22. AND THE FOLLOWING APPEND THEIR SIGNATURES:

HON. JUSTICE BENFEITO MOSSO RAMOS

PRESIDING

HON. JUSTICE CLOTILDE MÉDÉGAN NOUGBODÉ

MEMBER

HON. JUSTICE ELIAM POTEY

MEMBER

ASSISTED BY: MR. ATHANASE ATANNON

REGISTRAR