COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO
TRIBUNAL DE JUSTIÇA DA COMUNIDADE,
CEDEAO

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

Holden at Abuja - Nigeria

On 24 May 2018

GENERAL LIST: CASE N° ECW/CCJ/APP/12/17

JUDGMENT NO. ECW/CCJ/JUD/15/18

In the case,

Between

MRS. NAZARE GOMES DE PINA **APPLICANT**

And,

THE REPUBLIC OF GUINEE BISSAU **DEFENDANT**

Before their Lordships

1. Hon. Judge Jérôme TRAORE **Presiding**

2. Hon. Judge Alioune SALL **Rapporteur**

3. Hon. Judge Yaya BOIRO **Member**

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

The Court thus constituted delivers the following Judgment:

I – The parties and their representation

By initiating Application filed at the Registry of the ECOWAS Court of Justice on 3 March 2017, Mrs. Nazaré Gomes de Pina, living at 13 place des Dahlias Carrières sous Poissy (France), and whose Counsels are Barrister Assane Dioma Ndiaye, Lawyer registered with the Bar in Senegal and Barrister Abdoulaye Tine, Lawyer registered with the Bar in Paris, came before the Court with a human right violation case against the Republic of Guinea Bissau, an ECOWAS Community Member State, which is represented in the instant procedure by its Minister of Justice, and the General Prosecutor of the State.

II – Summary of the facts and procedure

Mrs. Nazaré Gomes de Pina averred that her husband Joao Bernado Vieira was elected the President of Guinea Bissau in October 2008. As from the month of November 2008, following the victory of Carlos Gomes Junior at the Legislative Polls, some soldiers who mutinied tried to kill him, by firing at his official residence with heavy artillery. It was during one of these attempt that President Vieira was finally killed on 2March 2009, when an attack was lunched in his official residence by soldiers, who, after killing him with automatic rifle, decapitated his corpse with machetes.

Plaintiff/Applicant further stated that since these tragic events occurred, the political authorities that came to power in succession have not showed any will to shed light on these happenings. It was sequel to this situation that she decided to come before the ECOWAS Court of Justice.

By Application filed at the Registry of the Court on 8 September 2017, Eden Jaoa Gomes de Pina Viera, Joao

Bernado Vieira Junior and Thirzah de Pinoa Bernado Vieria, who all are children of the late President sought to intervene voluntarily in the proceedings, and declared that they share in all the arguments presented and orders sought by their mother, who is the main Plaintiff/Applicant in the instant procedure.

The State of Guinea Bissau file its Memorial in Defence at the Registry of the Court on 25 Januarys 2018.

III – Pleas – in Law by the parties

In support of her Application, **Plaintiff/Applicant** argued that the facts of the case as exposed by her constitute a violation of the right to life, and the violation of the right to fair hearing.

In support of the violation of the right to life, Mrs. Nazaré Gomes de Pina invokes the following instruments:

- Article 3 of the Universal Declaration of Human Rights, which provides that: *« Everyone has the right to life, liberty and security of person »* ;
- Article 6§1 of the International Covenant for Civil and Political Rights, which provides that: *« Every individual has the inherent right to life. This rights shall be protected by law. No one shall be arbitrarily deprived of his life. »* ;
- Article 4 of the African Charter on Human and Peoples' Right, which provides that: *« Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person: no one may be arbitrarily deprived of this right. »*

According to Plaintiff/Applicant, the preservation of this right places a positive obligation on States to take all necessary measures for the protection of the lives of the persons living under their jurisdiction namely, by the

adoption of a concrete dissuasive criminal legislation, and application mechanisms, which are conceived to prevent, quell and sanction the violations of the right to life.

She further averred that, to expatiate the import of such an obligation, it is not sufficient for a State to adopt a criminal legislation for it to be considered to have carried out its obligation of protection; the State should also put in place the necessary means to ensure that whenever there is an infringement upon the right to life, it shall effectively be sanctioned.

In regard to the right to fait hearing, Plaintiff/Applicant cites the following provisions:

- Article 10 of the Universal Declaration of Human Rights, which provides that: *« Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. »* ;
- Article 14 §1 of the International Covenant for Civil and Political Rights, which provides that: *« All persons shall have the right to have their cause heard fairly and in public by a competent, independent and impartial tribunal established by law, which shall decide the well – foundedness of any criminal charge against him, whether his claims on his civil rights and obligations (…) »* ;
- Article 7 §1of the African Charter on Human and Peoples' Rights, which provides that: *« Every individual shall have the right to have his cause heard. This comprises: a) the right to appeal to competent national organs against acts violating his fundamental rights as recognised by and guaranteed by conventions, laws,*

regulations and customs in force (…) ; d) the right to be tried within reasonable time by an impartial court or tribunal. »

Plaintiff/Applicant argues that the alleged violation is sequel to the fact that up till the time the instant case was filed, and up till today, no proceedings is yet to be initiated against the unknown persons, following the tragic death of her husband, and, consequently, she was unable to enforce her right to reparation for the prejudices suffered. She further averred that beyond the civil reparation, to which she can lay claim, she was equally considers that she was deprived of her legitimate right to participate in the search for the truth on circumstances that led to the death of her husband, and to denounce a crime that the authorities of her country seem not disposed to investigate and try, and this, to her, constitutes a violation of her right to have her cause heard before a court. Despite various steps taken, both at the national level and abroad, no investigation was carried out, to try and identify the authors of the assassination and bring them to face the law.

Consequently, Plaintiff/Applicant seeks that the Court should find these violations, as the Defendant State was the author; and that an investigation, as well as a trial of the perpetrators be ordered. She finally sought reparation to the tune of five billion FCFA to be paid to her, for the prejudices suffered.

On its part, the **Defendant State** contests the claims of Mrs. Nazaré Gomes de Pina, by stating that, first of all, the authorities of Guinea Bissau undertook steps with a view to shedding light on the circumstances that led to the disappearance of President and that within the framework of this wide investigation, highly placed persons have even

been heard. According to the Defendant State, if this investigation has not yet come to an end, it is due to the unstable political and institutional situation of the country. A likely delay observed cannot be taken to be a lack of any likely will from the national authorities of Guinea Bissau.

Secondly, the Republic of Guinea Bissau argued that the Plaintiff/Applicant lacks the quality to act, knowing full well that she *« is not the officially declared wife of late President Joao Bernardo Vieira ».* Defendant State added that pursuant to the national laws of Guinea Bissau, a man cannot take more than one wife, officially, that any « marriage » other than the one that is admitted cannot be regarded as valid. The Defendant State also argued that its national legislation does not recognize polygamy, and averred that late President Vieira was known to be officially married to Lady Isabel Romano Vieira, with whom he had many children, before pointing out that the officially recognized wife was in the late President's residence, by his side, when he was assassinated.

Thirdly, the State of Guinea Bissau claimed that *« it is only in a situation where the criminal proceedings ae not initiated in the Member State that the victim can bring a case before the regional court (…). The victim was under the obligation to exhaust all local remedies of the Member State before having quality to act before the ECOWAS Court of Justice. »*

Finally, the Defendant State held that the sum sought as reparation was exorbitantly fixed, and that if by any extraordinary means the Court was made to consider it, there is need to beat it down considerably.

IV – Legal Analysis by the Court

The Court must first examine the main issues raised, and which are the subject – matter argued before it, in a logical manner, as it considers them.

As form:

a) *On the objection drawn from the lack of Plaintiff/Applicant's quality to act*

Following its Memorial in Defence filed on 25 January 2018, the Republic of Guinea – Bissau raised an objection as to inadmissibility of the initiating Application on the ground that Plaintiff/Applicant was never married to the late Head of State, hence she lacks quality to act before the Honourable Court, to the extent of seeking reparation.

But, whereas the effectiveness of the ECOWAS Regional Human Right protection Mechanism places an obligation of a guarantee of effective appeal for every person that feels directly affected by the violation of his fundamental rights.

The Court is of a strong opinion that in the instant case, the admissibility of the Application filed by Plaintiff/Applicant cannot be considered only on the existence or otherwise of a link of right between her and the defunct victim. The only important issue for Plaintiff/Applicant is the administration of the proof of shared feelings, which was materialized by being intimately close to late President Nino Vieira, and which constitutes the objective proof of that communal living or of feelings between the two parents.

At this juncture, it important to emphasise that through a Reply filed on 25 September 2017, Mrs. Gomes de Pina claimed that she was effectively married to President Vieira in a customary marriage, and that from that union between the two of them, three children were born, namely ***Eden***

Joao Vieira, Vieira Junior and ***Thirzah de Pina Bernado Vieira***, as could be seen on the Birth Certificates duly issued by the Authorities and produced before the Court, during the adversarial procedure. This fact was never contested by the State of Guinea - Bissau. The Court holds that this fact really constitutes the proof of a ***link***, which, on its own, constitutes the ground to establish that the Plaintiff/Applicant sufficiently has an interest to act.

In the instant case, not only were the children born of the couple, a fact that the State of Guinea - Bissau has never contested, yet, there was never proof brought to the attention of the Honourable Court that there had never been a union, even on a temporary basis, between Plaintiff/Applicant and late Nino Vieira, while Defendant only laboured to allege that the assassination of the Head of State took place *« in the presence »* of his « legitimate » wife. This sole circumstance, assuming it was true, is not certainly sufficient to contest the *locus standi.*

Moreover, the Court wishes to declare that it is not bound by the National Legislation of the State of Guinea – Bissau, which, as it were, has declared « null and void » a possible « marriage » between Plaintiff/Applicant and late President Vieira. The ground used here is, of course that of international law, as enshrined in conventions and other obligations to which the State of Guinea – Bissau has subscribed to. The reference to the national law to examine a principle of a fundamental right is not in any way pertinent here. Also, the same principle abhors that some moral considerations or value judgments should be used to examine the resolve of two free and consenting persons in their marriage. Rather than being subjective, the Court has adopted an objective view point in the instant case: it has limited itself to noting that there existed a union, or a simple link, an affective link, which is attested to by the

children, who were born of the couple, which *ipso facto* establishes an interest to act for Plaintiff/Applicant.

As it were, the view of the Court tallies with those of other international courts of competent jurisdiction.

In a case of *« Unknown Persons v. United Kingdom»* (judgment of 22 April 1997), the European Court of Human Rights declared that *« to determine whether a union is to be examined as a « family life », it could be revealed useful to take into consideration a number of indices, such as knowing if the partners live together, and for how long, whether they have children of their own, which is proof for their living together (mutual living). »*

In Judgment dated 27 October 1994, in the case of *« Kroon & others v. Netherlands »,* the Court reiterated that *« it is a general rule that a cohabitation can constitute a condition of « family life » but exceptionally, other factors can also serve to demonstrate that a relation presents sufficient indices to create « family links » de facto, such is the situation in the instant case, since four children were born from the relation between Mrs. Kroon and Mr. Zenouk. »*

(See also *« Keegan v. Irland »*, judgment of 26 May 1994; *« Velikova v. Bulgaria »*, judgment of 18 May 1999, and *« Gas & Dubois v. France »*, judgment of 31 August 2010.)

From all the above considerations, it then follows that there is need to reject, as ill – founded, the objection raised as to admissibility of the initiating Application, on the grounds of lack of interest of Plaintiff/Applicant to act.

b) On the voluntary intervention

The Court notes that the Defendant State did not object to admissibility of the Application for voluntary intervention. Also, it was established that, on the strength of their birth certificates filed as proof during the procedure the

voluntary interveners have all been recognised as being sons and daughter of the late Head of State, and, as such, they have both quality and interest to act before the Honourable Court, in seeking reparation for the prejudice they suffered owing to the assassination of their father.

Hence, the Court grants the interveners leave to join the main case brought by their mother; consequently, there is need to declare their Application for intervention as admissible.

c) On the objection as to admissibility drawn from the non – exhaustion of local remedy

In its Memorial in defence, the Defendant State raised a preliminary objection as to admissibility of the case, on the grounds that Plaintiff/Applicant did not exhaust local remedy, before bringing her case at the ECOWAS Court of Justice;

In support of this objection, Defendant argued that pursuant to the legal applicable before the Court, especially Article 10 of the Supplementary Protocol of 19 January 2005, the human rights violation cases that can be brought before the said Court are those for which the victim must have initially taken before the competent national courts, and not having satisfaction for her claims;

However, and contrary to the allegations made by the Defendant State, the provisions of Article 10 of the 2005 Protocol do not impose any obligation whatsoever on the victim of human rights violation to exhaust local remedy before bringing his case before the ECOWAS Court of Justice;

The Court has recalled in many instances that within the purview of the provisions referred to, admissibility of a human rights violation case is to meet two cumulative

conditions, which are: the said case should neither be anonymous nor be taken before another international Court of competent jurisdiction, and this is not so, in the instant case.

For this singular affirmation of the Court, which was made in the judgment dated 8 July 2011, *« Oceanking Nigeria Ltd v. Republic of Senegal »* thus: *« The Court decided in a plethora of jurisprudence, notably in the cases of « Prof. Etim Moses Essien v. Republic of The Gambia (…Judgment of 29 October 2007), « Musa Saidykhan v. Republic of The Gambia (…Ruling of 19 December 2010) and « Hadidjatou Mani Koraou v. Republic of Niger » that exhaustion of local remedy does not constitute a prior fulfillment before bringing a human right violation case before it. Consequently,* Plaintiff/Applicant does not need to exhaust local remedy before filing his case at the Court *»* (§41).

It then follows that the objection raised as to inadmissibility drawn from failure to exhaust of local remedy is ill - founded.

As to merit

On its merit, the case filed by the Plaintiff/Applicant is well – founded on two main pleas: the violation of the right to life and the violation of the right to fair hearing.

a) On the plea of the violation of the right to life

The Court holds that the obligation to preserve the right to life makes it binding on the State to ensure, particularly the security of persons. Thus, this is a positive obligation that every citizen must enjoy, but, which takes another dimension when it is to be applied to certain categories of persons, who, due to their peculiar situation, such as being exposed to threat, or the risk of having the physical integrity of their persons infringed upon, should have the

right to enhanced protection. The political leaders surely are among this group of people, the first in line is the Head of State, who must benefit from strict and enhanced measures of preservation.

In the instant case, the circumstances that led to the death of President Vieira, certainly leaves room to see that there was a failure. Having being assassinated by armed assailants, and particularly in atrocious conditions, right at his residence, he certainly did not enjoy adequate protection. In the least, the Defendant State never tried to deny its culpability on this issue, for, it has never brought proof that the late President was, at the time of his assassination, enjoying any specific safeguard measures.

1. At this juncture, the Court wishes to recall that in a very recent past, a similar case was brought before it, which was decided in the Ruling of the *« Heirs of Ibrahim Baré Mainassara v. Niger Republic »* (dated 23 October 2015). In the case under reference the parties were, on the one hand, the heirs of the deceased President of the Republic of Niger, who was equally assassinated, and whose heirs too sought reparation, and, on the other hand, the State of Niger. The Court declared *« … there is no doubt that the late President Mainassara Baré's right to life and physical integrity was violated to the highest degree, since he was killed. Now, it is established that it was the duty of the Republic of Niger to ensure his protection, in his capacity as President of the Republic. Manifestly, the Republic of Niger failed in its duty. Consequently, the Court finds that omission and holds that the Republic of Niger must be sanctioned. »* (§71)

The circumstances of the two cases remain rigorously comparable, and justify that the Court should reiterate its jurisprudence. Consequently, there is need to hold that the right to life of President Vieira was violated.

b) On the second plea drawn from the violation of the right to fair hearing

Whereas the main Plaintiff/Applicant also claimed that her right to fair hearing was violated by the Republic of Guinea –Bissau.

The Court holds that there is no doubt that it is the responsibility of the State to ensure rigorously that the crime committed against President Vieira should not go unpunished. This obligation can concretely be interpreted by the resolve of the State to do everything possible leading to the manifestation of the truth, namely by carrying out judicial investigations, and holding a trial, so that on the one hand, the perpetrators of the crime can be identified and punished, and, on the other hand, the victims who have taken their case before the court can obtain reparation, all things been equal.

In the instant case, it is not contested that since the assassination that occurred on 2 March 2009, the criminal procedure that the Defendant State claims to have initiated did not record any tangible progress. At no period during the trial has the Republic of Guinea - Bissau demonstrated or specified the steps taken, to ensure the diligent continuation of the judicial investigations. Certainly, the Defendant State claimed this delay was due to the political situation of the country, which is characterized by instability.

The Court cannot be convinced by these justifications. Indeed, on the one hand, they were never supported by probing facts. The Court could have been persuaded, if the

Defendant State brought proof for the diligent steps taken, as well as the goodwill of the political authorities in Guinea - Bissau. Now, none of these was brought before the Court, while the Defendant State only contented itself with making «general affirmations. »

On the other hand, since the assassination of President Vieira occurred in 2009 – that is more than nine (9) years now -, the Court holds that the judicial investigations should have already made some decisive findings, over the period, even if they have not yet ended. Everything points to the fact that no significant progress was made, and, in the final analysis, this non-productivity compromises the right to justice, as well as that of having fair hearing, while the notion of « reasonable period » also intervenes, at this juncture as a more or less indicator of the reality of the right under discussion. It is certain that the heirs of President Vieira have not, up till today, benefited from the possibility of having their cause heard by a tribunal to obtain reparation for the prejudice they suffered, but also, to know the truth of the circumstances the victim died. In this regard, it is noteworthy to emphasis that the International Covenant on Civil and Political Rights, which was cited by Plaintiff/Applicant does not only provide for the right to justice, but equally makes it mandatory, for the States, at the same time, to respect the victim's right*« to be tried without unnecessary delay »* (article 14, 2. c). In the same manner, the African Charter on Human and Peoples' Rights expressly provides for the exigencies of having access to justice *« within reasonable time »* (article 7.1 d.).

Finally, it is allowed to examine the pertinence of the Defendant State's argument on political and institutional instability, which it held to be justification for the observed delay. Without wanting to discuss the details of such an excuse, the Court recalls, as a way of playing down the

pertinence, that in principle, the State should not hold onto its « domestic affairs » as the reason for its failure towards its international obligations. In any case, no constraints of intense magnitude that have lasted for a decade were brought to the attention of the Court, and which have impeded any decisive progress in the judicial investigations. In the Judgment of the *« Heirs of Ibrahima Baré Mainassara » referred to above*, the Court considered, in the same vein that *« it translates into an obligation on State authorities to conduct inquiries and investigations into incidents and events in cause, and to guarantee, even if not a publication of findings thereon, at least free access to such findings (…) This is a minimal obligation, for which any default constitutes the violation of the right to justice »* (§ 55).

In these circumstances, the excuse of « political instability» must be deemed not to prosper.

C) On reparation

On the order sought as to pecuniary reparation, Counsel to Plaintiffs/Applicants requested the Court to award the sum of five (5) billions CFA francs in favour of Mrs. Gomes de Pina one billion CFA francs in favour of each of her children.

The Court recalls that it has a wide range of powers to determine the quantum of reparation sought before it. In the instant case, it appears to the Court that the sums sought for reparation are highly excessive, since the objective of a procedure of this nature is partially symbolic. The Court is of the opinion that, owing to all the factors to be taken into consideration, it is reasonable to award, as reparation, the sum of ten (10) millions CFA francs to Mrs. Nazare Gomes de Pina ten (10) millions CFA francs equally to each of her three children, namely:

-Eden Joao Gomes De Pina Vieira

- Joao Bernado Vieira Junior

- Thirzah de Pina Bernado Viera;

d) As to costs

Pursuant to Article 66 of the Rules of the Court: "*The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings;"*

In the instant case, it behooves the Court to order the Republic of Guinea – Bissau to bear all costs.

FOR THESE REASONS

La Cour, Statuant publiquement, contradictoirement, en premier et dernier ressort en matière de violations des droits de l'Homme

The Court,

Adjudicating in a public hearing, having heard both parties, in first and last resort, and in a matter on human rights violations;

As to Form

Declares that it has jurisdiction over the instant case;

Rejects the preliminary objections raised as to admissibility;

Declares as admissible the initiating Application filed by Mrs. Nazareth Gomes de Pina, as well as those of the voluntary interveners Eden Joao Gomes De Pina Vieira, Joao Bernado Vieira Junior, Thirzah De Pina and Bernado Vieira;

As to merit

Notes that the State of Guinea - Bissau violated the right to life of the late President Joao Bernado Vieira as well as the right to justice of his heirs;

Declares that the Republic of Guinea - Bissau is responsible for these violations;

Orders the Republic of Guinea – Bissau to pay to Mrs. Nazaré Gomes de Pina the sum of ten (10) millions CFA francs, and equally the sum of ten (10) millions CFA francs to each of her children, namely:

- Eden Joao Gomes de Pina Vieira ;
- Joao Bernado Vieira Junior
- Thirzah De Pina Bernado Vieira ;

Orders the Defendant State to bear all costs.

Thus made, adjudged and pronounced publicly in Abuja by the Community Court of Justice, ECOWAS on the day, month and year as stated above.

And the following have appended their signatures:

- Hon. Judge Jérôme TRAORE President

- Hon. Judge Alioune SALL Rapporteur

- Hon. Juge Yaya BOIRO Member

ASSISTED BY Athanase ATANNON (Esq.) Registrar