

COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNATE,
CEDEAO
TRIBUNAL DE JUSTICA DA COMUNIDADE,
CEDEAO



No. 10 DARES SALAAM CRESCENT
OFF AMINU KANO CRESCENT,
WUSE II, ABUJA-NIGERIA.
PMB 567 GARKI, ABUJA
TEL: 234-9-78 22 801
Website: www.courtecowas.org

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

HOLDEN AT ABUJA, NIGERIA

On the 30th November 2015

General List: ECW/CJJ/APP/10/12

JudgmentNo. ECW/CCJ/JUD/24/15

BETWEEN

Stella Ifeoma Nnalue & 20 Others

PLAINTIFF

AND

Federal Republic of Nigeria

DEFENDANT

BEFORE THEIR LORDSHIPS

- 1. Hon. JusticeFriday Chijioke Nwoke**
- 2. Hon. JusticeMicah Wilkins Wright**
- 3. Hon. Justice Alioune Sail**

Presiding
Member
Member

Assisted by **M. Abubacar Djibo Diakite**

Registrar

I. THE PARTIES AND THEIR REPRESENTATION

The Application was lodged before the Court on 6 September 2012 by twenty-one (21) persons in their capacity as dependents, relations and children of 5 persons presented as deceased, namely the late Messrs. Ndubuisi Christian Nnalue, Godwin Chigbo Isidienu, Chukwudi Eke, Uche Onuwuesi and Chinedu Onwe.

The Defendant is the Federal Republic of Nigeria.

II. SUMMARY OF THE FACTS AND PROCEDURE

In the terms of the Application filed by the Plaintiff, the five deceased persons mentioned above allegedly died after they were "taken into police custody by officers of Nigerian Police Force at Oregbemi Police Station and State C.I.D., Benin, Edo State, Nigeria, on 13 October 2010, and subsequently executed in the early morning of 16 October 2010 by the said officers while under their custody."

The Plaintiff equally averred that the deceased persons have not been seen by their families nor has any information been received concerning their whereabouts, since their arrest and detention; and that that was why in their capacity as dependents, relations and children of the presumed dead persons, they sued the Federal Republic of Nigeria before the ECOWAS Court of Justice, asking the Court to find that their fundamental rights, as guaranteed under Articles 1, 4, 5, 6 and 7 of the African Charter on Human and Peoples' Rights, are violated.

At the time the case came before the ECOWAS Court of Justice, the Federal Court of Nigeria had already been seized with the same case in 2011 and the reliefs sought before the said the Federal Court of Nigeria were dismissed.

Before the ECOWAS Court of Justice, the case was heard during two court sessions, one on 9 February 2015, and the other on 14 October 2015.

At the first court hearing, the Court made an order that the Federal Republic of Nigeria must produce the arrest warrant and other documents relating to the arrest and interrogation of the persons considered to have "disappeared", the order having been served on the Parties on 17 February 2015.

At the hearing of 14 October 2015, the Federal Republic of Nigeria did not put in an appearance, nor did it produce the documents demanded by the Court. At that same hearing, Plaintiff Counsel made further pleadings, by affirming:

1. That he had abandoned his statement concerning "illegal killing", as previously alleged to have been committed by the Federal Republic of Nigeria, and that hence, he was only going to make mention of a "suspicious disappearance" of the persons cited as deceased;
2. That his request was limited to asking the Federal Republic of Nigeria to conduct the necessary inquiries and investigations into the matter brought, so that he would be enlightened as to the fate of the persons in contention;
3. That at that stage of the procedure, at any rate, he was not asking for any financial compensation.

III. ARGUMENTS OF THE PARTIES

The Plaintiff purport to be dependents of the deceased or missing persons for their daily living and support, that they had thus been permanently denied their breadwinner, and complain of "failure of the Defendant (Federal Republic of Nigeria) to protect the rights of the deceased persons or to take measures to give effect to the rights provided under the African Charter on Human and Peoples' Rights." They rely on Articles 1, 4, 5, 6 and 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter 10 (Laws of the Federation of Nigeria) 1990 and on Article 3 of the ECOWAS Treaty, claiming that all the provisions therein were violated by the Federal Republic of Nigeria, by the involvement of its police officers and security agencies in the acts perpetrated against the alleged deceased persons.

The Plaintiff therefore seek the following orders from the Court:

- A declaration that the Defendant failed in its obligation to respect the rights of the deceased persons-notably the right to life;
- A declaration that the failure and/or refusal by the Federal Republic of Nigeria to investigate, discipline and prosecute the police officers "involved in the arbitrary arrest, torture and unlawful killing" of the deceased persons, constitutes a violation of certain specific rights, notably as stated in the African Charter on Human and Peoples' Rights;

- An order directing the Federal Republic of Nigeria to set up an independent panel of inquiry to look into the extrajudicial killing of the deceased persons;
- An order directing the Defendant "to tender an apology to the Plaintiff by publishing the said letter of apology in five national dailies."

In response to the affirmations made in the Application filed by the Plaintiff, the Defendant invokes Preliminary Objections and reacts to the merits of the case by denying the facts alleged by the Plaintiff. That response was contained in the Notice of Preliminary Objection dated 18 December 2012 and filed at the Registry of the ECOWAS Court of Justice on 21 January 2013. The notice was accompanied by an address in support of the Preliminary Objection.

In the first document of the Preliminary Objection referred to above, the Federal Republic of Nigeria asserts that the suit filed before the ECOWAS Court had earlier been filed by the Plaintiff before the Federal High Court sitting in Benin, Edo State, Nigeria; that the suit before the Federal High Court is still pending and so the case before the ECOWAS Court will amount to abuse of court process, since the Plaintiff cannot maintain the same matter based on the same facts before two different courts, and that in the event that it is determined that the suit before the Federal High Court was decided against them, the Plaintiff cannot come to re-litigate the same issue before the Community Court, as the Community Court has no appellate jurisdiction over the Federal High Court of Nigeria.

In another breath, the Federal Republic of Nigeria contends that the Court cannot adjudicate on the dispute brought before it by the Plaintiff, on the ground that "the unlawful killing of the deceased persons is a criminal offence and the Honourable Court has no jurisdiction over criminal matters."

Likewise, the Defendant pleads that indeed none of the Plaintiff's rights is violated; that even if one is to suppose that the matter concerns the right to life, only persons alive, by definition, may claim such right, and that "the Plaintiff having acknowledged the fact that the deceased persons were murdered, their (i.e. the deceased's) right to life have thus become extinguished and are unenforceable by the Plaintiff or any other person." (Pages 10 and 11 of Defendant's Address in Support of Preliminary Objections).

For these three reasons, the Federal Republic of Nigeria urged the Honourable Court to dismiss the Plaintiff's Application, as filed before the Court.

IV. CONSIDERATION AND ASSESSMENT OF THE WEIGHT OF THE ARGUMENTS ADVANCED BY THE PARTIES

From the exchange of written pleadings and arguments between the Parties, three strands of argumentation sort themselves out in the dispute brought before the Court, for consideration by the Court. These three points are:

- A. The divergent stands adopted by the Parties as to the scope and effect of the previous pleadings instituted before the domestic courts of Nigeria;
- B. Legal capacity of the Plaintiff for bringing an action as heirs or presumed successors, given that the direct victims of the alleged violation are "deceased".
- C. The weight of the pieces of evidence adduced by the Plaintiff, in the light of the fact that the very allegations of "disappearance" and "murder" are challenged by the Defendant.

A- Effect of previous proceedings instituted before domestic courts

In its written pleadings dated 18 December 2012 and lodged before the Court on 19 December 2012, the Defendant, namely the Federal Republic of Nigeria, raised a preliminary objection wherein it argued that the action brought before the ECOWAS Court of Justice should be inadmissible since the Plaintiff had already filed the same suit before the Nigerian courts (Federal High Court), and that in the event that it is determined that the suit before the Federal High Court was decided against them, the Plaintiff cannot come to re-litigate the same issue before the Community Court. On their part, the Plaintiff maintained that the issues, subject-matter, claims and parties in the suits before the High Court of Benin (subsequently struck out), before the Edo State High Court (re-filed and still pending), and before the ECOWAS Court of Justice, are substantially different, and that based on the same set of facts, the Plaintiff can maintain separate and different suits against different Defendants for different reliefs and

in different courts, and as such, their action before the ECOWAS Court of Justice does not amount to abuse of court process or estoppel res judicata.

The Court therefore considers that its duty is to examine whether the two suits have the same subject-matter. It is apparent, in that regard, that if the facts in issue remain incontrovertibly the same, the substance of the actions filed before court greatly differ. The Plaintiff's action before the judge in the domestic courts of Nigeria was to seek criminal investigation and prosecution of the alleged killers and compensation for the loss of their breadwinners, whereas the object of matter before the ECOWAS Community Court of Justice is to ask the Court to find that there is an occurrence of human rights violation, and to seek reparation for the harm done, if the Court should so find.

The texts relied on in pleading the two cases are equally different. Before the national courts of Nigeria, the request sought application of the provisions of the domestic criminal law of Nigeria, whereas before the ECOWAS Court, the request was to urge the Court to find an occurrence of the alleged human rights violation, essentially derived from the African Charter on Human and Peoples' Rights, which Nigeria is party to.

The two proceedings thus instituted are therefore independent of each other; they do not overlap, and one cannot be confused for the other. Similarly, the Court is of the view that in entertaining the instant case, the Community Court of Justice, ECOWAS is not acting as an appellate court, since the case filed before it does not have the same substance as the suit filed before the judge in the domestic court of Nigeria. The concept of "appeal" presupposes that the same case is transferred to a higher court, so as to adjudicate on the same facts and to examine the same arguments of the parties; but such is not the case here.

The Court thus holds that the thesis that the two suits are totally identical, cannot be upheld; and hence, the Court holds that the Plaintiff's right to bring their case before the ECOWAS Court of Justice cannot be contested. **For that reason, the Court rules that the preliminary objection thus raised by the Federal Republic of Nigeria is ill-founded, and the Court receives the action brought by the Plaintiff as admissible.**

B- Legal capacity of Plaintiff for bringing an action on behalf of deceased persons

Another argument raised by the Defendant is that the Plaintiff cannot claim any form of "right to life" before the ECOWAS Court, particularly as a result of the fact that the victims are "deceased". In its Notice of Preliminary Objection, the Federal Republic of Nigeria submitted that: "Having acknowledged the fact that the deceased persons were murdered, their (the deceased's) rights to life were thus extinguished and are unenforceable by the Plaintiff or any other persons ... And the Honourable Court will have no jurisdiction to entertain the suit." Further, in its written pleadings, the Federal Republic of Nigeria equally contended that: "Since the Plaintiff maintain that the deceased were killed, the aforesaid deceased's right to life is unenforceable. The Honourable Court cannot enforce an unenforceable right."

The Defendant's reasoning thus tends to deny the heirs and close relatives of the "deceased" every right to bring any claim whatsoever before the Court, notably in so far as it concerns "right to life."

Such view on the issue is inconsistent with the practice of several international courts, before which the right of persons close to people considered "deceased" or "disappeared", is well established. A number of international institutions may be cited in that regard:

- The UN Committee on Human Rights (Communication No. 1912/2009, Views adopted by the Committee at its 106th Session, 15 October- 2 November 2012);
- The Inter-American Court of Human Rights (*Velasquez Rodriguez v. Honduras*, 29 July 1988);

European Court of Human Rights (Judgments on *Kurt v. Turkey*, 20 May 1998, and *Cakici v. Turkey*, 8 July 1999).

Before all these Courts, it is upheld that close relatives of "deceased" victims are entitled to bringing such cases before court. The ECOWAS Court of Justice is therefore quite surprised by the Defendant's argument that such a right may only be claimed by such holders as are alive, and not dead. When it becomes impossible for him whose right is violated to insist on that right or to seek redress, either because he is deceased or prevented in one way or the other

from doing so, it is perfectly normal that the right to bring his case before the law courts should fall on other persons close to him. It would amount to the scope of human rights being shrunk considerably, with the beneficial effects of the legal provisions endorsing human rights having been reduced, if the judicial recognition of human rights is conditioned upon the physical presence of claimants before the relevant litigating bodies.

Similarly, it would amount to a dangerous acceptance of the serious offence of murder, if one should endorse the idea that, somehow, a "deceased" person loses all his rights, and cannot bring his case before court, not even through persons close to him. The Court is of the view that to endorse that line of reasoning would be synonymous with opening up the highway to impunity, in an era where committing "murder", and its corollary of torture, constitute violations of the imperative norms of international law (*jus cogens*).

It is worthy to recall, at this juncture, a number of initiatives or legal instruments adopted by the United Nations, notably those directly related to the issue of "disappearance" of persons:

United Nations Declaration on Protection of All Persons from Enforced Disappearance, adopted by the General Assembly (including the State of Nigeria) on 18 December 1992, whose Article 17 (1) states: *"Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these remain unclarified."*;

Report of the Working Group on Enforced or Involuntary Disappearances, under the Human Rights Commission of the United Nations;

Report of the United Nations Working Group on Arbitrary Detention, under the same United Nations Human Rights Commission.

The Court is of the view that the provisions relied on by the Plaintiff are perfectly relevant for bringing an action against the Federal Republic of Nigeria. As a reminder, the provisions in question are the following:

Article 1 of the African Charter on Human and Peoples' Rights: *"The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."*

Article 4 of the said Charter: *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."*

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

Article 6 of the said Charter, in whose terms: *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."*

Article 7 of the said Charter, which states that: *"Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal."*

The Court holds that the Federal Republic of Nigeria, as party to the African Charter on Human and Peoples' Rights, is under obligation to preserve human lives, prohibit the practice of torture, respect the integrity of human beings (Article 5), and respect the freedom and security of human beings (Article 6). The Court holds that every State Party to the said Charter, and more generally, any State Party to any legal instrument prescribing respect for right to life, physical integrity of human beings and prohibition of torture, remains under obligation to employ all the means at its disposal to *prevent* all acts and practices which tend to go contrary to those obligations. The State shall *guarantee* the actual implementation of the stipulated rights, notably within the context such as submitted before this Court in the instant case, where it is against the State's agents, i.e. against persons acting directly under the State's authority- State

police and security forces – that the complaints are made. That hierarchical relationship of authority creates, at any rate, a presumption of default on the part of the State in its obligations. Contrary to the affirmation made by the Federal Republic of Nigeria, in its written pleadings, it is indeed possible to sue a State for the "murder" or "disappearance" of human beings whose right to life the State is under obligation to protect.

In that connection, it is not the first time the ECOWAS Court is entertaining an action filed on behalf of a "deceased" person, or for a person placed in a situation which makes it practically impossible for him to claim his rights. In *Case Concerning Chief Ebrimah Manneh v. Republic of Gambia*, whose judgment was delivered on 5 June 2008 in regard to a journalist who had been held in The Gambia's prisons- with the said journalist finding himself in a situation where it was impossible for him to plead, himself, for his rights- the Court ruled that: *"...the Republic of the Gambia releases Chief Ebrimah Manneh, Plaintiff herein from unlawful detention without any further delay ... that the human rights of the Plaintiff be restored, especially his freedom of movement."* (Paragraph 44 (i) and (ii)).

In conclusion, the Court shall set aside the Defendant's argument that the interests and rights of a "deceased" person cannot be defended before court, not even where there is a proven violation of the deceased person's right. The resultant effect is that, the Plaintiff's application before the Court for violation of the rights of persons presumed dead, is admissible and actionable.

C- The weight of the evidence adduced by the Plaintiff

Having examined the legal capacity for suing, both from the status of the Plaintiff and from the previous procedure already followed, the Court shall now turn its attention to the merits of the case. It is appropriate, at this stage, to recall the circumstances of the cause being pleaded before this Court.

The Plaintiff, numbering 21, who are relations, heirs or dependents of the presumed victims, allege the "enforced disappearance" of 5 persons- Ndubuisi Christian Nnalue, Godwin Chigbo Isidienu, Chukwudi Eke, Uche Onuwesi and Chinedu Onwe, who were allegedly detained and "executed" (Plaintiff Argument in Support of Application) by the Police Force of Edo State in the morning of 15 October 2010, an act perpetrated by the policemen who arrested them. The Plaintiff therefore sought the following reliefs before the ECOWAS Court of Justice in the suit filed against the Federal Republic of Nigeria:

- A declaration that the Defendant failed in its obligation to respect the rights of the deceased persons- notably their right to life;
- A declaration that the failure and/or refusal of the Defendant to investigate, discipline and prosecute the police officers "involved in the arbitrary arrest, torture and unlawful killing" of the deceased persons constitute violation of a number of rights provided notably under the African Charter on Human and Peoples' Rights;
- An order directing the Defendant to set up an independent panel of inquiry to look into the extra judicial killing of the deceased persons;
- An order directing the Defendant "to tender an apology to the Plaintiff by publishing the said letter of apology in five national dailies."

Before taking a closer look at the substance of these requests, the Court must recall two essential provisions which govern the procedure followed before it.

Firstly, Article 11 of the 6 July 1991 Protocol A/P.1/7/91, in whose terms: *"Cases may be brought before the Court by an application addressed to the Court Registry. This application shall set out the subject matter of the dispute and the parties involved and shall contain a summary of the argument put forward as well as the plea of the plaintiff."*

Secondly, Article 33 of the Rules of Procedure of the Court, which states that:

"An application of the kind referred to in Article 11 of the Protocol shall state:
(a) the name and address of the applicant;
(b) the designation of the party against whom the application is made;
(c) the subject-matter of the proceedings and a summary of the pleas in law on which the application is based;
(d) the form of order sought by the applicant;
(e) where appropriate, the nature of any evidence offered in support."

Considering the reliefs sought by the Plaintiff and the provisions referred to above, the Court must find whether the case-file before it carries sufficiently convincing proofs of evidence and pointers enabling the Court to proceed to examine the Application further. The Court notes, in that regard, that even if the Application puts forward indisputably serious facts, the submissions therein do

not contain sufficient material evidence which may lend credence to the accusations made against the Nigerian Police Force. Throughout the entire proceedings on the matter brought before the Court, the Court observes that there are only two testimonies, one made by the an officer of People's Rights Organization, which, in reality, is a letter addressed to the Attorney General and Minister of Justice (Letter dated 13 December 2010), and another from Mr. Victor Okakah, implicated in a car accident after which certain presumed victims may have had a dispute with law enforcement agencies and judicial officers. But, no proofs of evidence directly related to what fate may have befallen the persons pleaded in the case as victims of "murder" or "enforced disappearance" seem to emerge from the said testimony; the deposition referred to particularly concern the accident in question. In the view of the Court, the outcome of an analysis of that situation is that, the items of evidence which may enable the Court to order an extensive investigation into the matter are lacking.

The Court would however want to state a point at this stage, that it is conscious of how difficult it may be for a litigant to bring evidence on "murder" or on "enforced disappearance." In principle, the total absence of information or an intelligence report on the victims, makes it difficult to establish the facts alleged. It is all the more so when the offence is committed by State Security Agencies, i.e. indirectly by the State. In terms of having to tender evidence therefore, one cannot make demands requiring the same degree of evidence as applicable to other cases. The Court even admits herein that it would be satisfied with indicia, that is to say, ordinary items of evidence which constitute pointers or leads to concrete evidence.

In the instant case, the Court is of the view that the rule governing the burden of proof must be relaxed, a burden which lies, in principle, on the Plaintiff. Considering however, that the Plaintiffs find themselves in a near-impossible situation of being able to produce any evidence whatsoever, the Court holds that it is only the Defendant State which is in a position to furnish the materials of evidence needed by the Court; that is the time-held practice before the international courts any time there is an issue regarding "enforced disappearance". It is up to the State, vested with the public authority from which the Police Force derives its powers, to account for all that concerns the safety and physical integrity of the persons in question. That duty becomes all the more binding, as in the instant case, when the persons considered to have "disappeared" had been held on the premises of the Police Force.

It was at any rate in that connection that the Court, by an order at its hearing of 9 February 2015, asked the Defendant State to produce a certain number of documents; but that order has not been complied with till today.

It shall be appropriate for the Court to sanction the Federal Republic of Nigeria, since it has not only failed to produce the documents requested by the Court, but also has not deemed it fit to even put in an appearance at the court hearings. The Federal Republic of Nigeria is thus **ordered** to throw light on those instances of disappearance, failing which the Plaintiff may subsequently make a complaint thereon against them before this Honourable Court.

The Court holds that it is reasonable, in the light of the prevailing circumstances, to ask the Federal Republic of Nigeria to bear the costs.

FOR THESE REASONS

THE ECOWAS COURT OF JUSTICE,

Adjudicating in a public session, after hearing both Parties, in first and last resort, in a matter concerning human rights violation,

In terms of formal presentation

Declares that the Application filed by the Plaintiff is admissible;

In terms of merits

Orders the Republic of Nigeria to produce, latest three months, the arrest warrant for the disappeared persons; and conduct appropriate inquiries on the said disappeared persons, and thereafter, submit the inquiry report to this Court;

As to costs

Orders the Federal Republic of Nigeria to bear the costs.

Thus made, declared and pronounced in a public hearing at Abuja, by the ECOWAS Court of Justice, on the day, month and year stated above.

And the following hereby append their signatures:

1. Hon Justice Friday Chijioke Nwoke

Presiding

2. Hon Justice Micah Wilkins Wright

Member

3. Hon Justice Alioune Sail

Member

Assisted by M. Abubacar Djibo Diakite

Registrar

