001 | 2017
28/06/2019
(005085 - 005044) JF

005085

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

ALFRED AGBESI WOYOME

V.

REPUBLIC OF GHANA

APPLICATION No. 001/2017

JUDGMENT
(Merits and Reparations)

28 JUNE 2019

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
ARUSHA - TANZANIA

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

In the Matter of:

Alfred Agbesi WOYOME

represented by:

i. Mr. Kwaku OSAFO-BUABENG, Lead Counsel
ii. Mr. Ken Stephen ANUKU Esq., Counsel
iii. Mr. Reynolds TWUMASI, Counsel

versus

REPUBLIC OF GHANA

represented by:

i. Mr. Godfred Yeboah DAME Esq., Deputy Attorney General
ii. Mrs. Dorothy AFRIYE- ANSAH, Chief State Attorney
iii. Mrs. Stella BADU, Chief State Attorney

after deliberation,

renders the following Judgment:

I. THE PARTIES

1. The Applicant, Alfred Agbesi Woyome, is a national of the Republic of Ghana. He is also a business man, a Board Chairman and Director in three (3) companies, namely, Waterville Holding (BVI) Company, Austro-Investment Company and M-Powapak Gmb Company.

2. The Respondent State is the Republic of Ghana, which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 March 1989, to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 16 August 2005. The Respondent State also deposited on 10 March 2011, the Declaration by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the Application that in July 2004, the Respondent State won the bid to host the 2008 Edition of the Africa Cup of Nations. In 2005, the Central Tender Review Board of the Respondent State accepted the bid of M-Powapak Company and Vahmed Engineering Gmbh & Company to undertake the construction and rehabilitation of two stadia for the tournament. Following this, Vahmed Engineering Gmbh & Company assigned its rights and responsibilities to Waterville Holding Ltd Company (BVI).

4. On 30 November 2005, the Respondent State and Waterville signed a Memorandum of Understanding (MOU) to *inter alia* secure funding for the project on behalf of the Respondent State from Bank Austria Creditanstalt Credit Consalt AG.

5. In December 2005, the Applicant, in alliance with Waterville Ltd Holding (BVI) Company and Austro Investment Company, where he was Board Chairman, engaged M-Powapak Gmb Company, where he was Director, through a contract to provide financial services in respect of rehabilitation and construction services of the two stadia.

6. On 6 February 2006, the Ministry of Education and Sports authorised the construction of the two (2) stadia by Waterville Holding Ltd (BVI) Company.

7. On 6 April 2006, the Respondent State abruptly terminated the contract of December 2005 with Waterville Holding Ltd (BVI) Company, citing high costs and the fact that Waterville Holding Ltd (BVI) Company had failed to secure the funding as agreed in the MOU concluded on 30 November 2005.

8. Waterville Holding Ltd (BVI) Company, through the Applicant, initially protested the termination of the contract but later on conceded and claimed the money for work already done as authorised by the Ministry of Education and Sports. The Respondent State agreed and paid Waterville Holding Ltd (BVI) Company a total of 21.5 million (Twenty-One Million, Five Hundred Euros) for certified work up to the point of termination. Following this payment, the Company is said to have fully paid the Applicant, as its agent, bringing the relationship between Waterville Holding Ltd (BVI) Company and the Applicant to an end. This payment is not a subject of dispute before this Court.

9. Following a change of government of the Respondent State in 2009, the Applicant, in his personal capacity, claimed from the new government payment of 2% as the total cost for the distinct role he played in raising funds for the project. On 6 April 2010, the

Respondent State through the Ministry of Finance agreed to pay the Applicant. This payment is different from the 21.5m Euro's payment made to Waterville Holding Ltd (BVI) Company for certified work done in the construction and rehabilitation of the stadia before the termination of the contract. This payment is the one relevant to the dispute before this Court.

B. Procedure at the National Level

10. On 19 April 2010, the Applicant, having not received payment of the 2% as agreed with the Ministry of Finance, instituted a suit at the High Court (Commercial Division) against the Respondent State. On 24 May 2010, the Respondent State having failed to file any defence, the High Court rendered a judgment in default in favour of the Applicant.

11. Following negotiations which led to an Out-of-Court Settlement, the default judgment was later substituted for a consent judgment and the Applicant was paid a total sum of Fifty-One Million, Two Hundred and Eighty-Three Thousand, Four Hundred and Eighty and Fifty-Nine Pesewas (GH₵ 51, 283, 480.59) in fulfilment of the 2% claimed for raising funds for the project.

12. Following the consent judgment, the former Attorney General of the Republic of Ghana, Mr. Martin Amidu, in his personal capacity[1], invoked the jurisdiction of the Ordinary Bench of the Supreme Court and challenged the constitutionality of the agreements entered into by the Respondent State and Waterville Holding (BVI) Ltd Company and the Applicant, in relation to the construction of the stadia. Mr. Amidu averred that the agreement was in breach of Article 181(5) of the Constitution of

[1] Article 2(1) (b) of the Constitution of Republic of Ghana states that "A person who alleges that... any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect" ..."

Republic of Ghana, because the contracts, being of an international nature, ought to have been approved by Parliament.[2]

13. On 14 June 2013, the Ordinary Bench of the Supreme Court found that the contracts were unconstitutionally awarded and therefore invalid and that the Applicant was not a party to the contracts. The Ordinary Bench, however did not order the Applicant to refund the money already paid to him by the Respondent State, but directed Waterville Holding Ltd (BVI) Company to refund the Respondent State all sums of money paid to it. The Ordinary Bench further directed the Plaintiff, Mr. Martin Amidu, to seek redress before the High Court with respect to the issues regarding the Applicant.

14. Dissatisfied with the decision of the Ordinary Bench, with respect to the Applicant, Mr. Martin Amidu filed an Application for Review before the Review Bench of the Supreme Court. By a unanimous decision, the Review Bench, in its Judgment of 29 July 2014, confirmed the decision of the Ordinary Bench on the issue of unconstitutionality of the contracts. In addition, it ordered the Applicant to refund the money to the Respondent State.

C. Alleged violations

15. The Applicant alleges that in relation to the judgment of the Review Bench of the Supreme Court, the following rights protected by the Charter have been violated:

i. Right to non-discrimination, guaranteed under Article 2;
ii. Right to equality before the law and equal protection of the law, guaranteed under Article 3; and
iii. Right to have one's cause heard, guaranteed under Article 7.

[2] Article 181(5) provides that this article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

III. SUMMARY OF PROCEDURE BEFORE THE COURT

16. The Application was received at the Registry on 16 January 2017 and transmitted to all entities stated under Rule 35(3) of the Rules on 30 June 2017.

17. The Parties were notified of the pleadings and filed their submissions within the time stipulated by the Court.

18. Upon the request of the Applicant filed on 4 July 2017, the Court issued an Order for Provisional Measures dated 24 November 2017, in which it ordered the Respondent State to stay the attachment of the Applicant's property, to take all appropriate measures to maintain the *status quo* and to avoid the sale of the property until the determination of this Application.

19. On 14 March 2018, the Registry informed the Parties that written pleadings were closed.

20. On 8 May 2018, the Court held a public hearing where the Parties were duly represented.

IV. PRAYERS OF THE PARTIES

21. The Applicant prays the Court to:

"

i. Find that the Respondent State violated his rights under Articles 2, 3 and 7 of the Charter.

ii. Order interim measures in the interest of justice to forestall irreparable damage being occasioned on the Applicant in refunding the money paid as ordered by the Review Bench of the Supreme Court."

22. On Reparations, the Applicant prays the Court

"

i. Find that he is entitled to the sum of Ghana Cedi 51,283,490.59 to be paid to him by the Respondent State as an outcome of the mediation process between the parties and therefore there is no need for him to refund it as ordered by the Review Bench of the Supreme Court;

ii. Order the Respondent State to pay the remaining amount of Ghana Cedi 1, 246, 982.92 of the judgment debt as at 19 October 2010 together with its cumulative interest from 7 October 2010 till date the date of final payment to the Applicant;

iii. Order the Respondent State to refund all monies paid by the Applicant as a result of the Supreme Court orders together with interest;

iv. Order the Respondent State to return with immediate effect all monies seized from the Applicant's accounts through garnishee proceedings to the Ghanaian Banks where the Applicant holds an account;

v. Find that he is entitled to loss of business due to the Review Bench decision, execution process and freezing of company shares- $ 15,000,000.00 for commission, $10,000,000.00 interest from 8 June 2017 to date of the final payment on the basis of the charging order in Civil Motion J8/102/2017 and Ghana Cedi 20,000 per month with interest using the cumulative commercial rate on the basis of the charging order in Civil Motion J8/102/2017;

vi. Order damages to the tune of $ 45,000,000.00 resulting from the comments made by Justice Dotse in his concurring opinion in Case J7/10/2013 of the Ordinary Bench of the Supreme Court;

vii. Order reparations for the defamatory statements by AFAG and the publications by lawyer Ace Anan Akomah on his Facebook page;

viii. Order the Respondent State to expunge from all internet sites, internet search engines such as google, yahoo etc. and other media outlets, any defamatory statements and publications about the Applicant;

ix. The Applicant prays that the Court order the Respondent State to pay legal fees/miscellaneous fees (stationary, secretariat, courier, air tickets, boarding and lodging) for Arbitration fee for the International Chamber of Commerce- $ 1, 100,710.00 and Trip cost for 7 people- $ 14, 700.00; and

x. Any other order that the Court deems fit."

23. In its Response, with regard to the admissibility of the Application, the Respondent State prays the Court to rule:

"

i. That the Application has not met the admissibility requirements provided under Article 56 (5) and (6) of the Charter and Rule 40(5) and (6) of the Rules.

ii. That the Application is inadmissible and be duly dismissed."

24. With regard to the merits of the Application, the Respondent State prays the Court to:

"

i. Find that the Respondent State did not violate the Applicant's rights as provided under Articles 2, 3 and 7 of the Charter.

ii. Find that the Applicant is not entitled to the sum of Ghana Cedi 51,283,490.59 paid to him by the Government of Ghana and should refund it as ordered by the Review Bench of the Supreme Court..."

25. The Respondent State further prays the Court to find that the proceedings before this Court are a ruse to deflect and frustrate the execution of lawful orders of the laws of the Respondent State and to avoid payment of the monies owed to the tax payers.

26. With regard to the Reparations, the Respondent State prays the Court to:

i. Find that the Applicant is not entitled to the sum of Ghana Cedi 51,283,490.59 paid to him by the Government of Ghana and should refund it as ordered by the Review Bench of the Supreme Court as the actions taken to recover the said amount were made pursuant to an order to recover made by the Supreme Court of Ghana on grounds that the payments to the Applicant were unconstitutional;

ii. Find that the Applicant is not entitled to loss of business due to the Review Bench decision, execution process and freezing of company shares;

iii. The Respondent State prays the Court to find that the Respondent State cannot be held liable for the defamatory statements by AFAG and the publications by lawyer Ace Anan Akomah on his Facebook page because there are available avenues under the Ghanaian legal system for the Applicant to seek redress if he so wishes;

iv. Find that the Applicant is not entitled to damages to the tune of $ 45,000,000.00, with respect to Justice Cecil Jones Dotse, the Respondent State submits that the Judge is a justice of the Supreme Court of Ghana and by virtue of that position, he enjoys immunity from any form of legal action or suit in respect of acts or omissions by him in the exercise of judicial power as enshrined in Article 127 (3) of the 1992 Ghanaian Constitution; and

v. Find that the Respondent State in not responsible for the actions of the persons who are not acting on behalf of the State.

V. JURISDICTION

27. Pursuant to Article 3(1) of the Protocol, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned." In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction..."

A. Objections to material jurisdiction

28. The Respondent State raises four objections to the material jurisdiction of the Court as follows:
    (i) That the Protocol has not been domesticated;
    (ii) The Application does not raise human rights claims;
    (iii) That domestic courts have jurisdiction over human rights matters and;
    (iv) That this Court cannot review decisions of the Respondent State's Supreme Court.

i. Objection that the Protocol has not been domesticated.

29. The Respondent State contends that its courts are not bound by the Protocol because, although it has ratified the Protocol, it is yet to domesticate it into its laws.

30. The Applicant avers that the Court has jurisdiction because the Respondent State has ratified the Protocol and deposited the Declaration required under Article 34 (6) of the Protocol.

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31. The Court notes that Article 34 of the Protocol does not make domestication a condition for its entry into force. It only requires[3] the deposit of instruments of ratification or accession for entry into force of the Protocol as far as the State is concerned[4]. Ratification by the Respondent State and the deposit of instruments of ratification signify its final will to be bound by the Protocol. Furthermore, having deposited the Declaration under Article 34(6) which expresses its commitment to the jurisdiction of this Court after ratification, the Respondent State cannot now claim that the non-domestication of the Protocol ousts the jurisdiction of this Court.

32. In any case, according to general international law, a State cannot invoke its domestic legislation to exempt itself from performing its treaty obligations as codified in Article 27 of the Vienna Convention on the Law of Treaties 1986.[5] The Court concurs with the International Court of Justice that Article 27 reflects "a well-established rule of customary law".[6] Consequently, whether or not the Respondent State has domesticated the Protocol, is immaterial as it remains bound by the provisions of the Protocol which it voluntarily ratified.

33. In light of the foregoing, the objection of the Respondent State is dismissed.

ii. Objection that the Application does not raise human rights claims

34. The Respondent State contends that the Applicant's claims are not human rights-related and therefore cannot be considered by this Court.

35. The Applicant for his part submits that the allegations of the violations are based on provisions guaranteed under the Charter, as outlined above.

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[3] Article 34(3) Protocol.
[4] This Protocol enters into force thirty (30) days after the deposit of fifteen instruments of ratification or accession."
[5] Article 27 of the Convention stipulates that a State Party to a Treaty "cannot invoke the provisions of its domestic law to justify the non-execution of the Treaty..."
[6] Matter of Pulp Mills (Argentina v. Uruguay) [2010] ICJ Rep, 20/4/2010, § 121.

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36. The Court recalls its jurisprudence in the Matter of *Frank David Omary v. United Republic of Tanzania* in which it held that it "...has the power to exercise its jurisdiction over alleged violations, in relation to the relevant human rights guaranteed by instruments ratified by the Respondent"[7] The Court also held similar positions in subsequent cases[8]. The Court notes that the Applicant alleges violations of rights guaranteed by the Charter, specifically, Articles 2, 3 and 7 thereof.

37. Based on the foregoing, the Court dismisses this objection.

iii. Objection that domestic courts have jurisdiction over human rights matters

38. The Respondent State avers that its Constitution explicitly spells out the procedure by which domestic courts exercise their jurisdiction over alleged human rights violations which the Applicant was free to pursue.

39. For his part, the Applicant contends that this Court has jurisdiction to hear this matter on the basis of the rights violated in the Charter and other instruments to which the Respondent State is a party to.

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40. This Court affirms the jurisdiction of the Respondent State's Courts to adjudicate human rights issues. Indeed, sub-Rule 40 (5) of the Rules require that before any Application is filed in this Court, local remedies must have been exhausted. This means that the Applicant must have seized the Respondent State's Courts before

[7] Application No. 001/2012. Ruling of 28/3/2014 (Jurisdiction and Admissibility) *Frank David Omary* v. *United Republic of Tanzania*, § 75;

[8] Application No. 001/2012, Ruling of 28/3/2014 (Jurisdiction and Admissibility) *Frank David Omary v United Republic of Tanzania*, § 75; see also Application No. 005/2015 Judgment of 20/11/2015 (Merits) *Alex Thomas v Tanzania* (Merits), § 45; Application No. 046/2016, Judgment of 11/5/2018 (Merits and Reparations), *APDF and IHRDA v Republic of Mali*, § 27; Application No. 001/2015, Judgement of 7/12/2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania*, § 31; Application No. 025/2016. Judgment of 28/3/2019 (Merits and Reparations), *Kenedy Ivan v. United Republic of Tanzania*, § 27.

filing an Application before this Court. However, as stated in paragraph 37 above, the Court has held in *Frank David Omary v United Republic of Tanzania* that it has jurisdiction when human rights violations have been alleged. Therefore, the fact that domestic courts have jurisdiction over human rights issues cannot oust the jurisdiction of this Court which it exercises by virtue of Articles 3, 5 and 34 (6) of the Protocol. The Respondent State cannot therefore claim that such jurisdiction is limited only to its domestic courts.

41. Based on the above, the Court dismisses this objection.

iv. Objection that the Court cannot review decisions of the Supreme Court

42. The Respondent State avers that decisions of its Supreme Court cannot be subject to an appeal or review by an international tribunal, including this Court, because the Respondent State is sovereign.

43. The Applicant did not address this issue.

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44. The Court recalls its decision in *Ernest Francis Mtingwi v. Republic of Malawi*,[9] in which it noted that it is not an appellate body with respect to decisions of national courts. However, the Court emphasised in the matter of Alex Thomas v. United Republic of Tanzania that "this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned".[10]

45. Consequently, the objection of the Respondent State is dismissed.

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[9] Application No. 001/2013. Decision of 15/03/2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi* §14.

[10] *Alex Thomas v Tanzania* Judgment (Merits) § 130. See also Application No. 010/2015. Judgment of 28/09/2017 (Merits), *Christopher Jonas v. United Republic of Tanzania*, § 28; Application No. 003/2014. Judgment of 24/11/2017 (Merits), *Ingabire Victoire Umuhoza v. Republic of Rwanda*, § 52; Application No. 007/2013. Judgment of 03/06/2013 (Merits), *Mohamed Abubakari v. United Republic of Tanzania*, § 29.

46. From the foregoing, the Court concludes that it has material jurisdiction over this matter.

B. Other aspects of jurisdiction

47. The Court notes that its personal, temporal and territorial jurisdiction are not in contention between the Parties and nothing on file indicates that it does not have jurisdiction. Consequently, it holds that:

    i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has filed the Declaration prescribed under Article 34 (6) of the Protocol to allow individuals and Non-Governmental Organisations to institute cases directly before it;

    ii. It has temporal jurisdiction given that the alleged violations happened between 14 June 2013 and 29 July 2014, after the Respondent State had ratified the Charter and the Protocol and deposited the Declaration under Article 34(6) of the Protocol, accepting applications from individuals.

    iii. It has territorial jurisdiction given that the alleged violations occurred in the territory of the Respondent State.

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

VI. ADMISSIBILITY

49. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter". Pursuant to Rule 39 (1) of the Rules, "The Court shall conduct a preliminary examination of ... the admissibility of the Application in accordance with Article 56 of the Charter and Rule 40 of these Rules".

50. Rule 40 of the Rules which in substance restates the provisions of Article 56 of the Charter sets outs the requirements for admissibility of applications as follows: "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

    1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
    2. Comply with the Constitutive Act of the Union and the Charter;
    3. Not contain any disparaging or insulting language;
    4. Not be based exclusively on news disseminated through the mass media;
    5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
    6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
    7. Not raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

51. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections on the admissibility of the Application, that is, the non-exhaustion of local remedies and that the Application has not been filed within a reasonable time after exhaustion of local remedies.

A. Conditions of admissibility in contention between the Parties

i. Objection based on failure to exhaust local remedies

52. The Respondent State contends that the Application does not meet the admissibility requirements stipulated under Article 56(5) of the Charter and Rule 40(5) of the Rules as local remedies had not been exhausted prior to its filing. It substantiates this by pointing to the on-going execution proceedings of Ghana Cedis Fifty-One Million, Two

Hundred and Eighty-Three Thousand, Four Hundred and Eighty and Fifty-Nine Pesewas (GH₵ 51, 283, 480.59).

53. The Respondent State also submits that it is simplistic and misleading for the Applicant to say that merely because the decision on which he is aggrieved was rendered by the Supreme Court in exercise of its review jurisdiction, he could not have resorted to the lower courts of the Respondent State for redress. It avers that even after the Supreme Court renders its decision, subordinate courts, in exercise of their specific jurisdictions, have given judgments in favour of claimants.

54. The Respondent State emphasises that if the Applicant was not confident of the subordinate courts handling this matter, he could have invoked the human rights jurisdiction of the Supreme Court. It states that, by the Applicant failing to do so, the Supreme Court was never availed an opportunity to determine whether the Applicant's human rights were breached.

55. According to the Respondent State, the matter before the Supreme Court concerned the constitutionality of the two contracts and was not related to a violation of human rights. It argues that the Applicant therefore did not exhaust local remedies with respect to the alleged human rights violations.

56. The Respondent State submits further that remedies for the enforcement of human rights are expressly provided for under Article 33 of its Constitution[11]. It avers that the procedure for the enforcement of human rights is fairly simple, can be completed in a timely manner and meets the international standards of availability, effectiveness and sufficiency.

[11] Article 33 of the Constitution of Republic of Ghana states that "where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress. 2. The High Court may, under clause (1) of this article, issue such directions or orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person, concerned is entitled. 3. A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court..."

57. The Respondent State, referring to the Court's jurisprudence[12], contends that the Applicant cannot rely on the exception provided under Article 56(5) of the Charter because he neglected to pursue domestic remedies.

58. The Applicant states that the procedure for seeking redress for human rights violations provided under Article 33 of the Constitution of the Republic of Ghana is discretionary and accordingly, there is no need for him to exhaust this remedy.

59. The Applicant also states that Article 33(3) of the Constitution of the Republic of Ghana provides that a person aggrieved by the decision of the High Court may appeal to the Court of Appeal and further appeal to the Supreme Court. He contends that it is inconceivable that the High Court or Court of Appeal would reverse a decision of the Review Bench of the Supreme Court, noting that in any case, the Supreme Court would have the final say on appeals from those subordinate courts, in this case, to determine whether it violated the Applicant's rights.

60. The Applicant further avers that his rights guaranteed under Articles 2, 3 and 7 of the Charter have been violated by the Supreme Court, the highest and final appellate court of the Respondent State and therefore he has exhausted local remedies.

61. In light of the above, the Applicant argues that the procedure under Article 33(1) of the Constitution of the Republic of Ghana is not capable of addressing his complaint. According to him, this is because the procedure envisaged therein is ineffective due to the constitutional impediment posed in challenging a decision of the Supreme Court, (the highest court) at the High Court. He cites *Dawda Jawara v. The Gambia*[13] to buttress this point.

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[12] Application No.003/2012. Ruling of 28/03/2014 (Admissibility), *Peter Joseph Chacha v. United Republic of Tanzania* (hereinafter referred to as "*Peter Joseph Chacha v. Tanzania* Judgment (admissibility)"), § 142.

[13] *Dawda Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000).

62. The Court notes that the High Court of Ghana has original jurisdiction to consider claims for enforcement of human rights by virtue of Article 33 (1) of the Constitution of the Respondent State.

63. The issue for determination before this Court is whether filing a claim at the High Court regarding the alleged violation of the Applicant's human rights by the Supreme Court would have been an effective remedy if the Applicant pursued it before bringing the Application before this Court.

64. In *Norbert Zongo v. Burkina Faso* this Court held that "in ordinary language, being effective refers to that which produces the expected result... the effectiveness of a remedy is therefore measured in terms of its ability to solve the problem raised by the Applicant."[14] The Court reaffirmed this in the case of *Lohé Issa Konaté v Burkina Faso* where it also noted that a remedy is effective if it can be pursued by the Applicant without any impediment.[15]

65. The Court finds that, in the circumstances of this case, even though the High Court has original jurisdiction on human rights, it would have been unreasonable to require the Applicant to file a claim before it to call into question, a decision of the Supreme Court, whose decisions are binding on subordinate courts.

66. This position is buttressed by the fact that in its decision of 29 July 2014, the Review Bench of the Supreme Court indicated that it assumed jurisdiction over the matter to avoid the High Court rendering a contrary decision from its own. It noted as follows "[a]s matters stand now, there is a real danger of the High Court, which is the appropriate forum that this Court referred to may itself give a contrary and conflicting decision quite apart from what this Court has given. The review application in our opinion is an opportunity for the Supreme Court to level up the playing field and give

[14] Application No. 013/2011. Judgment of 28/03/2014 (Merits), Beneficiaries of the *Late Norbert Zongo and Others v. Burkina Faso*, § 68.
[15] Application No. 004/2013. Judgment of 5/12/2014 (Merits) *Beneficiaries of the Late Norbert Zongo and Others v Burkina Faso* §§ 92 and 96.

one harmonious judgement for all the persons connected with the 26th April, 2006 CAN 2008 Stadia Agreements and other related matters to know their positions and bring everything to closure."

67. It should also be noted that the Respondent State did not provide proof of decisions showing that the High Court has considered claims of violations of human rights committed by the Supreme Court, as is alleged in the instant case.

68. The Court is therefore of the view that pursuing such a claim at the High Court would not have been capable of addressing the Applicant's grievances and would have therefore been an ineffective remedy. The Court finds that although local remedies were available they would not have been effective to address the Applicant's grievances.

69. Regarding the claim that the execution proceedings relating to the judgment debt of Ghana Cedis Fifty-One Million, Two Hundred and Eighty-Three, Four Hundred and Eighty and Fifty-Nine Pesewas (GH₵ 51, 283, 480.59) was pending before domestic courts when this Application was filed, the Court notes that, the basis of the Applicant's claim before it is the decision of the Review Bench of the Supreme Court which was delivered on 29 July 2014. The execution proceedings are immaterial to the Court's determination of whether or not the Applicant exhausted local remedies.

70. The Court therefore finds that the Respondent State's objection that the Applicant failed to exhaust local remedies has no merit and is dismissed.

ii. Objection on the ground that the Application was not filed within a reasonable time

71. The Respondent State contends that the Application was not filed within a reasonable time after exhaustion of local remedies and is therefore not compliant with Article 56(6) of the Charter and Rule 40(6) of the Rules.

72. The Respondent State submits that practice and precedent in international human rights law dictates that a period of six (6) months after exhaustion of local remedies is considered to be a reasonable time for filing such applications and this was not the case with the present Application.

73. The Respondent State argues that the assessment of reasonableness of time for filing this Application should be based on the date of the delivery of the judgment of the Review Bench of the Supreme Court, that is, 29 July 2014,

74. The Respondent State avers that the period of almost three (3) years that the Applicant took after the said judgment to file this Application is an unreasonable delay as there were no impediments in this regard. It adds that the Applicant was neither detained, in custody or under house arrest. According to the Respondent State, the Applicant slept on his rights and his human rights were not violated, rather he was aggrieved by the change in Government which further changed his circumstances.

75. The Respondent State notes that between 2015 and 2016 the Applicant won two criminal cases, Criminal Case Suit No. FTRM/115/12 in the High Court of Republic of Ghana, Accra and Criminal Case Suit No. H2/17/15 in the Court of Appeal of Republic of Ghana.

76. The Respondent State avers that subsequently, the Applicant filed an action against the Attorney General at the Court of Appeal challenging a Report of a Commission of Inquiry into inordinate payments made from public funds in satisfaction of judgment debts. The Commission of Inquiry examined, inter alia, the payments made to the Applicant and companies associated with him however, these payments did not relate to the substance of his claim before this Court. The Respondent State submits that it is therefore untrue that the Applicant was unable to file an Application before this Court from July 2014 to January 2017.

77. The Applicant insists that the Application was filed within a reasonable time after the exhaustion of local remedies since the decision of the Ordinary Bench of the Supreme Court was delivered on 14 June 2013 and the judgment of the Review Bench of the Supreme Court was rendered on 29 July 2014, whilst the Application before this Court was filed on 5 January 2017.

78. Furthermore, the Applicant contends that before seizing this Court he had to engage with the Commission of Inquiry into inordinate payments made from public funds in satisfaction of judgment debts. He avers that he appealed against these findings before the Court of Appeal in June 2016[16]on the grounds that neither he nor his lawyer were invited to appear before the Commission to be heard before the determination of the matter.

79. The Applicant submits that he did not "sleep on his rights". He avers that in considering what constitutes reasonable time the Court must take cognisance of the fact that the Charter does not define what constitutes reasonable time and submits that the above-mentioned reasons are adequate justification for the delay in filing the matter before this Court and in the interest of justice and fairness, the Court should admit and consider the Application.

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80. The Court recalls its jurisprudence in the matter of *Norbert Zongo v. Burkina Faso*, where it established the principle that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis"[17]

[16] *Alfred Woyome v Attorney General* Case No. H1/42/2017 (Court of Appeal, page 11, Vol. VI attachment AAW1).
[17] *Norbert Zongo v. Burkina Faso* (Merits), § 92.

81. In determining whether this Application was filed within a reasonable time, the Court considers that ordinary judicial remedies related to the present matter were exhausted when the Review Bench of the Supreme Court rendered its judgment on 29 July 2014.

82. Other proceedings were instituted by the Respondent State relevant to the subject of this Application. In this regard, the Court observes that after the Review Bench of the Supreme Court's judgment, between 2014 and 2017, there were two criminal cases which were instituted by the Respondent State against the Applicant for allegedly defrauding the Government by false pretences and for causing financial loss to the State. The judgment was rendered on 12 March 2015 by the High Court. Subsequently, following an appeal to the Court of Appeal by the Attorney General, the Court of Appeal rendered its judgment in this matter on 10 March 2016. The Court is of the view that it was reasonable for the Applicant to wait for the final determination of these criminal proceedings as they related to the subject matter of the Application before this Court.

83. In addition, the Court notes that, the Respondent State established a Commission of Inquiry with a mandate to look into the inordinate payments made from public funds in satisfaction of judgment debts since the 1992 Constitution came into force, including those made to the Applicant and companies associated with him. The record before this Court shows that the Commission of Inquiry completed its work on 20 May 2015 and submitted its report to the President of the Republic of Ghana on 21 May 2015. The Respondent State published the Commission's report together with the White Paper in 2016.

84. The proceedings of the Commission of Inquiry being quasi-judicial in nature, offered remedies that the Applicant was not required to exhaust. Nonetheless, he had a reasonable expectation that the Commission's findings would have resulted in a decision that was favourable to him and thereby dispensing with the need to file the Application before this Court. The Court considers that despite this expectation, in

June 2016, he challenged the findings of the Commission of Inquiry before the Court of Appeal on the basis of the lack of his representative's involvement in the process.

85. The Court notes that although local remedies were exhausted on 29 July 2014 at the Supreme Court, the Applicant had a reasonable expectation that the criminal proceedings filed against him and the proceedings of the Commission of Inquiry would be concluded in his favour.

86. The Court further notes that the time the Applicant spent awaiting the determination of the criminal proceedings instituted against him as well as the case at the Court of Appeal challenging the findings of the Commission of Inquiry is sufficient justification for filing the Application two (2) years, five (5) months and seventeen (17) days after local remedies were exhausted.

87. The Court finds that in the circumstances of this case, the Application has been filed within a reasonable time as envisaged under Article 56(6) of the Charter and Rule 40(6) of the Rules.

88. The Court therefore dismisses the objection on admissibility on the ground of failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

89. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 40, Sub-rules1, 2, 3, 4 and 7 of the Rules on, the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively, and that nothing on the record indicates that these requirements have not been complied with.

90. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

VII. MERITS

91. It emerges from the file that the Applicant alleges his rights guaranteed under Articles 2, 3 and 7 of the Charter were violated. In as much as the allegations of violations of Articles 2 and 3 are related to the allegation of the violation of Article 7, the Court will begin its assessment of the latter.

A. Alleged violation of Article 7 of the Charter

92. The Applicant makes two allegations which fall under Article 7 of the Charter: namely, the alleged violation of the right to be heard by a competent tribunal and the alleged violation of the right to be tried by an impartial tribunal.

i. The right to be heard by a competent tribunal

93. The Applicant alleges that if the Review Bench of the Supreme Court had allowed the case to continue in the High Court as ordered by the Ordinary Bench of the Supreme Court, the facts of the case would have been determined on the merits and the Applicant's role and claims would have been established. Instead the Review Bench of the Supreme Court assumed jurisdiction thus denying the Applicant the right to be tried by the competent tribunal. Furthermore, the Applicant submits that the said claims filed against him before the Review Bench of the Supreme Court did not involve matters for constitutional interpretation, and thus, did not fall within the jurisdiction of that Bench of the Court.

94. The Applicant further contends that even though the Supreme Court has supervisory jurisdiction over decisions made by other courts, including its Ordinary Bench, invoking the review jurisdiction of the Supreme Court is a specialised procedure. Moreover, the decision of the Review Bench of the Supreme Court to truncate the proceedings and assume jurisdiction over the matter denied him the opportunity to present his case on the merits before the High Court.

95. The Respondent State for its part submits that the Review Bench of the Supreme Court rightly assumed jurisdiction over the matter. According to the Respondent State, the Supreme Court, for purposes of hearing and determining any matter within its jurisdiction, is vested with the power to exercise any authority vested in all courts established by the Constitution of Ghana as provided under Article 129(4) of the Constitution.[18]

96. The Respondent State further contends that the Supreme Court has the power and authority under the Constitution as provided under Articles 2, 130 and 133, to determine matters relating to land, contract or crime which raise issues of constitutionality including review of decisions of its Ordinary Bench. The Respondent State avers further that when courts deliberate over matters that raise issues of constitutionality, they must halt such deliberations and refer the matter to the Supreme Court.

97. In this regard, the Respondent State asserts that the first case determined at the Ordinary Bench was a constitutional matter where Mr. Amidu, sought various declarations regarding the constitutionality of the contracts between the Respondent State and companies associated with the Applicant and the violation of Article 181(5)

[18] Article 129(4) states that "For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law".

of the 1992 Constitution.[19] It contends that the Application before this Court is hinged on a wrong assumption that the Supreme Court's jurisdiction is limited to determining constitutional matters and that its exercise of its review power was undue usurpation of the powers of the High Court.

98. In conclusion, the Respondent State contends that the Applicant had the opportunity to be heard, to present and prosecute his case through legal counsel. It maintains that even if the Applicant disagrees with the judgment of the Supreme Court, it is "ill" for him to interpret it as a violation of his human rights, especially because the Supreme Court in its review decision assumed jurisdiction provided under the Constitution to deal with the Applicant's outstanding issues.

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99. The Court notes that Article 7 (1) (a) of the Charter provides, *inter alia*, 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...."

100. The Court notes that in the present case, the key issue is whether the Applicant's right to be heard by a competent tribunal was violated as a result of the decision of the Review Bench of the Supreme Court hearing the matter rather than referring it to the High Court.

[19] Article 181(5) provides that this article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

101. The Court observes that the determination on whether a domestic court is competent to hear a matter depends on the legal system of the State concerned. In this regard, domestic courts have the power to interpret the laws and determine their jurisdiction.

102. In the instant case, the Court notes that Article 133 (1) of the Respondent State's Constitution provides that "The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court". On the other hand, Article 130 of the Constitution stipulates that the Supreme Court has original jurisdiction over matters regarding constitutional disputes. The Court further notes that the Ordinary Bench of the Supreme Court declared that it lacked jurisdiction because it was incompetent to examine the claims relating to the Applicant, as they did not raise a constitutional dispute.

103. The Court observes that, on the contrary, the Review Bench reversed this decision invoking its review jurisdiction, noting that the Ordinary Bench by declaring that it lacked jurisdiction with respect to the Applicant's claims resulted in a grave miscarriage of justice. The Review Bench stated that "As the matter stands now, there is a real danger that the High Court which is the appropriate forum that this court referred the matter to, may itself give a contrary and conflicting decision quite apart from what this court has given".

104. Considering the margin of discretion domestic courts enjoy in interpreting their own jurisdiction, this Court holds that, on the face of it, there is nothing erroneous or arbitrary in the Supreme Court's Review Bench interpretation of its own jurisdiction. This is significant given that the Supreme Court is the highest court in the Respondent State.

105. Furthermore, the Applicant has also not demonstrated how the Supreme Court violated any specific legal procedures or acted arbitrarily in assuming its review jurisdiction.

106. Lastly, the Court observes that the Applicant does not contest that he participated in the proceedings at both Ordinary and Review Benches of the Supreme Court and was assisted by a team of lawyers. In both Benches, he challenged the claims of Mr Amidu and at all stages of the proceedings, he was given the opportunity to file his submissions and seek redress.

107. In these circumstances, the Court holds that the Applicant's right to be heard by a competent tribunal, guaranteed under Article 7(1) of the Charter was not violated by the Respondent State.

ii. The right to be tried by an impartial tribunal

108. The Applicant alleges that his right to be tried by an impartial court has been violated on two grounds namely:

a) Whether the participation of eight judges at both the Ordinary and Review Benches casts doubt on the impartiality of the Supreme Court and;

b) Whether the remarks made by Justice Dotse call into question the impartiality of the Review Bench of the Supreme Court

a) **Whether the participation of eight judges at both the Ordinary and Review Benches casts doubt on the impartiality of the Supreme Court**

109. The Applicant alleges that the Review Bench of the Supreme Court was composed of eleven (11) judges, eight (8) of whom had previously heard the matter at the Ordinary Bench of the Supreme Court resulting in the violation of right to be tried by an impartial tribunal.

110. The Applicant avers that both the Ordinary Bench and the Review Bench of the Supreme Court agreed that the High Court was the proper forum to hear the matter. The Review Bench further reasoned that there would be a real danger if, it allowed the High Court to hear the matter on the merits and the High Court reached a different position or conclusion from that of the Ordinary Bench.[20] The Applicant further alleges that by truncating the proceedings in the High Court, the Review Bench of the Supreme Court assumed a jurisdiction it did not have, thereby violating his fundamental rights to a fair trial and hearing by an impartial court.

111. The Applicant contends that based on the concurring decision of the Review Bench, the Court cannot be said to have been impartial.

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112. The Respondent State submitted that the Applicant only alluded to the bias on the part of Justice Dotse, noting that the judgment that the Applicant complained about was unanimously rendered by all eleven (11) judges, including the eight (8) judges who heard the matter at the Ordinary Bench of Supreme Court. The Respondent State also contends that the judgment of the Ordinary Bench of the Supreme Court was mostly in favour of the Applicant.

113. The Respondent State avers that the eight (8) judges who sat on both Benches of the Supreme Court ruled seemingly in the Applicant's favour at the Ordinary Bench which prevented the recovery of the money that the Applicant had unconstitutionally obtained from the State. In this circumstance, the Respondent State questions why the Applicant now makes an allegation of bias simply because the same judges had on the second occasion exercised their review powers to order the reimbursement of the monies paid to him.

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[20] The Review Bench of the Supreme Court in its judgment ...noted that...As the matters stands now, there is a real danger that a High Court which is the appropriate forum that this court referred to may itself give a contrary and conflicting decision quite apart from what this court has given...".

114. Furthermore, the Respondent State submits that the Supreme Court was not specifically constituted to try this matter and there is no evidence of manipulation or influence from the Executive. The Respondent State consequently contends that neither the composition of the Court nor an examination of the entire proceedings at the Supreme Court discloses a violation of the Applicant's right to be tried by an impartial tribunal.

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115. The Court notes that it is not in dispute between the parties that the eight (8) of the judges of the Ordinary Bench also sat in the Review Bench and participated in the consideration of the same matter in question. The point of disagreement between the Parties and the main issue for determination by this Court is whether the composition of the Review Bench, the majority members who were also part of the Ordinary Bench, casts doubt on the impartiality of the tribunal to the extent that one could not reasonably expect a fair decision.

116. The Court observes that in order to determine the issue at hand, it should recall the common distinction between appeal and review proceedings. While an appeal involves a petition to a higher court or tribunal, a review relates to a petition before the same tribunal which made the decision being challenged in the petition, often with changes in the number of judges constituting the bench. The right to appeal presupposes that the appellate tribunal must be higher in authority and different in its composition from the tribunal whose decision is appealed against, but in contrast, a review is usually considered by a special bench of a court which has already examined a matter with a view to correcting any error found.

117. In this regard, the Court notes that it is common amongst those jurisdictions[21] having review procedures for review benches to involve in the review proceedings, judges who previously considered the matter. In such circumstances, the mere fact that a judge or some of the judges participated in the review proceedings does not necessarily imply the absence of impartiality even if this may give rise to an apprehension on the side of one of the parties.

118. The Court notes from the records, that the Review Bench of the Supreme Court was constituted in accordance with the Constitution of the Respondent State which stipulates that the Supreme Court of Ghana is composed of a Chief Justice and not less than nine (9) other justices and when it sits as a Review Bench, it shall be fully composed with not less than seven (7) judges.[22] In line with this, the *Practice Direction* on the practice and procedure of empanelment in the Supreme Court in constitutional cases empowers the Chief Justice to empanel all available justices of the Supreme Court or at least seven (7) justices in constitutional matters, This was affirmed by the Supreme Court in the case of *Ghana Bar Association and Others v Attorney General and Others*.[23]

119. The Court observes that the implications of the above-mentioned provisions of the Constitution of Ghana, together with the practice and jurisprudence, are that the judges of the Supreme Court who considered the matter at the Ordinary Bench may form part of the Review Bench as long as the criteria for the minimum number of judges is observed. There is thus no irregularity or a breach of law as far as the composition of the Review Bench is concerned. Furthermore, an objective assessment of the nature of the composition, involving judges who sat at the Ordinary

[21] Constitution of Kenya, 2010 article 47(3)(a) and Part III of the Fair Administrative Action Act No. 4 Of 2015; Rule 66 of the Tanzania Court of Appeal Rules, 2009; Malawi has (a) judicial review of administrative action-Order 53 and of the Rules of the Supreme Court, 1965 or Order 54 of the Civil Procedure Rules, 1998 and (b) constitutional judicial review Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution.
[22] Article 128 (1) and Article 133 (2) of the Constitution of Ghana.
[23] J1/26/2015) [2016] GHASC (20 July 2016).

Bench, does not *per se* raise any reasonable doubt as to the impartiality of the Review Bench to correct any errors found.

120. On the personal bias of judges, the Court notes that there is no evidence on record showing that the judges were predisposed or had preconceived bias against the Applicant, which would lead to a reasonable conclusion they would not render a fair decision. In fact, the judges who sat at the Ordinary Bench and later at the Review Bench were the same judges who unanimously rendered the decision, which was interpreted by the Applicant to be in his favour, when they ruled that his matter should be examined by the High Court. Therefore, the Applicant's contention that the Review Bench was partial is based on a misapprehension that is neither justified nor objective.

121. In view of the above, the Court concludes that the composition of the Review Bench of the Supreme Court by judges who had participated in the Ordinary Bench does not call into question the impartiality of the Review Bench.

b) Whether the remarks made by Justice Dotse call into question the impartiality of the Review Bench of the Supreme Court

122. The Applicant alleges that his right to be tried by an impartial court has been violated by the Respondent State because the lead judgment of the Review Bench was drafted by Justice Dotse who had expressed biased opinions in a concurring judgment, at the Ordinary Bench. In this regard, the Applicant avers that in his concurring opinion at the Ordinary Bench of the Supreme Court, Justice Dotse alleged that the Applicant had no contract with the Respondent State and as such, was not entitled to the money that was paid to him. Moreover, in the same opinion, Justice Dotse stated that the Applicant had formed an alliance with another party, Waterville to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise." and further referred to the Applicant as being at the centre of "the infamous Woyome payment scandal".

123. The Respondent State submitted that the Applicant only alluded to the bias on the part of Justice Dotse, noting that the judgment that the Applicant complained about was unanimously rendered by all eleven judges, including eight judges of the Ordinary Bench of Supreme Court. The Respondent also contends that the judgment of the Ordinary Bench of the Supreme Court was mostly in favour of the Applicant.

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124. The Court observes from the record and it is not in contention between the Parties that Justice Dotse in his concurring opinion at the Ordinary Bench referred to the Applicant as having formed an alliance with another party, Waterville Holding Ltd *to* "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise." and further referred to the Applicant as being at the centre of "the infamous Woyome payment scandal".

125. The issue for determination is thus whether the remarks of Justice Dotse disclose a perception of bias and in light of the circumstances, call into question the impartiality of the Review Bench of the Supreme Court as a whole.

126. According to the *Dictionnaire de Droit International Public*, impartiality signifies the '"absence of bias, prejudice on the part of a judge, referee or expert in dealings with parties appearing before him."[24]

127. The Court notes that according to the Commentary on the Bangalore Principle of Judicial Conduct;

> "A judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or

[24] *Dictionnaire de droit international public, Sous la direction de Jean Salmon*, Bruyant, Bruxelles, 2001, at 562. See also Application No. 003/2014. Judgment of 24/11/2017, *Ingabire Victoire Umuhoza* v. *Republic of Rwanda*, §103 and 104 and Black's Law Dictionary (2nd ed. 1910).

social matter directly related to the case does not disqualify the judge from sitting. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable."[25]

128. The Court considers that, to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt.[26] However, the Court observes that the impartiality of a judge is presumed and undisputable evidence is required to refute this presumption. In this regard, the Court shares the view that "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge"[27] and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding"[28]

129. In the instant case, the Court notes that Judge Dotse's statements were made on the basis of his assessment of the facts of the matter. The Court is of the view that, although the said statements were unfortunate, and went beyond what can be considered as an appropriate judicial comment they however did not give an impression of preconceived opinions and do not reveal bias.

130. Justice Dotse statements concurred with the unanimous decision of the Ordinary Bench in referring the determination of his matter to the High Court.

131. The Court notes that even though Justice Dotse wrote the lead Judgment rendered by the Review Bench which was constituted of eleven (11) Judges, Judge Dotse was only one (1) out of eleven (11) Judges on that Bench. The Court is of the opinion that a single judge's remarks cannot be considered sufficient to taint the

[25] Commentary on The Bangalore Principles of Judicial Conduct, § 60.
[26] *Findlay v UK* (1997) 24 EHRR 221 § 73. See also Nsongurua J Udombana, 'The African Commission on Human and Peoples' Right and the development of fair trial norms in Africa' 2006 African Human Rights Law Journal Vol 6/2.
[27] *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (Wewaykum).
[28] Okpaluba and Juma "The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa" PELJ 2011 (14) 7 at 261.

entire Bench. Furthermore, the Applicant has not illustrated how the judge's remarks at the Ordinary Bench later influenced the decision of the Review Bench.

132. The Court therefore concludes that the Respondent State has not violated the Applicant's right to be heard by an impartial tribunal guaranteed under Article 7 (1) (d) of the Charter.

B. The alleged violation of the right to non-discrimination and the right to equality before the law and equal protection of the law

133. The Applicant argues that his right to non-discrimination and right to equality were violated as a result of Justice Dotse's remarks and by the Supreme Court truncating the proceedings.

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134. The Respondent State contends that the Applicant has not demonstrated how he has been discriminated against based on race, ethnic, group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Furthermore, it avers that the Applicant has not demonstrated how he was not accorded equal protection of the law.

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135. Article 2 of the Charter states that "Every individual shall be entitled to the enjoyment of rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."

136. Article 3 of the Charter guarantees the right to equality and equal protection of the law in the following terms:

"

1. Every individual shall be equal before the law
2. Every individual shall be entitled to equal protection of the law."

137. In the Matter of *Tanganyika Law Society and Legal and Human Rights Centre and Rev. Christopher Mtikila v Tanzania*[29] the Applicants alleged that the constitutional provisions which prohibited independent candidature had the effect of discriminating against the majority of Tanzanians because only those who are members of and are sponsored by political parties can seek election to the Presidency, Parliament and Local Government positions therefore violating the right to freedom from discrimination enshrined in Article 2 of the African Charter. This Court held that the same grounds of justification do not legitimise the restrictions to not be discriminated against and the right to equality before the law therefore found a violation of Articles 2 and 3(2) of the Charter.

138. In the instant case, the Court holds that the Applicant has not demonstrated or substantiated how he has been discriminated against, treated differently or unequally, resulting into discrimination or unequal treatment based on the criteria laid out under Article 2 and 3 of the Charter.

139. In view of the foregoing, the Court finds that the Applicant's rights to non-discrimination, his right to equality before the law and to equal protection of law as guaranteed under Articles 2 and 3 of the Charter were not violated by the Respondent State.

VIII. REPARATIONS

140. The Applicant prays for several reliefs reflected in paragraph 22 above while the Respondent State's prayers are reflected in paragraph 26 above

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[29] Application No 011/2011. Judgment of 14/6/2013 (Merits), *Christopher Mtikila v United Republic of Tanzania* § 116-119.

141. Article 27(1) of the Protocol provides that "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

142. The Court notes that since no violation has been established, the issue of reparation does not arise. Consequently, the Applicant's prayers for reparation are dismissed.[30]

IX. COSTS

143. The Applicant did not pray for costs with respect to the Application before this Court.

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144. The Respondent State prays that each Party bears its own expenses and costs.

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145. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each Party shall bear its own costs".

146. The Court finds that there is nothing in the instant case, to allow it to decide otherwise. Accordingly, each Party shall bear its own costs.

X. OPERATIVE PART

147. For these reasons,

THE COURT,

[30] *Werema Wangoko Werema and Waisiri Wangoko Werema v. Tanzania* (Merits), § 99.

On jurisdiction

Unanimously:

i. Dismisses the objections on the jurisdiction of the Court;

ii. Declares that it has jurisdiction.

On admissibility

By a majority of Eight (8) for and one (1) against, Judge Suzanne MENGUE dissenting:

iii. Dismisses the objections on the admissibility of the Application;

iv. Declares that the Application is admissible.

On merits

Unanimously:

v. Finds that the Respondent State has not violated Article 2 of the Charter on the right to non-discrimination;

vi. Finds that the Respondent State has not violated Article 3 of the Charter on equality before the law and equal protection of the law.

vii. Finds that the Respondent State has not violated Article 7 (1) of the Charter on the right to have one's cause heard by a competent tribunal.

viii. Finds that the Respondent State has not violated Article 7 (1) (d) of the Charter on the right to be tried by an impartial tribunal in respect to the composition of the Review Bench of the Supreme Court.

By a majority of Seven (7) for and Two (2) against, Judges Gérard NIYUNGEKO and Rafaâ BEN ACHOUR dissenting:

ix. Finds that the Respondent State has not violated Article 7 (1) (d) of the Charter in respect to the remarks made by Justice Dotse in his concurring opinion before the Ordinary Bench of the Supreme Court.

On reparations,

By a majority of Seven (7) for and Two (2) against, Judges Gérard NIYUNGEKO and Rafaâ BEN ACHOUR dissenting:

x. Rejects the reliefs sought by the Applicant.

On costs

Unanimously:

xi. Decides that each Party shall bear its own costs.

Signed:

Sylvain ORÉ, President;

Ben KIOKO, Vice-President;

Gérard NIYUNGEKO, Judge;

El Hadji GUISSÉ, Judge;

Rafaâ BEN ACHOUR, Judge;

Ângelo V. MATUSSE, Judge;

Suzanne MENGUE, Judge;

M-Thérèse MUKAMULISA, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

and Robert ENO, Registrar.

In accordance with Article 28 (7) of the Protocol and Rule 60(5) of the Rules, the Dissenting Opinions of Justices Gerard NIYUNGEKO, Rafaâ BEN ACHOUR, Suzanne MENGUE and Individual Opinion of Chafika BENSAOULA are appended to this Judgment.

Done at Arusha, this Twenty Eighth day of June in the year Two Thousand and Nineteen in English and French, the English text being authoritative.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

2019-06-28

Judgement on Merits and Reparations in the Matter of WOYOME Vs Republic of Ghana Delivered on 28 June 2019

African Court on Human and Peoples' Rights

African Court on Human and Peoples' Rights