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1. CASE LAW NOTE: *PRIVATE BARNABAS ELI V. THE FEDERAL REPUBLIC OF NIGERIA* (JUDGMENT NO ECW/CCJ/JUD/29/19)

1. Introduction

On the 11th October 2019, the Community Court of Justice of the Economic Community of West African States (hereinafter “The Court”) released the judgment ECW/CCJ/JUD/29/19, namely the case between [Private Barnabas Eli and the Federal Republic of Nigeria](#).

The Applicant, Private Barnabas Eli, is a Nigerian citizen who enrolled into the Nigerian Army (hereinafter “the Army”) on the 14th August 2009. The applicant refers that he was sent to the first battalion of the Army to be part of the so-called “Special Task Force”, operation Save Haven. Specifically, he was on duty at the Kassa checkpoint. On 6th April 2012, while at work, the applicant states to have a severe stomachache and, therefore, needs to purchase medication at the closest chemist. When the applicant came back to his domicile, he found his residence robbed and his rifle disappeared. He was charged with the arm’s disappearance and detained at the Barkin Ladi Police station. At a later stage, he was held at the third Division, which had jurisdiction on the case. On 9th December 2013, he was condemned by the Military Court Martial to a two years imprisonment. He was released on 8th December 2015, after completing the two years’ detention.

The applicant complains the disrespect of article 6 of the African Charter on Human and Peoples’ Rights (hereinafter “The Charter), namely the right to liberty. He then alleges that the Respondent state was no able to prove any allegation related to his rifles’ vanishing and objected to embrace the general martial court’s deliberations to date. Furthermore, he stated the violation of articles 1,2,3,4,5,7 and 15 of the African Charter; the disrespect of Articles 1,2,4,5,6,7,9 and 23 of the Universal Declaration of Human Rights; Articles 5 and 6 of International Covenant on Economic Social and Cultural Rights. With regards to the disrespect of article 6 of the Charter, he requests that the court recognizes the illegal, unlawful and null nature of his arrest and detention. Moreover, Barnabas Eli asks the court to acknowledge a violation of his right to be heard in a reasonable time and to be corresponded with a sum of 4500000 Nairas as an allowance for his absence from work (from March 2015 to date).

This case is of interest because it faces different alleged violations which came up from the African military context. Although African countries are progressively bettering their observance for human rights, the relation between soldiers and states in Africa has not always been the best. The approach of the Court in the case reflects an increasing attention to individual rights and follows the international jurisprudence trend to limit state abuses.

2. *On whether to make a default judgement*

On 10th October 2018, the applicant prayed the Court to consider a default judgment as the respondent state did not deliver a defense in response to the Application. This request was based on different reasons. Firstly, the state concerned failed in filing a defense as foreseen by Article 90 (4) of the *Rules of the Community Court of Justice*, although it was duly served with the Applicant's proceeding by the registry of the court. In addition, it was more than two years that the respondent state was aware of the proceeding. When analyzing this first issue, the court declared that the case was filed on its registry on the 14th December 2016 and, after two days, the respondent received the originating application. In respect of Article 90 of ECOWAS rules, the defendant has an obligation to deliver a defense within a month or, alternately, to make appearance. In this case, Nigeria objected and failed to file a defense in the expected time. In particular, article 90 (1) foresees that if a defendant does not deliver its defense within the aforementioned time, the applicant can apply for a default judgment. In the case *Chude Mba v. The Republic of Ghana*, the court provided requisites to accept an application of default judgment: primarily, the court needs to take into consideration the admissibility of the application; moreover, it has to verify whether procedural requirements are respected; finally, it needs to ensure that a sufficient amount of facts are provided by the applicant.

In *Mohammed El Tayibbah v. Republic of Sierra Leone*, the court's judgment dispensed the same requirements to determine an application for default judgment. In reference to admissibility of the case, the Court needed to prove to have jurisdiction over this case. Article 9 (4) of the 2005 Supplementary Protocol of the Court envisages that "the Court has jurisdiction to determine cases of violation of human rights that occur in any member state." As in other cases, in *Kareem Meissa Wade v. Republic of Senegal*, the Court established that a simple claim for human rights violation is sufficient to determine the Court's jurisdiction over a case. The applicant provided several allegations of human rights' disrespect and, for this reason, in line with the previous jurisprudence, the court determined its jurisdiction over the case.

Also, the court acknowledged that the application was not anonymous and that the same matter had not been examined by any International Court for adjudication. That being said, the Court determined the admissibility of the application.

At a second stage, the ECOWAS court had to evaluate whether the application met the envisaged formalities. It verified that, in two different occasions, the Applicant filed an application. More precisely, the initiating application was delivered on the 14th of December 2016, while a second one was sent to request a default judgment due to the negligence of the defendant. Therefore, the Court held that any appropriate formality was compliant with the rules of the Court.

Finally, the court had to determine whether the applicant provided a sufficient amount of facts to justify a default judgment. The same criterium was adopted under another case, *Vision Kam Jay Investment limited v. President of Ecomas Commission*. In this case, the court stated

that all evidence presented by the plaintiff had to be evaluated in order to prove cause of action. Further, the case *Mohammed El Tayyib v. Republic of Sierra Leone*, reaffirms the need for competence, admissibility and proof before evaluating the merit of a case and make a default judgment. In this last case, the court held that “it is necessary to evaluate the evidence adduced by the applicant so as to determine whether it is sufficient to ground a decision of the court in his favor”. ECOWAS court therefore holds to assess the merits of the case concerned.

3. *On the alleged violation of the right to liberty*

With regard to the violation of the right to liberty, the court assesses whether the detention of Barnabas Eli is unlawful and, therefore, in violation of Article 6 of the African Charter. In its reasoning, the court evaluates evidence which has been provided by the applicant and examines it in conformity with the *Nigerian Armed Forces Act (AFA)*. Notably, the sections 68 (1) (a) and 148 of the Armed Forces Act provide for the competence of a martial court to judge a soldier whether he is guilty and liable to have lost a public or service property. The court martial might convict to jailing, for an offense under this provision, for a period which cannot constitute more than a two years imprisonment. At the same time, these provisions establish the release of the convicted whether a “confirming authority” did not receive the court martial proceedings within sixty days and did not confirm the finding and sentence. Digging deeply, section 148 (3) affirms that a sentence of a court martial “*shall not*” be considered as a finding of guilty or sentence until the confirming authority embraces the same view and gives a judgment about it. In the same provision, there is no objection to any military custody of the convicted until the confirming authority issues a final sentence. In the Court’s view, it appears evident the “indispensable role” of the Confirming authority. This is confirmed by the use of the word “shall”, which is intended to underline a compulsory action. Indeed, the court recalls section 151 (1) of AFA where it is stressed the need for either a confirmation or a refusal of the finding provided by the court martial. Alternately, the finding or sentence might be referred to a higher confirming authority. At this stage, the court finds five different aspects which are keys to analyse the case. Theft or loss of public property by a member of the military body is liable to condemnation by a court martial; after this, records of proceedings must be sent to a confirming authority in 60 days: if that does not occur, the person in custody must be undoubtedly released while waiting for a decision by the authorizing authority; Although a court martial judgment’s might result in a period of imprisonment, a response by a confirming authority is necessarily needed; whether there is no response by a confirming authority, the finding or sentence cannot be considered as a finding or sentence. In its light, the court considers the confirming authority as an “appellate or reviewing authority” and states that any sentence of the martial court cannot be implemented without the authority’s acceptance. Accordingly, the court recalls the concept of “hung jury” and the decisions in *United States v. Perez* 579 (1824) and *Logan v. United States*, 144 (1891). Finally, the court recognizes that a “no show” of the confirming authority is equivalent to a rejection without cause of the finding or sentence of the court martial. As a consequence, the execution of the sentence of the court martial was not proper and represented a disrespect of the right of liberty of the applicant. Therefore, while the arrest and the trial of the plaintiff are lawful in the court’s view, the detention without any acceptance of a confirming or higher authority is deemed null and void. Evidence and

allegations provided by the applicant have to be treated as legitimate and prove the disrespect of Article 6 of the African charter.

4. *On the alleged violation of the plaintiff's right to be heard in a reasonable time*

With respect to this alleged violation, the court adopts a comprehensive approach which is intended to, firstly, recall some of the court's previous decisions regarding the right to fair hearing and its fundamentals. After having summoned Section 7 (d) of the Charter, which ensures the right to be "processed within a reasonable time", the court mentions the cases *Tandja v. Republic of Niger* and *Federation of African Journalists and Others v. The Republic of the Gambia*, where the court expressed the necessity of a prosecuted to be tried in a reasonable time. Then, the court recalls some of the international law jurisprudence of the Inter-American Court on Human Rights; the case of *Mateos v. Spain (1993)*, tried by the European Court of Human Rights; African Court on Human and Peoples' Rights on *Alex Thomas v. United Republic of Tanzania (2017)*. The court outlines three different criteria which need to be kept under consideration when assessing the right to be heard in a reasonable time. These are: the level of sophistication of the subject; the procedural operations carried out by the defendant; the conduct of judicial subjects.

As to the first criterion, the court does not consider that the matter had an elevated level of sophistication which could justify a detention for 19 months ahead of a process and a condemnation. Second, the court revolves around Section 122 of the AFA, which unequivocally states that an individual under service who is in custody must be tried by a court martial within ninety days. Barnabas Eli held on 19 months before being tried. As a consequence, the court recognizes a clear violation of Section 122 of the AFA. Inevitably, the court held that article 7 of the Charter has been violated by the Respondent.

5. *On the alleged violation of the right to work*

As to this violation, the Court is called to determine whether the Respondent state has disrespected the right to work of Barnabas Eli. The Applicant was not reintegrated into the Nigerian Army after the two years imprisonment, although he sent communications to officially request his reinstatement to the Army's officials. Here, the Court echoes article 23 of UDHR in conjunction with Article 15 of ICESCR, which state the any individual has the right to work, and recalls one of its cases (*Justice Paul Uter Dery and Others v Republic of Ghana, Judgment No. ECW/CCJ/JUD/19*) where the disrespect of the right to work is defined as a liquidation which strips a worker from a job with an evident unfair condition. The applicant requested to be reintegrated in his job position and any communication and attempts of his legal representatives have not been successful. Recalling that Section 68 (1) of the AFA does not state that a 2 years reclusion implies an impossibility to be reinstated and that the first prison sentence was unlawful, the court concludes that the rejection of the respondent state to reintegrate the applicant violates the right to work of the applicant himself.

6. *On the alleged violation of other rights*

The applicant has also alleged the disrespect of other rights: right to non discrimination (Article 2 of the African Charter); equality before the law (Article 3 of the Charter); right to

life and integrity of his person (Article 4 of the Charter); Prohibition from torture, cruel, inhuman and degrading punishment and treatment (Article 5 of the Charter).

As to the right to non discrimination, the court echoes the case Justice *Paul Uter v. The Republic of Ghana Jud. No. ECW/CCJ/JUD/17/19*, where the court stresses the need for an identical or similar case where there is a diversity of treatment in order to have a successful discrimination complaint. In the court's opinion there is no sufficient evidence to demonstrate the foundation of this alleged violation.

The court maintains a strict approach when assessing the applicant's allegation regarding the Right to equality before the law. It is mentioned the case *Badini Slafo v The Republic of Burkina Faso*, where it is stated that two similar legal situations need to be compared to understand whether a bad treatment was addressed to one of them. In this case, the court does not recognize a discrimination proven by the Applicant and, therefore, the violation cannot be acknowledged.

On the Right to life, the court outlines that, to have a proper violation of it, a victim of this abuse has to be dead and not able to represent himself. It is for this reason that the court finds this request as groundless and unsubstantiated.

Finally, for what concerns the prohibition from torture, the court shows the need for one main element to prove that an effective violation has been put in place. Recalling its jurisprudence, in the case of *Federation of African Journalists and Others v. The Republic of the Gambia, Judgment No: ECW/CCJ/JUD/04/18*, a medical report is necessary to demonstrate consistence with a violation of the prohibition from torture. Since the applicant did not release any evidence or report which shows a clear torture inflicted over the period, the court cannot determine that a period of imprisonment is equivalent to torture.

As to the alleged cruel, inhuman and degrading treatment or punishment, also recalling different decisions of the European Court of Human Rights, the court holds that there is not enough evidence provided by the applicant so that a violation may be detected. The alleged violation is, therefore, seen as unfounded and baseless.

Differently from the other rights, as for the alleged violation of Article 1 of the Charter, the court did not receive any evidence but, however, decided to exercise its discretion and decide on the matter. Grounding its decision on the violation of different rights of the Charter, the court held that a violation occurred and invited the defendant to put in place necessary measures to effectively execute the Charter's provisions.

6. Conclusion

The case *Barnabas Eli v The Republic of Nigeria* must be evaluated from different angles. From a state perspective, the "no show" of the Nigeria, with no response to the plaintiff's application, has resulted in the activation of a default judgment. Reasons to explain the "Nigeria's disappearance" cannot be stated for sure but they might be associated with lack of coordination between Nigerian judicial authorities. From another angle, it might be noted that the court also recognized a violation of Article 1 of the Charter. This approach is an indirect invitation to the Defendant to better its protection tools and to take necessary measures to ensure a respect of the rights concerned. This unveils the active role of the court in suggesting improvements and propose change across the economic community. From an individual perspective, Barnabas Eli has evidently been partly suited in his requests but lack of evidence and documentation did not allow the plaintiff to see several violations recognized. This becomes clear when the court analyzed the alleged violation of the

prohibition from torture. Sensibility of the case might be perceived because of the fact that the entire matter revolved around military issues. Needless to say, the African context witnessed an elevated amount of power grabs and abuses attributable to the military and its officials. The recognition of the violation of the right to liberty and the right to work of a soldier represents only one of the steps which proves that the African regional and continental protection systems are gradually making progress.

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