



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

HOLDEN AT ABUJA, IN NIGERIA

On this 11th day of June 2013

GENERAL LIST NO. ECW/CCJ/APP/19/12 JUDGMENT NO. ECW/CCJ/JUD/05/13

11 June 2013

Between

SOW BERTIN AGBA

APPLICANT

Counsel for Applicant: Maitre Ahlin Gabriel Komlan, Maitre Sylvain Koffi Attoh-Mensah and Maitre Ata Messan Zeus Ajavon, all Lawyers registered with the Bar of Togo

And

REPUBLIC OF TOGO

DEFENDANT

Represented by the Minister of Justice and *Garde des Sceaux* (Keeper of the Seals)

Counsel for Defendant: Maitre Ohini Kwao Sanvee and Maitre Edah N'Djelle, Lawyers registered with the Bar of Togo

BEFORE THEIR LORDSHIPS

- | | |
|--------------------------------------|-----------|
| 1. Hon. Justice Awa Nana Daboya | Presiding |
| 2. Hon. Justice Hansine N. Donli | Member |
| 3. Hon. Justice Anthony Alfred Benin | Member |

Assisted by Maitre Aboubacar Djibo Diakite

Registrar

Delivers the following Judgment:

FACTS AND PROCEDURE

The facts of the case as narrated by the Applicant

1. Mr. Sow Bertin Agba, a Togolese businessman, domiciled at Lome, was arrested on 7 March 2011 by officers of the National Intelligence Agency (ANR), under the pretext that he had committed the offence of fraud against the Emirate national, Mr. Abass Al Youssef.
2. Mr. Sow Bertin Agba was kept at the premises of the ANR for eight (8) days without access to legal assistance or a visit by a doctor or family member, and was allegedly subjected to inhuman and degrading treatment and acts of torture, before being transferred to the National Gendarmerie. On 23 March 2011, the National Gendarmerie handed him over to the Office of the Public Prosecutor at the Court of First Instance of Lome, where the Investigating Judge of Trial Chamber 4 placed him under a committal order on 25 March 2011.
3. In the complaint lodged on 10 March 2011 (i.e. 3 days after being summoned for questioning) before the Public Prosecutor, Mr. Abass Al Youssef maintained that Sow Bertin Agba together with his co-perpetrators and accomplices defrauded him of a sum of Forty-Eight Million US Dollars (USD 48,000,000) by falsely claiming that they could gain access to the hidden fortune of the late President of Cote d'Ivoire, General Robert Guei, which had been lodged at the Central Bank of Togo.
4. Before the Investigating Judge, however, Sow Bertin Agba made it clear that he was engaged in business relations with Mr. Abass Al Youssef, to assist him obtain concessions in the areas of mining, petroleum and telecommunications in several African countries and that sums of money amounting to almost USD 5,000,000 which he received in the bank accounts of his companies in Togo were commissions and advances on commissions or charges; that the transactions undertaken thereof are documented by receipts whose records can be found in the accounts statements of his bank.

5. On 22 July 2011, when the Applicant and the complainant brought their opposing claims before the Investigating Judge, the Defendant, Mr. Abass Al Youssef, failed to bring any evidence on the allegations he had made in respect of fraudulent steps the Applicant may allegedly have taken to entice the said Mr. Abass Al Youssef to give him the sum of 48 Million US Dollars. That was why an application for provisional release was filed on 2 August 2011, but it was rejected.
6. On 16 December 2011, the Applicant filed another application for provisional release, which was again dismissed by the Investigating Judge. The Applicant appealed and the Criminal Chamber, by Judgment No. 009 of 23 January 2012, ordered that the Applicant be released on provisional grounds, upon the payment of CFA F 150,000,000 as surety.
7. On 20 June 2012, the Supreme Court, in Judgment No. 48/12, dismissed the appeal filed by the Public Prosecutor and decided that the judgment of the Criminal Chamber shall take its full effect.
8. The surety of CFA F 150,000,000 was paid on 23 July 2012 to the finance division of the Supreme Court, through a cheque signed by the Presiding Member of the Bar Association at the Court of Appeal of Lome, with whom the money was duly lodged on 25 June 2012. Despite the fact that he had complied with the judgment of the Criminal Chamber by paying the stipulated amount, the Public Prosecutor refused to issue to the Head of the Tsevie civilian prison, where the Applicant was incarcerated, the order for the provisional release of the Applicant.
9. The Applicant contended that his human rights have been violated and he invoked the following pleas in law:
 - Violation of Article 9 of the 10 December 1948 Universal Declaration of Human Rights;
 - Violation of Article 6 of the 27 June 1981 African Charter on Human and Peoples' Rights;
 - Violation of Article 9 of the 16 December 1966 International Covenant on Civil and Political Rights.

... 10. It is for all these reasons that he brought his case before the Court, asking the Court to:

-Adjudge and declare that the refusal to release the Applicant on provisional grounds, following the court decisions made to that effect, constitutes an arbitrary and illegal detention in regard to the legal provisions cited above;

-To order the Republic of Togo to release him provisionally, by adhering to Judgment No. 009 of the Criminal Chamber as delivered on 23 January 2012;

-To ask the Republic of Togo to pay to him, in reparation for the harm done him, and in compliance with Article 9(5) of the International Covenant on Civil and Political Rights, the sum of USD 1,000,000 as damages for all the prejudice suffered.

11. The Applicant asked for expedited procedure on the grounds that the Republic of Togo, having adopted the Protocol on Democracy and Good Governance, violates the provisions of same legal instrument, by refusing to enforce a lawfully made court decision delivered in the Republic of Togo.

The facts of the case as narrated by the Republic of Togo

12. The Republic of Togo, in a Memorial in Defence dated 8 January 2013, maintained that Mr. Abass Al Youssef, an Emirates businessman, was requested by some alleged parents of the late Ivorian President Robert Guei, to help them transfer from Togo to a foreign country, a fortune of 275 Million US Dollars, which allegedly belonged to the late President Robert Guei. Mr. Abass Al Youssef then dispatched to Lome, Mr. Loik Floch-Prigent, his partner and expert in African affairs, to establish contact with the supposed parents of President Guei, and especially, assess the genuineness of their claims. Mr. Loik Floch-Prigent reported back to Mr. Abass Al Youssef that the business was a promising one.

13. Thus, Messrs. Pascal Bodjona and Sow Bertin Agba became participants in the deal and succeeded in defrauding Mr. Abass Al Youssef of successive advance fees totalling USD 12,825,000 supposedly for

removing certain hindrances; and subsequently, they concocted another business story on the transfer of certain funds belonging to an Iraqi General, and once again, they were able to extort from Mr. Abass Al Youssef the sum of USD 5,600,000.

14. Again, for the purposes of resolving difficulties in relieving certain financial obligations incurred in relation to the transfer of the entire fund in question, other cumulated advance fees amounting to 33 Million US Dollars were paid by Mr. Abass Al Youssef to Mr. Sow Bertin Agba et al. Mr. Abass Al Youssef eventually realised that it was all a fabrication and he filed a complaint against Mr. Sow Bertin Agba et al. for fraud, involving almost 48 Million US Dollars. Mr. Sow Bertin Agba was summoned by the Gendarmerie for questioning, and was subsequently transferred to the Court of First Instance of Lome and placed under a committal order for fraud, forgery and use of fake documents.
15. After he had been interrogated on the merits of the case, he applied for provisional release, which was rejected. A second application for provisional release was equally dismissed. Upon an appeal filed by him, the Criminal Chamber ordered that he should be released on provisional grounds, upon payment of a surety of CFA F 150,000,000cfa.
16. The Public Prosecutor referred the judgment of the Criminal Chamber before the Supreme Court for violation of Article 422 (2) of the Code of Criminal Procedure of Togo, since the Criminal Chamber had decided that the witness Pascal Bodjona shall be heard by the President of the said Chamber, whereas the Article invoked provides that depositions of Members of the Government shall be heard by the President of the Court of Appeal.
17. Furthermore, the Republic of Togo averred that the pending issues included non-enforcement of the international warrants of arrest issued against Mr. Lo'ik Floch-Prigent, who is a French national; the question regarding the alleged parents of the late Ivorian President Guei; and, the hearing Mr. Pascal Bodjona, etc. The Republic of Togo argued therefore that for all those reasons, the preventive detention of the Applicant is

perfectly lawful and does not violate any constitutional or legal text in force in Togo.

ANALYSIS OF THE COURT

As to the admissibility of the Application

18. The Republic of Togo states that it would rely on the wisdom of the Court in this regard.

Article 10(d) of the Supplementary Protocol A/SP.1/01/05 amending Protocol A/P.1/7 /91 of the ECOWAS Court of Justice provides:

"Access to the Court is open to ... (d) individuals on application for relief for violation of their human rights; the submission of application for which shall (i) not be anonymous; nor (ii) be made whilst the same matter has been instituted before another International Court for adjudication."

19. Sow Bertin Agba invokes the refusal by the Republic of Togo to release him on provisional basis, in spite of the Supreme Court decision confirming a judgment delivered by the Criminal Chamber. This is manifestly a violation of the right to liberty. It is consistently held that in any instance where an applicant alleges human rights violations on the territory of a Member State, the Court upholds its competence and declares the application admissible.

Since the Application is in conformity with the provisions of the said Article 10(d), as cited above, there are grounds for declaring same admissible.

As to the application for expedited procedure

20. In a separate application dated 8 November 2012, registered at the Registry of the Court on 12 November 2012, the Applicant requested that his Application be brought under expedited procedure;

A request for expedited procedure is granted when the particular urgency of a case requires that the Court adjudicates within the shortest possible time. The Applicant applied for the said measure, considering, himself, that his detention is arbitrary and illegal. But as the time the

Court is pronouncing judgment on this case. The detention of the Applicant has ceased, since he was released on 16 April 2013.

Therefore, the urgency which warranted the expedited procedure is no more existent; and there is no ground to adjudicate on that issue.

AS TO THE MERITS OF THE CASE

- 21. Regarding the refusal by the Republic of Togo to release Sow Bertin Agba on provisional grounds**
- 22.** Sow Bertin Agba was formally charged by the Investigating Judge of Trial Chamber 4 of the Court of First Instance of Lome, and on 19 December 2011, Sow Bertin Agba lodged an application for provisional release. By Order of 22 December 2011, the Investigating Judge dismissed the Applicant's request.
- 23.** Sow Bertin Agba appealed against that Order. The Criminal Chamber, before which the appeal against the said Order was brought, by Judgment 009/12 of 23 January 2012, ordered that Sow Bertin Agba be released on provisional grounds, upon payment of CFA F 150,000,000 as surety. Meanwhile, the Public Prosecutor had sought for a quashing of the judgment delivered by the Criminal Chamber
- 24.** However, it is apparent from the provisions of Article 179(1) of the Togo Code of Criminal Procedure that *"When the Criminal Chamber has adjudicated on an appeal brought against an order made by an investigating judge on a matter concerning preventive detention, whether the order is confirmed or reversed, the Criminal Chamber, in releasing the detainee or in continuing to hold him in detention, or in issuing a committal order or an arrest warrant against him, the Public Prosecutor shall instantly return the case-file to the investigating judge after having enforced the judgment."*
- 25.** The Public Prosecutor disregarded this requirement and the argument put forth by the Republic of Togo to maintain Sow Bertin Agba in detention is that "The Public Prosecutor had two obligations. The obligation to release the Applicant on provisional basis, but also the necessity, as demanded by the Court, to hear the Minister Pascal

Bodjona beforehand ... It was under those conditions that the Applicant was maintained in detention till he was provisionally released in February 2012. The Public Prosecutor's Department wanted to avoid a collision between the Parties or the risk of shelving the testimony of a witness; it was absolutely necessary to hear one of the witnesses, in the person of Minister Bodjona, before releasing the Applicant."

26. But, Judgment No. 009/12 of 23 January 2012 by the Criminal Chamber, while making the Order for the provisional release of Sow Bertin Agba, posed only two conditions: the payment of CFA F 150,000,000 as surety, and also that the Applicant will be banned from going outside the territory of Togo till further notice, for the purposes of the procedure. In no instance was there a requirement that Minister Pascal Bodjofla had to be heard first before the Applicant could be released.

27. Further, Judgment No. 48/12 of 20 June 2012 by the Criminal Chamber of the Supreme Court declared that the appeal brought by the Public Prosecutor attached to the Court of Appeal of Lome, on the aspect of the case dealing with the detention of Sow Bertin Agba, was inadmissible. The Supreme Court declared it is forbidden to seek to quash a decision on a matter concerning preventive detention.

28. In spite of the judgments by the Criminal Chamber and by the Supreme Court, Sow Bertin Agba was maintained in preventive detention. To justify this detention, the Republic of Togo emphasizes that an order for his provisional release was received at the civilian prison of Tsevie on 12 February 2013, on charges of fraud, forgery and use of fake documents, as brought against him, but his release could not be secured because he was being held for another cause.

However, the Court notes that the Republic of Togo fails to bring forth a relevant and convincing argumentation as to what it meant by that 'other cause' for which Sow Bertin Agba continued to be kept in prison.

29. The Republic of Togo, still for the purposes of justifying the detention of the Applicant, stresses that between the time the Public Prosecutor brought the appeal and the release of Sow Bertin Agba, the matter had

gone before the United Nations Working Group of Geneva. Essentially, the Working Group's opinion was that saw Bertin Agba's release must not be conditioned on Minister Pascal Bodjona having to be heard beforehand, and that that idea helped in finding a common ground among the Parties, thus making it possible for the Public Prosecutor to order for the release of the Applicant.

30. Counsel for the Applicant responds by stating that it was Sow Bertin Agba who referred the question of preventive detention before the United Nations Working Group on Arbitrary Detention, and that the Working Group stated in its point 1: "That it is manifestly impossible for a State to cite any legal basis whatsoever to justify the denial of liberty in an instance of the preventive detention of a person who has been released on the basis of a court decision that is final." That opinion, which was made on 14 December 2012, was notified on the Republic of Togo in the same month of December 2012 and the actual release of the Applicant took place only on 16 April 2013. Counsel for the Applicant further argues that the time lapse between the notification of the opinion on the Republic of Togo and the release of Sow Bertin Agba, proves that the Republic of Togo not react promptly.
31. The Republic of Togo maintains that the opinion was served on it on 23 January 2013 and that it was on 12 February 2013 that Sow Bertin Agba was released on a provisional basis.
32. The Court notes that Judgment No. 009/12 of the Criminal Chamber which ordered the provisional release of Sow Bertin Agba was made on 23 January 2012 and the surety was paid on 25 June 2012. As from the latter date, the Applicant must have been released unconditionally, but he was held in detention till 16 April 2013, the date on which his release became effective. From 25 June 2012 to 16 April 2013, the detention of Sow Bertin Agba is unjustifiable, since he had paid the required surety and had ostensibly showed no intention to evade trial.
33. In the Judgment of 8 November 2010 on case concerning *Mamadou Tandja v. General Salou Djibo*, the Honourable Court, in demonstrating the arbitrary nature of the prevention detention at take, referred to the

definition of the United Nations Human Rights Commission. On arbitrary detention, the Working Group considered as "arbitrary", instances of denial of liberty, which for one reason or another, are contrary to the relevant international norms enunciated in the Universal Declaration of Human Rights, or instances which are so considered by the relevant international instruments ratified by the States.

To determine the arbitrary nature of a detention, the Working Group set out three criteria, namely that:

- It shall be manifestly impossible to invoke any legal basis whatsoever to justify the denial of liberty;
- Denial of liberty shall be corollary to the exercise of rights or freedoms stipulated by Articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights, in as far as the States are parties to the International Covenant on Civil and Political Rights;
- Non-observance, be it total or partial, of the international norms relating to the right to fair trial, as enunciated in the Universal Declaration of Human Rights and in the international instruments ratified by the states concerned, is of such gravity as the denial of liberty is of an arbitrary nature.

34. On the whole, Sow Bertin Agba was illegally held in prison for 9 months and 21 days, aside of the fact that he was held in custody for 16 days for the purposes of the preliminary inquiry on the premises of the National Intelligence Agency (ANR) Gendarmerie.

35. Since the detention of the Applicant is not on any legal basis, it is arbitrary, and violates the provisions of the following legal instruments ratified by the Republic of Togo:

36. Article 9 of the 10 December 1948 Universal Declaration of Human Rights, which provides that: ***"No one shall be subjected to arbitrary arrest, detention or exile"***;

Article 9(1) of the International Covenant on Civil and Political Rights:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law" with such

Article 6 of the African Charter on Human and Peoples' Rights: *"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."*

As to damages

37. The Applicant maintains that he is a Director of several business companies incorporated in Lome and outside Togo. In Ghana for example, he states that he operates an airline. For all these reasons, Sow Bertin Agba pleads that the harms done to him are of a material, moral, psychic and psychological nature and asks for the sum of One Million US Dollars (USD 1,000,000).

To buttress his claim, he invokes Article 9(5) of the International Covenant on Civil and Political Rights, which provides: **"Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation."**

38. The Court recalls that since the US Dollar is a currency which is foreign to the ECOWAS zone, the amounts of money asked for as damages must henceforth be evaluated in the currencies of the Member States.

39. Counsel for the Applicant converted the amount requested and claimed the equivalent value of 1 Million US Dollars (i.e. the amount CFA F 500,000) in damages.

40. The Republic of Togo, the Defendant, objects to that request and maintains that the amount asked for by the Applicant has no legal basis.

41. The Court holds that Sow Bertin Agba does not file any justifying evidence to losses he incurred or in respect of any revenues he would have had to earn during the period of his detention. He does not lodge

any medical certificate to attest to torture'- inhuman or degrading treatment which he claims to have suffered on the premises of the National Intelligence Agency (ANR).

In the absence of proofs of evidence, the Court is not in a position to award damages for material damage. But the Court finds that having been subjected to illegal detention from 25 June 2012 to 16 April 2013, i.e. for 9 months and 21 days plus 16 days in police custody, the Applicant suffered undoubted moral harm; whereas it shall be appropriate to award him damages in reparation thereof.

FOR THESE REASONS

42. In terms of formal presentation

The Court,

Declares that the Application of Sow Bertin Agba is admissible;

Declares that there is no ground for adjudication on the application for expedited procedure.

43. In terms of merits

As regards the application for the provisional release of Sow Agba

Since the Applicant was released on provisional grounds in the course of the adjudication by the instant Court, there is no ground for adjudication on that matter.

As regards the detention of Sow Bertin Agba

Declares that the detention of Sow Bertin Agba, after the judgments delivered by the Criminal Chamber and by the Supreme Court of Togo, is illegal and arbitrary.

As regards damages

Since the Applicant did not lodge any pleading to justify losses he incurred or in respect of any revenues he would have had to earn during the period of his detention, or a medical certificate proving the torture suffered on the premises of the ANR, the Court has no proof of evidence to rely on to award the material damages asked for. Consequently, that request is dismissed.

Conversely, the moral harm suffered by Sow Bertin Agba is undoubted and real. The Court orders the Republic of Togo to pay to Sow Agba Bertin the sum of 8 Million CFA Francs (CFA F 8,000,000) in reparation for the harm done him.

As to costs

The Court asks the Republic of Togo to bear the costs.

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

And the following hereby append their signatures:

Hon. Justice Awa Nana, Daboya

Presiding

Hon. Justice Hansine N. Donli

Member

Hon. Justice Anthony Alfred Benin

Member

Assisted by Maitre Aboubacar Djibo Diakite

Registrar

