

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



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

**ON SEPTEMBER 26th, 2019
PROCEEDING N.º ECW/CCJ/APP/12/18**

JUDGMENT N.º ECW/CCJ/JUD/26/19

BETWEEN:

SALIFO SAWADOGO

APPLICANT

AND

THE STATE OF BURKINA FASO

DEFENDANT

COMPOSITION OF THE PANEL

Honorable Judge Gberi-Be OUATTARA -

President

Honorable Judge Dupe -ATOKI -

Member

Honorable Judge Januária Tavares Silva Moreira COSTA - Member/Rapporteur

Assisted by: Athannase Atannon

– Deputy Chief Registrar

ON THE REPRESENTATION OF THE PARTIES

ON BEHALF OF THE APPLICANT:

The Lawyers: Maitre Hamidou SAVADOGO and Maitre Seydou Roger YAMBA

ON BEHALF OF THE DEFENDANT:

Agent Judiciaire du Tresor

1. ON THE PROCEDURE

The applicant, **Mr. SALIFOU SAWADOGO** came, by means of an application initiating proceedings (doc.1) registered at the Court Registry on 23rd February 2018, to initiate the present action against the **STATE of BURKINA FASO**, claiming infringement of the parliamentary immunity he enjoys under Articles 86 (2 and 3) of the Rules of Procedure of the National Assembly of Burkina Faso, 1 of the ECOWAS Supplementary Protocol A/SP.1/12/01 of 21st December 2001 on Good Governance and Democracy, 21 of the Additional Act A/SA/1/12/16 relating to the Enhancement of the Powers of the ECOWAS Parliament, 8 of the Regulation of the 4th Legislature of the ECOWAS Parliament of 8th February 2016 and 206 And 52 of the Burkina Faso Code of Criminal Procedure.

He gathered documents, a total of 16 Annexes.

The Defendant State was duly summoned on 26th February 2018 and it presented its defense (doc.2), which was registered with the Court Registry on March 20th, 2018 and notified to the applicant on 10th April 2018.

The parties were heard at the sitting at this Court on 14th May 2019.

ON THE FACTS CLAIMED BY THE APPLICANT

1. The applicant, Mr Salifou SAWADOGO, has been a burkinabe Member of Parliament since 30th December 2015, elected under the banner of the Congress for Democracy and Progress abbreviated "CDP" (opposition party). ; (Annex 1)

2. In addition, he was elected Member of the ECOWAS Parliament, as set out in the sworn statement of 4th February 2016; (Annex 2)

3. On September 13th, 2016, by letter N.º16-511/TMO/P, the Government Commissioner at the Ouagadougou Military Court appealed, through the Minister of Justice, to the H.E the President of the National Assembly of Burkina Faso to request authorization to prosecute or waive the parliamentary immunity of Parliament Member SALIFOU SAWADOGO; (Annex 3)

4. To support such a request, the Government Commissioner at the Ouagadougou Military Court claimed that after an attempted Coup d'état orchestrated in Burkina Faso on September 16th, 2015, the applicant's criminal liability had to be clarified for the following offenses:

- Criminal association;
- Acts of vandalism;
- Aggravated intentional degradation or destruction of movable or immovable property belonging to others;
- Involvement in attack on State security;
- Any other consequential infringements.

5. Upon receipt of the request, the National Assembly of Burkina Faso withdrew Parliament Member Salifou SAWADOGO's parliamentary immunity; (Annex 4):

6. The applicant was therefore brought before the investigating judge of the Ouagadougou Military Court, where he was heard, imprisoned and then notified to appear before the Investigating Control Chamber, who referred him to the Military Court for trial on 27th February 2018 following the prosecution decision; (Annexes 5 and 6)

7. In the procedure for waiving his Parliamentary Immunity by the National Assembly of Burkina Faso, the request was made by the Government Commissioner of the Ouagadougou Military Court and not by the Attorney General, as required by Article 86 of the Rules of Procedure of the National Assembly; (Annex 3)

8. In Burkina Faso, before the courts, the Public Prosecution Service is represented by a Faso Prosecutor or Government Commissioner and before the Courts by Attorney Generals;

9. The Government Commissioner at the Ouagadougou Military Court, who requested the waiver of parliamentary immunity, is the equivalent of a Faso Prosecutor at the Court;

10. This authority cannot request the waiver of parliamentary immunity of a Parliament Member;

11. Only the Attorney General at the Ouagadougou Court of Appeal could request the waiver of the Parliament Member's parliamentary immunity before possibly making him available to the Government Commissioner at the Ouagadougou Military Court;

12. The waiver of his parliamentary immunity was made in breach of the rules of law governing the matter, namely Article 86 of the Rules of Procedure of the National Assembly of Burkina Faso;

13. That from the beginning of the investigation until the prosecution hearing, no request for a persecution permit was sent by the investigating judge or another Burkina Faso authority to the ECOWAS Parliament;

14. That the judge was aware that he was not dealing with a case of flagrant crime, as he requested the waiver of his immunity from the Burkinabe National Assembly;

15. And that it could not have been otherwise, because the facts for which he was prosecuted in December 2016 occurred on 16th September 2015 and following days, according to the procedural act;

16. The State of Burkina Faso attempted to rectify the situation by submitting a request for waiver of his immunity to the ECOWAS Parliament in accordance with letter No. 2017/034/AN/PRES/SG dated 5th May 2017; (Annex 10)

17. That there was no waiver of the applicant's immunity as an ECOWAS parliamentary until the referral judgment was addressed;

18. That he continues to be a Community Parliament Member, as is clear from the invitations to do activities of the ECOWAS Parliament and the authorizations to leave the territory granted by the military justice authorities; (Annex 11)

19. That the applicant enjoys immunity as an ECOWAS parliamentarian throughout the Community, including in Burkina Faso;

20. That the waiver of his parliamentary immunity by the Burkina Faso National Assembly, as long as that of the ECOWAS Parliament exists, is ineffective;

21. That at the end of the investigation procedure and before the Investigative Control Chamber, the applicant raised the nullity of the proceedings brought against him for breach of Articles 86 of the Rules of Procedure of the Burkina Faso National Assembly, on the one hand, and on the other hand, 20 and 21 of Supplementary Protocol

A/SA/1/12/16 on Enhancement of the Powers of the ECOWAS Parliament, Article 1 of the ECOWAS Supplementary Protocol A/SP/1/12/01 of 21/12/2001 on Good Governance Democracy and 8 of the Rules of Procedure of the 4th Legislature of the ECOWAS Parliament of 8th February 2016;

22. That this entity was responsible for ensuring the compliance of the acts and of the whole procedure followed during the proceedings and the investigation;

23. But in order to reject the claim for invalidity concerning breach of Article 86 of the Rules of Procedure of the National Assembly of Burkina Faso, the Control Chamber concluded that: "*In accordance with Article 86 of the Rules of Procedure of the National Assembly, the request for waiver of immunity of a parliamentarian must be made by the Attorney General; whereas, however, only the National Assembly remains competent to assess the validity of the petition, since Article 86 (2) gives it the opportunity to declare the application inadmissible; whereas, therefore, it is not for the Chamber to rule on the compliance of the consultation of the National Assembly*"

24. That the Chamber of Control itself acknowledges that this provision has been infringed, but considers that it has no competence to declare invalidity, whereas the Article 206 of the Code of Criminal Procedure gives it the power to verify the compliance of the proceedings brought before it;

25. That it was wrong and in flagrant violation of Articles 206 of the Code of Criminal Procedure and 101 of the Code of Military Justice that the Chamber of Control issued the Judgment No. 076 of 12/29/2017;

3. The Applicant's Conclusions:

The applicant thus formulates the following requests:

With regards to the form that the application be considered admissible;

In terms of merits that it be considered well-founded and consequently be evidenced the violation of the rights of the applicant and be declared irregular the proceedings against him and be ordered that he be reinvested into his rights.

4. ARGUMENTS PLEADED BY THE DEFENDANT IN ITS DEFENSE:

1. Following the failure of the military coup d'état in Burkina Faso on 16th September 2015, judicial information was opened against all persons who participated as author, co-author or accomplice of the coup;

2. Accordingly, there were apparent elements from the investigation of this process likely to determinate the criminal liability of the applicant, Mr SAWADOGO Salifou, then a Parliament Member in the National Assembly;

3. In view of the gravity of the facts, the Military Court wanted the applicant's criminal liability to be invoked, as those of other persons persecuted for the same facts;

4. It then appealed, through the Minister of Justice, to His Excellency, President of the National Assembly, for permission to bring an action against the applicant and to waive his parliamentary immunity;

6. Upon receipt of the request, was set up an *ad hoc* commission composed of fifteen (15) members appointed on a proportional representation of parliamentary groups;

7. The discussion at the meeting dealt with the *ad hoc* committee's conclusions formulated in a motion for a resolution which is limited only to the facts mentioned in the request and transmitted to the President of the National Assembly by the Minister of Justice;

8. On December 6th, 2016, the Members considered the request for the waiver of the parliamentary immunity of the Parliament Member Salifou SAWADOGO;

10. And at the end of a vote by secret ballot, the Members authorized, by 86 in favor and 33 against, 00 abstention, 4 invalid votes, the waiver of parliamentary immunity of the concerned Parliament Member;

11. It was following this parliamentary authorization that the investigating judge accused Mr SAWADOGO and that he was incarcerated at the Army Detention and Correctional Center from December 15, 2016;
12. The admissibility of the request for the purpose of waiving parliamentary immunity is the responsibility of the addressee of the document, namely the Burkina Faso National Assembly;
13. Pursuant to Article 86 of its Rules of Procedure, only the Burkina Faso National Assembly may consider the admissibility of the application submitted to it;
14. There is no violation of Article 1 of *ECOWAS Supplementary Protocol No. A/SP1/12/01 of 21st December 2001 on Democracy and Good Governance*;
15. As to the alleged infringement of Articles 20 of the Additional Act A/SA/1/12/16 relating to the Enhancement of the Powers of the ECOWAS Parliament and 8 of the Rules of Procedure of the Fourth Legislature of the ECOWAS Parliament of 8 February 2016, the above provisions should be regarded as conferring full powers on the ECOWAS Parliament to stay proceedings or detention of a Parliament Member of the Community;
16. In the present case, after sending a new information mission to Burkina Faso, the ECOWAS Parliament has indeed taken a decision on the circumstances of waiver of parliamentary immunity and imprisonment of the applicant;
17. Instead of using its powers, that Parliament reminded the Burkina Faso National Assembly that it had an obligation to submit to it in advance the request for waiver of the immunity of the concerned Parliament Member;
18. In its report on its first ordinary session of 2017, held in Abuja from 10 to 25 May 2017, the ECOWAS Parliament welcomed the provisional release of the applicant;
19. Until the judgment of the case, Burkina Faso received no decision from the ECOWAS Parliament ordering the suspension of the proceedings or of the arrest of the applicant;
20. The Chamber of Control found that the investigating judge, acting in the context of a flagrant crime, was not required to request the waiver of Honorable Salifou SAWADOGO's parliamentary immunity;

21. This process lost its purpose because the trial, which was postponed to February 27th, 2018, resumed on March 21, 2018 and would continue on March 26th and the following days;

22. In the present case, the Chamber of Control has stated that the admissibility of the request for the waiver of the applicant's parliamentary immunity can only be assessed by the addressee of the document, namely the Burkina Faso National Assembly, so that it was not for it to decide on the compliance of the consultation of the National Assembly;

24. The resolution 022-2016/NA relating to the waiver of Parliament Member SAWADOGO Salifou's parliamentary immunity is not a judicial act, but rather a deliberation of the National Assembly;

Conclusions of the Defendant State

The defendant ended by claiming that the applicant's claims should be rejected.

On the Issues to Be Decided

It is for the Court to determine its jurisdiction for the present case and to decide whether the applicant's claims are well founded.

5. ON THE ANALYSIS BY THE COURT

On the jurisdiction of the Court:

The jurisdiction of the Court depends on the nature of the question referred to the court by the applicant, based on the facts alleged by him/her.

In this case, the applicant's petition is based on claims of no compliance in the procedure leading to the waiver of his parliamentary immunity at national level and, in the absence

of waiver of his parliamentary immunity at ECOWAS level, having thus been filed a criminal case against him under national jurisdiction, which he considers to be violators of his rights, which, however, he does not identify.

The applicant claims that the procedure followed should be declared unlawful and that the criminal proceedings against him be declared void.

The applicant alleges that were infringed:

- The Article 86 of the Rules of Procedure of the Burkina Faso National Assembly;
- The Article 1 of Supplementary Protocol A/SP.1/12/01 of 21st December 2001 on Good Governance;
- The Article 21 of Additional Act A/SA/1/12/16 on Enhancement of the Powers of the ECOWAS Parliament;
- The Articles 52 and 206 of the Burkina Faso Code of Criminal Procedure.

The applicant claims that his rights have been infringed, but he does not substantiate them, although he invokes the jurisdiction of this Court, as provided for in Article 9 (4) of Supplementary Protocol A/SP.01/01/05 of 19/01/2005, to hear cases of human rights violations in any of the member States.

Indeed, it is stated in Article 9 (4) of the Supplementary Protocol that: "*The Court has jurisdiction to determine case of violation of human rights that occur in any Member State.*"; And of article 10 (d) of the same law where it is stated that: "Can consult the court: ... Anyone who is a victim of human rights violations.... "

And it is case-law of this Court, that its jurisdiction can not be called into question whenever the facts being claimed are related to Human Rights. Cf. the Judgments # ECW/CCJ/RUL/032/2010 of 14th March delivered on the case ECW/CCJ/APP/07/08 between Hissène Habré and the Republic of Senegal, # ECW/CCJ/JUD/05/10 of 8th November 2010, delivered in the case #ECW/CCJ/APP/05/09 case between Mamadou Tandja and the Republic of Niger; # ECW/CCJ/RUL/05/11 pronounced in the case ECW/CCJ/APP/03/09 between *Private Alimu AKeem* and the Federal Republic of Nigeria.

The Article 10 of the same Protocol states in turn that individuals may consult the Court in order to obtain compensation for Human Rights, provided that the request is not anonymous and that the same case is not pending before another competent international court.

First, it appears that the applicant, in his original pleading, does not specify or identify his human right violated by the Defendant State.

The applicant has the status of national and ECOWAS Community Parliament Member.

The applicant has alleges the ***violation of parliamentary immunity*** which he has, in the course of criminal proceedings brought against him and that is being carried under domestic or national court.

It remains to be ascertained whether the breach of *parliamentary immunity* configures a violation of a human right:

The Constitution of the Republic of Burkina Faso, in its Articles 95 and 96, grants to the national Parliament Members the parliamentary immunity, while the Regulation of the National Assembly of the same State, approved by the Resolution N° 001/2016/AN, in its article 86, establishes the procedure to waive the parliamentary immunity enjoyed by its Members.

In turn, the Protocol on the Parliament of the Community (A/P.2/8/94), and the Supplementary Protocol A/SP.3/6/06, that amends it, define the mode of election of the Parliament Member of the Community (Article 7) and confers parliamentary immunity on its members in all Member States (Article 9), while the Rules of Procedure of the ECOWAS Parliament, *lays down* The procedure for waiving parliamentary immunity (art. 8).

Also the Additional Act /A/SA.1/12/16 Relating to the Enhancement of the Powers of the ECOWAS Parliament *at its* Article 20, in line with the ECOWAS General Convention on Privileges and Immunities of 1978, reproduces in the same vein the content of Article 9 of the Protocol on Parliament (cited above), reiterating parliamentary immunity and stating that any request for waiving of a Member's immunity shall be addressed to the President of Parliament (Article 21).

Within the framework of parliamentary immunities, there is a difference between *irresponsibility or material immunity and inviolability* (also referred to as *substantial criminal immunities* and *procedural criminal immunities or immunity in the strict sense*).

The *parliamentary irresponsibility (or material immunity)* means that Parliament Members do not incur civil and disciplinary liability because of the votes and opinions they cast in the performance of their duties. It is absolute, perpetual and permanent, and Parliament Members are free from civil, criminal and administrative actions which, pursuant to the opinion votes expressed in the performance of their duties, may be directed against them.

The *inviolability (or procedural or immunity in the strict sense)* shall mean that Parliament Members shall not be subjected to detention, imprisonment, mere hearing (as deponent or defendant) or trial for any other acts, save as otherwise provided in the Constitution or the Law and with the formalities provided for therein.

That is, this *immunity* does not to exempt the Parliament Member from being detained, arrested, heard or tried, but it only prohibits it without the authorization of the Assembly, which will then be able to check whether there is any indication that justify maintaining these immunities.

Unlike the *parliamentary irresponsibility*, the *immunity in the strict sense* has a limited, provisional and temporary character and is valid only in criminal proceedings and extends only for the duration of the mandate.

The deliberation of the assembly on immunity, as a rule, takes the form of *resolution* (as proceeds in the Defendant State) - This *resolution* is a legal-constitutional act with a political nature, as it represents the exercise of a faculty directly conferred by the Constitution that defines its requirements and its object.

Thus, this is an act of relationship between two organs of sovereignty (National Assembly and the Court) that represents in practice a conditioning of the Judiciary by the Parliament, with scope beyond the mere procedural effects, as it configures as an instrument for the affirmation and independence of the legislative power, and is therefore on the same level as legislative acts coming from a sovereign body or a supreme State body, with an individual and concrete nature, similar in their content to administrative acts.

Parliamentary immunity, either the national (of the concerned State Member) or the Community (ECOWAS) immunity enjoyed by the applicant is not a personal privilege of the Member of Parliament, but prerogatives or guarantees granted to Parliament Members with a view of ensuring them the protection and independence necessary for the performance of their duties. Therefore, they are ultimately aimed at preserving the dignity, integrity and independence of Parliaments as a whole, vis-à-vis other State bodies or any other authorities.

Therefore, it appears that the *parliamentary immunity* itself does not constitute a human right.

However, violations of parliamentary immunities may lead to violations of human rights provided for in international instruments, such as the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, including the rights to freedom of expression, equality under the law and fair trial. (See Conclusions OF ADVOCATE GENERAL NILO JÄÄSKINEN delivered on 9th June 2011 (1) on the Proceedings **C-163/10 of the European Court of Justice**).

In this case, none of these or other human rights have been claimed by the applicant.

Whereas by virtue of the combined provisions of Articles 9 and 10 of the Supplementary Protocol A/SP.01/01/05 of 19/01/2005, this Court has jurisdiction only in cases of human rights violations, provided that the petitions meet the conditions laid down therein.

The applicant has come in this application to ask this Court of Justice of the Community to determine that his rights have been infringed – which he does not materialize – and declare the proceedings against him non compliant and order the be reinvested on him his rights.

In this case, the alleged breach of parliamentary immunity, as the applicant admitted, merely generates procedural nullity in the criminal proceedings brought against him and which is under national jurisdiction.

So much so, that the applicant sought from the Investigative Control Chamber, the declaration of procedural nullity claimed, having that entity issued Judgment No. 076 of 12/29/2017, in which it stated that it had no jurisdiction to address the claimed defect.

It means that what the applicant is seeking now is to obtain from this Court a ruling reviewing the invalidity claimed and prosecuted in the domestic court.

This Community Court of Justice has repeatedly reiterated that *"In accordance with its area of competence, it is not for it to assess the legality of decisions taken by the national courts of the Member States"* - See Judgment delivered on 23 April 2015 in ECW/CCJ/APP/19/14 in the case of *Tidjani Abdoukarim and others versus Republic of Niger*.

In addition, it has contended in several cases that it is outside its mandate to examine a decision taken by a court of a State Member in accordance with its constitutional provisions and that it is not a court of appeal, cassation or reformatio of decisions taken by the jurisdictions at national level. Cfr- Judgments ECW/CCJ/JUD/06/13 in case ECW/CCJ/APP/19/11, between *Kpatcha Gnassimbé versus Republic of Togo* (in CCJLR

2013 pag.151paragraph 36) and ECW/CCJ/JUD/03/07 delivered in case ECW/CCJ/APP/05/06 between Sieur Moussa Leo Keita versus State of Mali.

In this sense, it is not for the Court to address the invalidities generated in criminal proceedings - unless there is a claim of the infringement of a human right - especially when they have already been dealt with at national level, such as the present case - under penalty of breach of the principle of *res judicata*, as, as has been pointed out, this Court is not an appeal body against judgments pronounced in domestic courts.

That is why this Court also has ruled *“That in order to make his cause prosper the applicant must indicate the human rights being violated and prove the such violations. “-Cf. Judgment of 23 April 2015 in ECW/CCJ/APP/19/14 between Tidjani Abdoukarim and Others against the Republic of Niger.*

In the present case, the facts claimed by the applicant not only do not specify the human rights allegedly infringed by the State of Burkina Faso, but also from the analysis of the facts, this Court did not uncover the violation of any human rights.

Thus, since the infringement of any human rights has not been alleged nor demonstrated, this Court has no jurisdiction to hear the case.

6. DECISION

In the light of the foregoing, the Court finds that it has no jurisdiction to hear the case and, consequently, it dismisses the application initiating proceedings as inadmissible.

Expenses:

That the applicant shall bear the costs in accordance with the Article 66 (1) of the Rules of Procedure of the Court of Justice.

This judgment was declared and pronounced in a public court hearing held in Abuja by the Court of Justice of the Community on 26th of September 2019.

By the Judges:

Honorable Judge Gberi-Be **OUATTARA** -

President

Honorable Judge Dupe -**ATOKI** -

Member

Honorable Judge Januária Tavares Silva Moreira COSTA - Member/Rapporteur

Athannase **ATHANNON** - Deputy Chief Registrar