

COMMUNITY COURT OF JUSTICE,

ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE,

CEDEAO

TRIBUNAL DE JUSTIÇA DA COMUNIDADE,

CEDEAO



No. 10 DAR ES SALAAM CRESCENT,

OFF AMINU KANO CRESCENT,

WUSE II, ABUJA-NIGERIA.

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**IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY
OF WEST AFRICAN STATES (ECOWAS) HOLDEN IN ABUJA, NIGERIA ON**

THIS 18TH DAY OF APRIL, 2016.

SUIT N°: ECW/CCJ/APP/12/14.

JUDGMENT N°: ECW/CCJ/JUD/5/16.

BETWEEN:

Dr. Malachi Z. York



Plaintiff

AND

Republic of Liberia



Defendant

BEFORE THEIR LORDSHIPS:

- | | |
|------------------------------------------|-------------|
| 1- Hon. Justice Friday Chijioke Nwoke | – Presiding |
| 2- Hon. Justice Hamèye Founé Mahalmadane | – Member |
| 3- Hon. Justice Alioune Sall | – Member |

Assisted by Aboubakar Djibo Diakité, Esq – Registrar

Representation of the Parties;

1. Frederick A.B Jayweh- Counsel with Lela R. Holden- Agent to the Plaintiff
2. Christiana Tah, Counsel, Ministry of Justice, Republic of Liberia.

Delivers the following Judgment:

1. SUMMARY OF THE FACTS AND PROCEDURE

The Plaintiff alleges that the Defendant appointed him as her Consul General to the United States in 1999. He was accredited to the office near Atlanta in Georgia United States of America. According to him, on May 8th, 2002, he was arrested, on an indictment for sexually related offences purportedly committed prior to his appointment, and was tried and sentenced to 135 (one hundred and thirty- five) years by a Court in the United States.

He further complained that the Defendant, whom he represents as Consul General, neither intervened, protested nor offered him diplomatic protection by invoking diplomatic immunity on his behalf and securing his release after conviction. He therefore claimed that such omission or negligence by the Defendant amounted to the violation of his human rights as provided for by the African Charter on Human and Peoples' Rights and the Vienna Convention on Diplomatic Relations 1961.

He therefore claimed for a Declaration that his rights have been violated by the Defendant and also claimed damages.

2. THE PLAINTIFF'S CASE

By an application dated the 10th of July 2014 and lodged before this Court on the 18th of July, 2014 the plaintiff, a naturalized Citizen of the Republic of Liberia (the Defendant) alleged that his right as provided for by the African Charter on Human

and Peoples' Rights and the Vienna Convention on Diplomatic Relations has been violated by the Defendant. In his narration of facts, he alleged;

1- That the Defendant is a signatory to the Revised Treaty establishing the Economic Community of West African States (ECOWAS), 1993.

2- That he is a citizen, Consul General and Diplomat of the Defendant appointed on the 15th of December 1999, by President Charles Taylor, the then President of the Defendant and accredited near Atlanta Georgia, United States of America. *He further avers that consistent with his appointment and Diplomatic Status, he immediately took up his assignment near Atlanta Georgia, United States and conducted his duties and responsibilities until he was violently arrested by the United States authorities on the 8th of May, 2002.*

3- The Plaintiff further states that his diplomatic passport bearing No.003828 was renewed by the Government of the Defendant on 07th June, 2006 without reservation by the Government of President Ellen Johnson Sirleaf, the current Government of Liberia.

4- He further contained that to confirm and reconfirm his Community Citizenship and Diplomatic status as Consul General of Liberia, he filed a petition for Declaratory Judgment before the 6th Judicial Circuit, Civil Law Court Liberia and he obtained a judgment in his favour in June 2004; a judgment that further declared that he is a Citizen of the Defendant Liberia and her Consul General.

5- The Plaintiff also avers that in spite of the fact that both the United States and the Republic of Liberia are signatories to the Vienna Convention on Consular Relations, he was arrested on 8th May, 2002 by the Government of the United States, tried and imprisoned for 135 years without the Government of the Defendant doing anything

concrete to secure his release and repatriation back to Liberia as required by diplomatic intercourse.

6- He further stated that his arrest, trial and imprisonment for 135 years at USP Florence ADMX located in Colorado, United States, runs contrary to ECOWAS Convention on Diplomatic Privileges, immunities and Vienna Convention on Consular Relations as well as the United Nations Covenant on Civil and Political Rights and the Constitution of Liberia.

7- The Plaintiff avers further that all Governments of the Defendants including the Government of President Ellen Johnson Sirleaf are fully aware and placed on judicial notice that the Plaintiff is a Citizen of Liberia and Consul General of Liberia. In spite of this, administration after administration of the Republic of Liberia has only simply acknowledged the foregoing facts, but has totally and absolutely done nothing to secure his release and repatriation back to Liberia.

8- According to him, he avers that the States and Member Countries of the Economic Community of West African States (ECOWAS) have jurisdiction over their nationals and in particular Consul General and Diplomats accredited and assigned to foreign Countries to protect their rights and immunities from arbitrary arrest and imprisonment by their receiving States. Since the Government of Liberia has done nothing to protect his rights he brings this complaint.

9- The Plaintiff further avers that the privileges and immunities of a diplomatic agent exempt him from the jurisdiction of the receiving States. Thus, the Plaintiff prays the ECOWAS Community Court of Justice to take Judicial Notice of the foregoing provision of the Vienna Convention on Consular Relations cited supra, and forthwith proceed to order the Government of Liberia to secure his release and repatriation back to Liberia consistent with diplomatic requirements and intercourse.

The Plaintiff consequently sought the following orders from the Court;

A DECLARATION:

- a. That he is a citizen of Liberia and Consul General of Liberia, and as such, the Government of Liberia is morally and legally obliged to secure his release from the USP Florence ADMAX Federal Penitentiary in Colorado, United States, and accordingly ensure his repatriation back to Liberia, consistent with the Vienna Convention on Consular Relations of 1963 and 1964 to which Liberia and United States are parties.
- b. That being Consul General of Liberia, Liberia is obligated to secure the Applicant's release in line with the Vienna Convention on Consular Relations of 1961 and 1964.
- c. That his arrest, trial and conviction on 8th May, 2002 and subsequent imprisonment for 135 years at Florence ADMX, Colorado by the United States without Liberia securing his release and repatriation is inconsistent with the 1961, 1963 and 1964 Conventions on Consular Relations and thus, violates the Applicant's human rights.
- d. That the Defendant is legally obliged to respect and uphold the rights of all its Heads of Mission and Representatives, including Dr. Malachi Z. York, Applicant, Liberia's Consul General and Diplomat, consistent with the Vienna Convention on Consular Relations.
- e. That the Applicant is exempt from arrest and imprisonment by the United States and because Liberia is a party to the African Charter on Human and Peoples' Rights, Your Lordships need to declare that Liberia seeks and secure the release of the Applicant.
- f. That Liberia's failure and refusal to secure the release and repatriation of the Applicant back to Liberia, his sending State and Country of origin, violates his

human rights, and runs contrary to Vienna Convention on Consular Relations and the African Charter on Human and Peoples' Rights. Applicant prays that the Defendant be ordered to ensure his release and repatriation back to Liberia.

g. And that the sum of ₦10, 000, 000 (Ten million Nigerian Naira) or an equivalent of USD 60,000.00 (sixty thousand United States Dollars) as damages from the Defendant.

3. THE DEFENDANT'S CASE.

The Defendant in answer to the Plaintiff's claim, denied liability for all the claims and urged the Court to dismiss same. In further answer, the defendant stated as follows:

1- That the claims of the Plaintiff have no legal basis as it tended to mislead the Court into believing that the Plaintiff is entitled to rights and privileges accruing to Diplomatic Agents and Consular Officers. Furthermore that with appointment of the Plaintiff as Consul General to Atlanta Georgia, he did not attain the status of a Diplomatic Agent under the Vienna Convention on Consular Relations 1963 as there was no evidence that he was carrying out his duties as such consul as at then or until he was arrested by the United States authorities. Moreover, there is no evidence that he was issued an exequatur.

2- That the Plaintiff surreptitiously and fraudulently obtained Liberia Diplomatic Passport NO. 003828 out of his prison cell as there was no evidence of issue of such passport by the Ministry of Foreign Affairs of the Defendant. She further posited that the passport was not renewed by the Government of Liberia under Ellen Johnson Sirleaf as claimed by the Plaintiff.

3- That with regard to the claim by the Plaintiff that the 6th Judicial Court, civil Law Court, Montserrado County, which declared that the Plaintiff as Consul General was

entitled to immunity and therefore should be repatriated by the Defendant, that the said judgment lacks foundation judging from the provisions of the Vienna Convention on Consular Relations and other International instruments upon which the Court relied.

4- That as to the Plaintiff's allegation that the Defendant is a signatory to the Vienna Convention on Consular relations, the Defendant concedes to that fact, but argues that consistent with Articles 41(2) (2) and (3), 42 and 43 of the said Convention, Consular Officers are not immune from criminal proceedings except with respect to acts performed in the exercise of their Consular functions. That as a matter of law, only diplomatic agents enjoy immunity from criminal jurisdiction of the receiving State under Article 31(1) of the Vienna Convention on Diplomatic Relations 1961. That the relevant law is Article 41(1), (2), and (3) of the Vienna Convention on Consular Relations which provides as follows:

- a. Consular Officers shall not be liable to arrest or detention pending trial except in case of a grave crime, and pursuant to a decision by the competent judicial authority.
- b. Except in case specified in paragraph 1 of this Article, Consular Officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.
- c. If criminal proceedings are instituted against a Consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and except in the case prescribed in paragraph 1 of this Article, in manner which will not hamper the exercise of Consular functions as little as possible.

d. When in the circumstances mentioned in paragraph 1 of this Article, it has become necessary to detain a Consular officer, the proceedings against him shall be instituted with minimum delay.

e. Similarly, Article 42; in the event of the arrest or detention of Consular Staff, or if criminal proceedings is being instituted against him, the receiving State shall promptly notify the Head of the Consular post, should the latter be himself the object of any such measure, the receiving State shall notify the sending State through diplomatic channels.

f. The Defendant therefore argued that Consular officers are not immune from criminal prosecution for acts or conducts perpetrated by them not in the exercise of their Consular functions. In the instant case, the Plaintiff was prosecuted and convicted on account of sexually related offences which have absolutely no bearing or relation to the exercise of his consular relations.

The Defendant further contended that;

g. They have no legal obligation to secure the release of the Plaintiff since he was convicted for a crime unrelated to the exercise of his functions as a Consular Officer. The fact that the past Government of the Defendant exhibited benevolence in seeking the release of the Plaintiff as evidenced by the Plaintiffs' own admission shown by the note verbal attached to his application, places no duty on the Government as a matter of law to secure the Plaintiffs' release.

h. On the issue of the Plaintiff's entitlement to diplomatic Protection, the Defendant states that while it has duty to protect its diplomatic agents, it is obliged to do so if the conduct or the action for which the officer or agent is held to answer was done in the exercise of his or her official function. In the instant case, the Plaintiff has not shown that he was arbitrarily arrested, nor did he plead that he was deprived his right

to due process. The plaintiff rather recognized that he was arrested, tried and convicted. The Defendant contends that the Plaintiff not being a diplomatic agent of the Defendant at the time of his arrest and not being arrested on account of actions or conduct carried out in the exercise of his official duty, is not entitled to immunity from criminal jurisdiction of the United States of America.

i. The Defendant also contends that the ECOWAS Convention on Privileges and Immunities is only applicable to ECOWAS Member States. The issue of the Plaintiff's incarceration in the United States, the subject matter of this proceedings is a matter between the Government of the Defendant and Government of the United States which is not a member of ECOWAS.

j. That the Plaintiff's Counsel in the statement of facts only intended to mislead the Court. According to the Defendant,

“Plaintiff's pleas in law, specifically on page 6 of the Plaintiff's

application recites/ quotes Article 31(1) of the Vienna

Convention on Diplomatic Relations but cites same as Vienna

Convention on Consular Relations being fully aware that the

provision of the law grants immunity to diplomatic agents and

not Consular Officers”.

K. Furthermore, the Defendant also contended that Articles 2, 3, 4,5,6,7 of the African Charter on Human and Peoples' Right relied on by the Plaintiff are not supportive of the Plaintiff's theory and the facts and circumstances of this case.

In Conclusion, the Defendant contended that based on the facts and circumstances of the case, the Plaintiff was not arbitrarily arrested, deprived his right to personal liberty, neither was he deprived of his freedom except for reasons and conditions

previously laid down by law. The Plaintiff was tried according to law and afforded due process.

Hence the provisions of the African Charter on Human and Peoples' Rights relied upon by the Plaintiff are not supportive of his case;

AND urged the Court to;

- i. Deny and dismiss the application as same is legally wanting.
- ii. Declare that Article 31 of the Vienna Convention on Diplomatic Relations is not applicable to Consular officers.
- iii. Declare that the Defendant is not legally obligated to secure the release of the Applicant/Plaintiff.

4. ANALYSIS OF THE ISSUES FOR DETERMINATION AND LEGAL ARGUMENTS OF THE PARTIES.

As earlier stated, the Plaintiff's case is that he was appointed the Consul General of the Republic of Liberia (The Defendant) on the 15th of December, 1999. He was accredited at Atlanta Georgia in the United States of America. He was issued with Diplomatic Passport No. D/P003828-04 08 (see attachment A and B of the Plaintiff's claim).

On the 08th of May, 2002, the Plaintiff was arrested, indicted, tried, convicted and sentenced to 135 years imprisonment. He argued that his arrest, trial and imprisonment, while he was the Consul General of the Defendant is a violation of his human rights.

In the same vein, the hands off approach adopted by the defendant especially their failure to diplomatically secure his release violates his human rights under the Vienna Convention on Consular relations and the Defendant's constitution.

He therefore argued that the Defendant is both morally and legally obligated to seek his release and repatriation back to Liberia.

By an application dated the 10th of July, 2014 and filed on the 18th of July, 2014, the Plaintiff sought the following reliefs from the Court, namely,

A DECLARATION:

1- That the Plaintiff as a citizen of the Defendant, and its Consul General, the Defendant is morally and legally obligated to secure his release from the United States and repatriate him back to Liberia in consonance with the Vienna Convention on Consular Relations.

2- That States have jurisdiction over their nationals, even when they are outside their borders. Accordingly, being the Consul- General of the Defendant, the Defendant is obliged to secure the release of the Applicant in line with the Vienna Convention on Consular Relations of 1961 and 1964.

3- That the arrest, trial and conviction of the Applicant and subsequent imprisonment for 135 years on the 08th of May 2002 by the Court of the United States, without Liberia securing his release and repatriation is inconsistent with the 1961, 1963 and 1964 Conventions on Consular Relations and thus violates the Applicants' human rights.

4- That the Defendant is legally obligated to respect and uphold the rights of all its Heads of Mission and representatives, including the Applicant (Consul General and Diplomat) consistent with the Vienna Convention on Consular Relations.

5- That consistent with Article 6(a) to (g) of the ECOWAS Convention on Privileges and Immunities, the Applicant as Consul- General and Diplomat of the Defendant, is exempt from arrest and imprisonment by the United States, and because the Defendant is a party to the African Charter on Human and Peoples' Rights, thus the

Court should declare that the Defendant should seek and secure the release of the Applicant.

6- That the failure and refusal of the Defendant to secure the release and repatriation of the Applicant back to the territory of the Defendant, his sending State and State of origin, violates his human rights and runs contrary to the Vienna Convention on Consular Relations and the African Charter on Human and Peoples' Rights. AND

7- That the Defendant should pay the sum of N10, 000,000 (Ten Million Nigerian Naira) or equivalent of USD 60, 000 (Sixty thousand United States Dollars) as costs damages against the Defendant.

At the expiration of the time required for the Defendant to file a reply, and following the failure of the Defendant to enter appearance and file a reply, the Applicant brought two applications namely;

a. Application for Expedited Hearing in which he sought for an order of this Court granting the Plaintiff expedited hearing of the suit pursuant to Article 59(1) and (2) of the Rules of this Court.

b. An Application asking the Court to enter judgment in default against the Defendant for failure to enter appearance or file a defence to the suit in accordance with Article 90 of the Rules of this Court. However, before the hearing of the two applications, the Defendant filed an application pursuant to Article 35(2) of the Rules of this Court seeking for the order of the Court granting an extension of time within which the Defendant should enter appearance, file and serve a Defence on the Plaintiff and to deem same as properly filed and served.

c. On the 12th of February 2015, the Defendant moved its motion for extension of time. The Plaintiff who had originally filed a motion to strike out the application for

extension of time decided to withdraw same. The motion for extension of time was granted by the Court and thus issues were joined between the parties.

d. Following this development, the Plaintiff withdrew his applications for expedited hearing and default judgment and both were struck out on the 12th February, 2015. In her statement of Defence, the Defendant denied all the claims of the Plaintiff. Specifically the Defendant argued that;

- i. The entire application should be dismissed for lacking any legal basis and intended to mislead the Court into believing that the Immunities and Privileges accruing to Diplomatic Agents and Consular Officers are the same.
- ii. That the Plaintiff is not a Diplomatic Agent of the Defendant and that the purported Liberian Diplomatic Passport N° 003828 exhibited by the Plaintiff was fraudulently obtained out of his prison cell, since there was no record at the Ministry of Foreign Affairs of the Defendant relating to the said Passport.
- iii. That although in the Plaintiff's narration of facts he claimed that the 6th Judicial Circuit Court, Civil Law Court, Montserrado County of the Defendant declared the Plaintiff as a Consular General and thus enjoys Diplomatic Immunity and should be repatriated by the Defendant, the said judgment lacks foundation having regard to the provisions of the Vienna Convention on Consular Relations and other International instruments relied upon by the Court.
- iv. Consular Officers are not immune from Criminal proceedings except with respect to acts performed in the exercise of their functions, but that the Plaintiff was arrested, tried and convicted of grave crimes of sexual assault unrelated to his functions as a Consular officer.

- v. That the Defendant has no legal obligation to secure the release of the Plaintiff having been convicted of a crime unrelated to the exercise of his functions as a Consular officer. The mere fact that the past Government of the Defendant exhibited benevolence in seeking the release of the Plaintiff as evidenced by the admission of the Plaintiff himself shown by the Note verbal attached to his application (Exhibit P/6) places no obligation on the current Government of the Defendant as a matter of law to secure the release of the Plaintiff.
- vi. That while the Defendant has a duty to protect its Consular and Diplomatic Agents, this obligation only extends to cases where the agent is held to answer for acts done in the exercise of his or her official function. This does not apply to the Plaintiff.
- vii. That the ECOWAS Convention on Privileges and Immunities which the Plaintiff relies on is only applicable in Member States of ECOWAS. The issue of the Plaintiff's incarceration, the subject matter of the current proceedings is an issue between the Defendant and the Government of the United States which is not a member of ECOWAS.
- viii. That none of the action or inaction of the Defendant has violated the Plaintiff's right. That Articles 2, 3,4,5,6 and 7 of the African Charter on Human and Peoples' Rights relied upon by the Plaintiff does not support his case. The Defendant therefore urged the Court to dismiss the case of the Plaintiff.

5. ANALYSIS OF THE CASE OF THE PARTIES.

At the end of pleadings, the Court asked the parties to address it on the import of Article 88 of the Rules of this Court on the propriety of this case. The Parties complied with the request. However, the Court opines that the case can be decided fairly and fully without recourse to the submission of the parties.

6. ISSUES FOR DETERMINATION.

From the pleadings and arguments in law, four major issues can be discerned as the basis of the action and if appropriately addressed, the Court will holistically determine the merits or otherwise of the case. However, it is necessary to mention that the existence or otherwise of a cause of action for which the Court can resolve the dispute between the parties is the claim of the Plaintiff. From the pleadings of the Plaintiff, it is apparent that the claim is grounded on the status of the Plaintiff first as an ordinary Citizen of the Defendant and thus of the Economic Community of West African States (ECOWAS) of which the Defendant is a member and then on his purported position as “**Consul**” of Liberia in the United States when the circumstances culminating in this action arose.

Accordingly, the following issues call for determination;

- 1- Whether the Plaintiff as a citizen of the Defendant and mutatis mutandi of ECOWAS is entitled to diplomatic protection from the Defendant.
- 2- Whether the Plaintiff by virtue of his purported appointment as the Consul-General of the Republic of Liberia to the United States of America is immune from arrest, indictment, prosecution, conviction and sentence to terms of imprisonment by the host or receiving State, and whether failure to secure the release of the Plaintiff by the defendant violated any of the rights of the Plaintiff under the African Charter on Human and peoples’ Rights particularly Articles, 3,4,5,6, and 7.
- 3- Whether from the totality of the facts presented by the Plaintiff, there is an indication of a characteristic violation of the human rights of the Plaintiff as to give the Court competence to entertain the suit and if the answer is in the

positive, whether in the circumstances of the case, this Court can grant the reliefs sought by the Applicant.

With regard to issue No.1, the Plaintiff claims that every citizen is entitled to protection by his State of origin whenever in a Foreign State. To buttress his argument, the Plaintiff cites two major international human rights instruments against the Defendant, namely;

- a. The United Nations International Covenant on Civil and political Rights and
- b. The African Charter on Human and Peoples' Rights.

In contemporary International law, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national or legal person that is the national of the former State with a view to the implementation of such responsibility (see Article 1 of the International law Commission, Draft Article on Diplomatic Protection 2006).

Although a State is under a duty to protect its nationals and it may take up their claims against other States, there is under International law, however no obligation for States to provide diplomatic protection for their nationals abroad (see the case of **HMHK vs. Netherlands 94 ILR,P.342, Kaunda vs. President of South Africa 2004,2 ALC, 5**). The right of Diplomatic protection is not a right of the individual but that of the State. Thus in **Mavrommantis Palestine Concession case (P.C.I.J. series A No 2 1924) P.12**.

The Permanent Court of International Justice succinctly stated that;

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights, its rights to ensure, in the person of its subject respect for the rules of International law.

Thus, an individual cannot force his State of nationality to take up a claim for injury done to him against another State. In fact in *Kaunda vs. President of South Africa* (Supra), the Court rightly stated that diplomatic protection is not recognized in international law as human right, but a prerogative of State to be exercised at its discretion.

The plaintiff as earlier noted referred to the provision of the International Covenant on Civil and Political rights and the African Charter on Human and Peoples' Rights to buttress the fact that his right has been violated but none of these texts make provisions for such right. The right to diplomatic protection is not a human right as the concept is understood, and it is not enshrined in any international text on Human rights.

The Court finds that when the Plaintiff cites a text, he refers to provisions which deal with legally recognized rights like, freedom from arbitrary arrest, freedom of association, the right to a fair hearing and fair trial, the right to the security or physical integrity of the person etc. and not provisions which deal with a right which an individual may claim in order to demand from his State, as of right, to intervene in his favour. Accordingly, the Plaintiff's argument on this plank must fail and the Court so holds.

On issue N0.2, it is obvious from the evidence submitted, that the Plaintiff's case also hinges on the alleged fact that:

**“He was a Diplomatic Agent at all times material to this suit
and therefore inviolable”**

Accordingly, the Plaintiff argues that the Defendant is legally bound to assert his diplomatic Status so that he would not have been tried, convicted and sentenced to imprisonment by the Receiving State; in this case, the United States of America. In claiming immunity, the Plaintiff copiously quoted the provision of the Vienna Convention on Diplomatic Relations 1961. The relevant provision is Article 31(1) which provides;

**A Diplomatic Agent shall enjoy immunity from the criminal
jurisdiction of the receiving State.**

However, Article 1 of the same convention is apposite to the determination of the status of the Plaintiff. This is because it provides for the category of persons who qualify as diplomatic agents as envisaged by Article 13(1) (supra). It provides the definitions of officers who are diplomatic officers. Thus:

- a. The “head of mission” is the person charged by the sending state with the duty of acting in that capacity.
- b. The “member of the mission” are the head of the mission and members of the Staff of the mission.
- c. The “members of Staff or Staff of the mission” are members of the diplomatic Staff of the administrative and technical Staff of the service Staff of the mission.
- d. The members of the “diplomatic Staff” are members of the Staff of the mission having diplomatic rank.
- e. A “diplomatic agent” is the head of the mission or a member of diplomatic Staff of the mission.

- f. The members of the “administrative and technical Staff” are the members of Staff of the mission employed in the administrative and technical service of the mission
- g. The “members of the service Staff” are members of the Staff in the domestic service of the mission.

In the same vein, Article 3 on its part stipulates the functions of a diplomatic mission thus;

- 1. The functions of a diplomatic mission consist inter alia in:
 - a. Representing the sending State in the receiving State.
 - b. Protecting in the receiving State the interest of the sending State and of its nationals, within the limits permitted by international law.
 - c. Negotiating with the Government of the receiving State.
 - d. Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State.
 - e. Promoting friendly relations between the sending State and the receiving State and developing their economic, cultural and scientific relations.

However, nothing in the Convention shall be presumed as precluding or preventing the performance of Consular functions by a diplomatic mission.

It is obvious from the above provisions that diplomatic Agents are Ambassadors or High Commissioners, and other diplomatic officers and Staff who are appointed by the sending State and deal directly with the receiving or host State.

In this case, the Applicant claims that he was appointed Consular General by the Defendant and by virtue of his position his arrest, indictment, trial and conviction by the host State without the Defendant intervening on his behalf is contrary to

international law. He interchangeably invokes the Vienna Convention on Diplomatic Relations and the Convention on Consular Relations and the Optional Protocols 1963. It is obvious from Article 31(1) of the Vienna Convention on Diplomatic Relations 1961(Supra) that a Consular General is not one of the recognized persons to be accorded privileges and immunity because he is not a diplomatic Agent. The Defendant has rightly argued that the Plaintiff has surreptitiously presented the matter as if he is a diplomatic Agent. The Defendant has equally contested the status of the Plaintiff as even a Consul by maintaining that the Plaintiff is not a member of the Consular and diplomatic Corps of the Defendant. Above all, that his diplomatic passport may have been fraudulently obtained.

For the avoidance of doubt, the issue to be clarified is whether the provision of the Vienna Convention on diplomatic Relations are applicable to Consular Officers as to afford them the same immunity as afforded diplomatic agents. In order to clarify the issue, one needs to look at the provisions of the Vienna Convention on Consular Relations which deals specifically with Consular Officers. The Vienna Convention grants limited privileges and immunities to Consular Staff or personnel in the receiving State. They can be arrested and prosecuted for criminal offences and other offences, except ones committed in the course of the performance of their duties.

Article 41 provides that consular officers may not be arrested or detained except in case of grave crimes and following a decision by the competent judicial authority of the receiving State. If criminal proceedings are instituted against a Consul, he must appear before the competent authorities.

Under Article 43 of the Convention on Consular Relations, the immunity of Consuls including the Consul General is restricted in both criminal and civil cases to acts done in the official exercise of their Consular functions. In **Koeppel and Koeppel Vs. The**

Federal Republic of Nigeria, it was held that the provision of refuge by the Nigeria Consul- General to a Nigerian national was an act performed in the exercise of a Consular function within the meaning of Article 43 and thus attracted consular immunity.

There is no evidence that the offences for which the Plaintiff was convicted were acts done in the performance of his consular duties rather they are “**grave crimes**” committed by him for which he was afforded due process. The law also is that Consuls must possess a commission from sending State and the authorization (EXEQUATUR) from a receiving State.

As rightly posited there is no evidence that the Plaintiff was issued with exequatur by the receiving State and this further shows that his status as Consul General of the Defendant at the time of incarceration is questionable.

In the light of the foregoing, it is obvious that the Plaintiff being a Consul- General of the Defendant is not covered by the inviolability provisions afforded to Diplomatic Agents under international law.

Above all, it is the sending State which grants the status of “**Consul**” to individuals in accordance with Article 10, of the Convention on Consular Relations which provides that;

**“Heads of consular posts are appointed by the sending
State and admitted to exercise their functions by the
receiving State”.**

If the Defendant contests the status of the Plaintiff as a Consul, he cannot lay claim to it.

Furthermore, assuming the status of the Plaintiff as Consul was established (which in our opinion is not the case) an arrest and detention is possible by virtue of the provisions of Article 43 of the Convention on consular Relations which permits

immunity only in connection with one's consular functions, as Consul, which is not the case with regard to the charges against the Plaintiff in the instant case, but the charges were for sexual offences and racketeering and we consider these offences grave crimes covered by Article 41 of the Convention on Consular Relations.

With regard to issue N0 3, whether there has been a violation of the human rights of the Plaintiff as provided for by international human rights instruments to which the Defendant is a party.

As earlier noted the Plaintiff's claim is based on the alleged failure of the Defendant to honour its obligation towards him under the Vienna Convention on Consular Relations by her failure to stop the arrest, prosecution, conviction and incarceration of the Plaintiff as well as failure to secure his release thereafter. His Contention is that being a Consul General of the Defendant, he is immune from criminal prosecution by the host State by virtue of his diplomatic status. In the same vein, he alleged that the Defendant's failure to intervene and stop his prosecution and conviction and secure his release from prison is a violation of his rights under Articles 2 to 7 of the African Charter on Human and Peoples' rights. His Contention is predicated on the alleged inaction of the Defendant to call to play in his favour the relevant provisions of the 1963 Vienna Convention on Consular Relations to secure his release.

The question to be asked in practical terms is whether there is a legal obligation on the Defendant to intervene on behalf of the Plaintiff to secure his release.

We have already stated above that the 1963 Convention on Consular Relations which guides the operation of Consular officials, grants very limited privileges and immunities in that it limits their inviolability to acts done in performance of their Consular duties. Accordingly, since the protection accorded Consular officers is not absolute but limited to acts in performance of their official functions, Is the Defendant

in a position to claim on behalf of the Plaintiff immunity from Prosecution in the circumstances of this case? In other words, is the Defendant under an obligation to take diplomatic or other measures to secure the release of the Plaintiff from prison and repatriate him to the Defendant State? The answer is simply in the negative. First because the offence for which the Plaintiff was charged, prosecuted and convicted has nothing to do with his employment as Consular General of the Defendant. In committing those acts he was on a frolic of his own.

We had already noted that the basis underlying the grant of diplomatic immunity under customary law and treaties is to ensure the doctrine of sovereign equality of States and allow representatives of foreign States to carry out their functions in the receiving State without hindrance, usually referred to as the doctrine of functional necessity. It is not meant to benefit individuals directly, but rather a right appurtenant to their State.

Accordingly, the Court declares that the Defendant has no legal duty to secure the release of the Plaintiff from Prison in the United States of America.

This naturally leads us to the determination of issue No.3 i.e.

Whether taking into consideration the facts and circumstances of the case any known human rights of the Plaintiff has been violated?

Article 9(4) of the Supplementary Protocol of this court, 2005 creates the human rights jurisdiction of this Court and allows it to determine cases of human rights violation that occur in any member State. For a claim for violation of human rights to be sustained, the suit in question must be predicated on a claim for human rights recognized by international human rights instrument to which the Member State is a party. Such right must have been violated by an act of the Defendant Member State

within its territory and other conditions for seising the Court with competence must have been satisfied.

Applying the above elementary criteria to privileges and immunities granted to consular officers (which the Plaintiff claimed to be one) do they have the character of human rights? The answer is in the negative. They are not recognized by any known human rights instruments both locally and internationally.

Accordingly, their claims as one of the rights envisaged by Articles 2,3,4,5, 6 and 7 of the African charter on Human and Peoples' Rights in particular on any other international human rights instrument in general, cannot be sustained.

In the circumstances, the Plaintiff's case has not disclosed any characteristic violation of his human rights to ground the Court jurisdiction to entertain the same.

In **Alhaji Hammani Tidjani vs. Federal Republic of Nigeria & 4ors (2004-2009) CCJLR**, the Plaintiff alleged a breach of his right to freedom from arbitrary arrest and detention provided for under Article 6 of the African Charter on Human and Peoples' Rights. This Court copiously laid down general conditions for the exercise of its human rights mandate thus;

The combined effect of Article 9(4) of the Protocol of the Court as amended, Article 4(g) of the Revised Treaty and Article 6 of the African Charter on Human and Peoples' Rights is that the Plaintiff must invoke the Court's jurisdiction by;

1. Establishing that there is a right recognized by Article 6 of the African Charter on Human and Peoples' Rights.
2. That this right has been violated by the Defendant.

3. That there is no action pending before another international Court in respect of the alleged breach of his right and
4. That there was no previously laid down law that led to the alleged breach or abuse of his rights and freedom from arbitrary arrest.

Similarly, in **Moussa Leo Keita vs. The Republic of Mali (2004)**, this Court also refused to assume jurisdiction where the Applicant did not identify the exact violation alleged or specified the particular right allegedly violated.

Applying the principles established in the above cases, this Court is of the view that the Plaintiff in the instant case, has not identified the specific right violated by the Defendant in relation to him.

He has purported to state that his rights under Articles 2, 3,4,5,6 and 7 of the African Charter on Peoples' and Human Rights have been violated by the Defendant, but the right to Diplomatic or Consular protection is not one of the human rights recognized by those Articles.

In this regard, the entire action of the Plaintiff is incompetent, must fail and is hereby dismissed.

FOR THESE REASONS

Adjudicating in a public session, after hearing both parties, in the first and last resort,

THE COURT

IN TERMS OF MERITS

In regard to this Application holds that the Defendant has committed no human rights violation against the Plaintiff and that the Plaintiff's claim is hereby dismissed.

AS TO COSTS

ASK EACH PARTY TO BEAR ITS COSTS.

And the Following hereby append their signatures.

1- Hon. Justice Friday Chijioke Nwoke – Presiding

2- Hon. Justice Hamèye Foune Mahalmdane – Member

3- Hon. Justice Alioune Sall – Member

Assisted by Aboubakar Djibo Diakité Esq - Registrar