

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



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

HOLDEN IN ABUJA NIGERIA

ON THE 27TH OF FEBRUARY, 2019

SUIT NO: ECW/CCJ/APP/06/18

JUDGMENT NO. ECW/CCJ/JUD/09/19

BETWEEN:

JUSTICE JOSEPH WOWO

PLAINTIFF

AND

THE REPUBLIC OF THE GAMBIA

DEFENDANT

COMPOSITION OF THE COURT:

HON. JUSTICE EDWARD AMOAKO ASANTE - PRESIDING

HON. JUSTICE GBERI-BE QUATTARA - MEMBER

HON. JUSTICE KEIKURA BANGURA - MEMBER

ASSISTED BY:

MR. TONY ANENE-MAIDOH - CHIEF REGISTRAR

JUDGMENT

PARTIES

The Plaintiff is a Nigerian and a former Chief Justice of the Republic of The Gambia.

Although the Plaintiff initially designated two Defendants in this suit; namely the Republic of The Gambia and its Ministry of Justice, the Court, in line with its jurisprudence struck out the name of the latter as it is bereft of a legal personality distinct from that of the State, being just a constituent part and the legal arm of the Defendant. See the case of HOPE DEMOCRATIC PARTY & ANOR. V. THE FEDERAL REPUBLIC OF NIGERIA AND 5 ORS. Suit No. ECW/CCJ/APP/04/15 where the Court held that ***“2nd through 6th Defendants not being competent parties/Defendants before the ECOWAS Community Court of Justice, the case against these defendants is ruled inadmissible (...) and they are dropped as improper parties before the Court, and the case accordingly dismissed severally and jointly”***.

In effect the only defendant in the instant suit is the Republic of the Gambia a Member State of the ECOWAS, and a signatory to the Revised Treaty establishing the ECOWAS.

THE PLAINTIFF’S SUMMARY OF FACTS

The application is premised on an alleged violation by the Defendant of the Plaintiffs legitimate rights as enshrined in Articles 1, 2, 3, 4 & 19 of the African Charter, Articles 6 & 7 of the Universal Declaration of Human Rights and section 24 of the 1997 Constitution of The Gambia.

The Plaintiff avers that he served as Chief Justice of the Republic of The Gambia in 2013, under the administration of President Yahaya Jammeh.

Plaintiff claims that owing to his nationality, he suffered discrimination by most of the members of The Gambian Bar to the extent that the then Bar President, Ms Ubna Farage and the Minister of Justice, Ms. Amie Joof, sometime in the year 2013, made frivolous allegations of corruption against him which led to the Plaintiff's removal from office without prior investigation. The Plaintiff states that he contested his removal through the security authority who initiated an investigation into the matter. At the completion of the investigation, the Plaintiff anticipated the announcement of the outcome by the office of the then President Yahaya Jammeh which until date has not been announced. The Plaintiff contends that the refusal to announce the outcome of the investigation is hinged on the realization of the falsity of the allegations made against him.

According to the Plaintiff, in view of this development, he called for a press conference to publicly state that the allegations of corruption made against him were false and that the President erred in removing him from office without compliance with the proper procedure. The then President, according to the Plaintiff perceived his action as an affront to his authority so publicly declared that he must be put in jail.

The Plaintiff avers that the then Minister of Justice, under the instructions of the then President, filed a frivolous case against him on allegations of abuse of office and false information under sections 90, 112, 102 and 106 (i) (d) of the Criminal Code, vol iii Revised Laws of The Gambia.

The Plaintiff states that while he was in office, he was reliably informed by some staff of the Judiciary of compilation of documents that was done in the Judiciary without recourse to the proper procedure. Plaintiff went on to say that upon

hearing this, and in his capacity as the acting Chief Justice, he wrote a letter to the National Intelligence Agency (NIA) to investigate the issue.

It is the case of the Plaintiff that upon investigations, a report dated the 18th of December, 2012, was produced which clearly commended the Plaintiff and indicted two others. The plaintiff claims that to his utter surprise, he who has been commended was charged and convicted for false information whereas the two persons indicted by the report were not charged with any offence.

He further states that prior to his trial, he was presiding over a case of corruption as the Chief Justice, involving one Justice Emmanuel Nkea. He says upon his removal from office, his successor assigned his own trial to the said judge who was standing trial before him. Another perplexing concern of the Plaintiff is that the prosecution of his case was remitted to one Legunju Vitalis, a state Counsel who is a nephew to the trial Judge and at that time, was living in the same house with the trial judge.

Plaintiff claims that during the trial, his Counsel filed a motion urging the trial Judge to recuse himself from proceeding with the matter based on the above grounds but the trial judge failed to do so. He further avers that, sometime in 2014, the matter was adjourned for adoption of brief but when the case was called, the trial Judge deliberately ignored all the documents and testimonies of witnesses, convicted and sentenced the Plaintiff to two (2) years imprisonment.

The Plaintiff maintains that the whole trial was a charade and a well-acted drama to achieve a pre-conceived intent of putting him in jail at all cost and without hearing. The Plaintiff asserts that he was sent to Mile 2 prison without access to the outside world, including his lawyers.

The plaintiff states further that upon enquiry, it was discovered that the trial Judge in his case, Justice Emmanuel Nkea did not attend the Sierra-Leone law school as he claimed, neither did he attend any other law school.

The Plaintiff further asserts that he was granted a presidential pardon in August, 2015 as a result of pressure from the governments of Nigeria and United States of America.

The Plaintiff maintains that his fundamental human rights were violated by the Court of Appeal and the Supreme Court where in the latter Court, the prosecution clearly stated that there was no case against the Plaintiff and therefore they were not filing any brief. To this end, and without relying on any law, the Court dismissed the case against the Plaintiff.

In Conclusion, the Plaintiff restates that he has been seriously injured by the conduct of the Defendant by denying him the benefits of a fair, independent and impartial trial, and therefore urged the Court to restore his rights.

On the 20th of March 2018, the Plaintiff applied for a judgment to be entered in default in view of the Defendant's failure to lodge a defence within time. Before the Court could pronounce on the Plaintiff's application for default judgment, the Defendant on the 24th of May 2018, filed an application for extension of time within which to file its defence, stating reasons why it was unable to file the defence within the prescribed time. The Defendant filed its defence to the Plaintiffs application together with its own application for extension of time.

The originating Application of the Plaintiff was initially endorsed with three reliefs which said reliefs were amended upon application to the Court dated 14th June, 2018. The Plaintiff added an additional relief upon the grant of the amendment.

ORDERS BEING SOUGHT BY THE PLAINTIFF

On the basis of the foregoing, the Plaintiff is seeking the following amended reliefs from the Court:

- 1. A DECLARATION that the trial of the Plaintiff by the trial judge who was undergoing some corruption allegation proceedings before him is a violation of his human rights.**
- 2. A DECLARATION that the Defendant pay the Plaintiff the sum of Twenty Million US Dollars (\$20,000.000) plus six percent (6%) interest per annum for violation of his human rights.**
- 3. A DECLARATION that Defendant pays successful Attorney's fees.**
- 4. A DECLARATION that the Plaintiff's trial is a violation of his human rights.**

DEFENDANT'S SUMMARY OF FACTS

In its defence filed on 24th May, 2018, the Defendant denied each and every material allegation of fact contained in the Plaintiff's application and contends that the Plaintiff had a good working relationship with the Gambian Bar Association during his tenure of office which commenced sometime in 2000, till his arrest and trial for abuse of office and other offences in the year 2013.

On the alleged petition, the Defendant maintained that the said petition by the Gambian Bar Association was addressed to the Judicial Service Commission alleging serious malpractices by the Plaintiff based on certain revelations contained in an audio recording published by the press. The Defendant stated further that the Plaintiff was removed from office by the President in consultation with the Judicial

Service Commission after investigations and due deliberations pursuant to the petition.

The Defendant vehemently opposed the Plaintiff's assertion that the President receives and announces outcomes of police investigations and further stated that, on the contrary criminal investigation reports are forwarded to the office of the Director, Public Prosecution at the Attorney General's Chamber for legal advice and further actions as may be necessary. The Defendant therefore maintained that the Plaintiff was properly charged based on the outcome of the investigation report submitted to the Attorney Generals Chambers by the police, the legal opinions and surrounding facts.

According to the Defendant, the said investigations, only offered a limited reprieve for the Plaintiff's actions in referring the matter to the Gambian National Intelligence Agency, and did not commend or clear the Plaintiff of any wrong doing. The Defendant again stated that the investigation reports are not conclusive in the sense that final decision to bring charges or not rests with the Director of Public Prosecution.

The Defendant denied that the trial judge in his case had any corruption case before or during the trial of the Plaintiff and that primarily informed the refusal of his application requesting the trial judge to recuse himself from the trial since the facts deposed to in the affidavit disclosed no grounds to warrant granting the application. The Defendant further submitted that it did not file an affidavit in opposition to the appeal at the Supreme Court because the allegations were targeted at the trial Judge.

The Defendant maintained that the prosecution was led by a special litigation counsel and assisted by a state counsel Legenju Vitalis, who to all intents and purposes was a state counsel at the Attorney General's Chamber. The Defendant claims that the Plaintiff was accorded a free and fair treatment during the trial and the whole proceedings were witnessed by the press officials of both the American and Nigerian Embassies without protest. In the estimation of the Defendant, the Plaintiff was accorded all his rights as a litigant and that even his appeals were given speedy and fair attention devoid of any deprivation of access to his Counsel while in prison.

On the Plaintiff's allegation about the trial judge not possessing the requisite qualifications, the Defendant maintained that the trial judge was employed upon meeting the requirements for employment.

The Defendant stated that the Plaintiff's case at the Supreme Court succeeded in part to which they annexed copies of the said judgment. Furthermore, the Defendant affirmed that the Plaintiff was granted remission of sentence as part of a general exercise of the Presidential powers of prerogative of mercy to over three hundred (300) prisoners as published in the Official Government Gazette No. 21, vol 132.

In conclusion, the Defendant reiterates that the Plaintiff's rights were never denied at any point during the trial nor after his conviction and thus he is not entitled to any restoration of rights as none have been violated in the first place.

THE PLAINTIFF'S REPLY TO THE DEFENDANT'S STATEMENT OF DEFENCE

On the 31st of May 2018, the Plaintiff filed its response to the Defendant's defence.

In his reply, the Plaintiff reiterated categorically that most of the members of the Gambian Bar were not happy with his appointment due to his nationality. He also stated that contrary to the Defendant's assertion, the petition from The Gambian Bar dated 2nd July, 2013, against the Plaintiff was addressed to the Attorney General and Minister of Justice, and not to the Judicial Service Commission. The Plaintiff further contends that the Attorney General is not a member of the Judicial Service Commission and would at the hearing of this suit rely on the provisions of sections 145, 146, 147 and 148 of the Gambian Constitution 1997 as amended.

In advancing his position, the Plaintiff maintained that as the chief Justice at that time, he was the chairman of the Judicial Council and there was no deliberations or consultation with the President before his removal, neither was there any investigations in that regard. Again, the fact that he was in the office performing his duties until the close of the day on Friday, 19th July 2013, while the letter terminating his employment which emanated from the Attorney General and Minister of Justice, on the directives of Security operatives was received on Saturday, the 20th of July, 2013.

The Plaintiff replied to the Defendant's statement of defence that the investigations conducted (on abuse of office) were after the termination of his appointment and the said investigations clearly exonerated him and that was the reason why the prosecution refused to produce the report in Court. Plaintiff again replied that the prosecution only produced the report on false information which

equally exonerated the Plaintiff. The said report has been annexed to his application as “**ANNEXURE -5**”

The Plaintiff also maintained in his reply that the matter before the Court of Appeal was not in compliance with the Court of Appeal Rules as parties were not called to settle the records.

The Plaintiff acknowledged that the ECOWAS Court is not a Court of Appeal to re-open and re-litigate the matter decided at the National Courts. The Plaintiff however maintained that the Defendant was given ample opportunity to deny the allegations against the trial judge during the trial of the Plaintiff but they refused to do so because the allegations were true. He further contends that one of the prosecuting Counsel withdrew from the case in the face of the injustice to which the records of proceedings, the ruling and judgment of the High Court clearly shows that Mr. Legenju Vitalis was prosecuting alone. That the Defendant is only trying to mislead the Court in this regard.

The Plaintiff insists that he was not accorded free and fair treatment during the trial. To this effect, letters of protest were sent by the American and the Nigerian Embassies to the Gambian Government. He also maintained that he was not allowed access to his Counsel while in Mile 2 prison. He also replied that the trial judge fled the Gambia as a result of the discovery of not having the requisite qualification and the alleged corruption charges and has since been declared wanted by the Government of the Gambia.

The Plaintiff denied being among those that were granted mass pardon, but was granted pardon on the pressure from both the Nigerian and United States’ Governments.

Furthermore, the Plaintiff asserts that his right to fair trial was violated by the Courts. That even at the Supreme Court, the prosecution informed the Court that they will not file any brief because they believed that the Plaintiff had not committed any offence, but the Court did not allow the appeal. The record of proceedings have up till the time of filing this suit not been released despite the Plaintiffs application.

On the 5th of July 2018, the Defendant filed a rejoinder to the Plaintiff's reply stating inter alia that the said petition was sent to the Judicial Service Commission and that it was on the strength of the petition from the Gambia Bar Association that an investigation was conducted. The Defendant reiterated its position that it was based on the report of the said investigation that the Plaintiffs appointment was rescinded by the then President.

The Defendant denied that the prosecution counsel opted out of the case on the grounds canvassed by the Plaintiff and further states that the Counsel stopped appearing in Court when his contract with the ministry of Justice expired as state Counsel. The Defendant again denied receiving any letters of protest neither from the American Embassy nor the Nigerian Embassy on the conduct of the case and puts the Plaintiff to the strictest proof.

The Defendant contends that the Plaintiff's assertions are mere speculations meant to draw the sympathy of the Court as he was accorded all the rights he deserved without hindrance during the course of his trial and that he was on bail throughout his trial.

On the Plaintiffs assertion of being granted a presidential pardon, the Defendant contends that if such pardon exists, then the Plaintiff should not complain of being unable to secure a new job.

That the decision of the Defendant's counsel in not filing a brief at the Supreme Court was based on technical grounds and not that he was pessimistic in the Appeal.

The Defendant concluded that the Plaintiff is not entitled to the reliefs being sought.

PROCEDURE

The Plaintiff on the 31st May, 2018, filed a motion seeking leave of the Court to lead evidence for the purpose of establishing facts already asserted in his initiating application.

On the 22nd November, 2018, the Court granted the Plaintiff request to lead oral evidence after all pending interim applications have been dealt with in the presence of respective counsel of the parties. He gave oral evidence after which the parties were given opportunity to file written addresses if they so wished to do.

ISSUE FOR DETERMINATION

At the completion of the trial, one cardinal issue stands out for resolution as could be gleaned from both the written and oral procedures as follows:

WHETHER IT CAN BE DEDUCED FROM THE TOTALITY OF FACTS AND EVIDENCE PRESENTED THAT THE ACTS OF THE DEFENDANT CONSTITUTE A VIOLATION OF THE PLAINTIFF'S RIGHTS AS ALLEGED.

The Court shall now proceed to determine the issue as set out.

The stance espoused by the Plaintiff is that the Defendant denied him a fair trial through the unlawful termination of his employment with no regard to the proper procedures. Advancing this position, the Plaintiff posits that his trial by a Judge whose case he was handling prior to his trial, having publicly raised his reservations, falls short of the guarantees of the right to be heard by *an impartial and independent tribunal*. The Plaintiff further alleged that there was complete failure to comply with the requirements of fair trial during his trial and he has suffered discrimination by the Defendant.

The position of the Defendant is that the powers it exercised relative to the Plaintiff were in line with its Constitution and that the Plaintiff was properly charged on the outcome of the investigation report submitted to the Attorney General's Chambers by the police, as well as the legal opinions and surrounding facts.

As amply stated in the decision of the European Court of Human Rights [ECHR] in the case of:

***O'HALLORAN AND FRANCIS V. THE UNITED KINGDOM* [GC], NOS. [15809/02](#) AND [25624/02](#), § 53, ECHR 2007-III);**

“What constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case”

The right of an accused to be tried before an impartial tribunal, as provided for both in the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights (hereinafter referred to as UDHR and ACHPR respectively) is not only an integral component of the right to fair trial but also an unqualified right.

ARTICLE 10 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS reads:

*“Everyone is entitled in full equality to a fair and public hearing **by an independent and impartial tribunal**, in the determination of his rights and obligations and of any criminal charge against him”*

ARTICLE 7 (1) OF AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS also reads:

Every individual shall have the right to have his cause heard. This comprises:

a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

*b) the right to be presumed innocent until proved guilty **by a competent court or tribunal**;*

c) the right to defence, including the right to be defended by counsel of his choice;

*d) the right to be tried within a reasonable time **by an impartial court or tribunal**.*

The Court’s primary concern under the above mentioned instruments is to evaluate the overall fairness of the criminal proceedings. The contemporary approach to the determination of whether or not a trial has met the requirements of fair trial must be devoid of piecemeal approach but rather every aspect of the trial ought to be meticulously examined.

In the instant case, to enable the Court resolve the sole issue as set out (supra), the evaluation of the overall fairness of the proceedings warrants the determination of the following sub-issues:

- Whether or not the Plaintiff's nationality accounted for his dislike by members of the Gambian Bar which resulted in the alleged discrimination against him;
- Whether or not the trial judge's refusal to recuse himself from the trial of the Plaintiff amounted to a breach of fair trial rules in the circumstance of this case.
- Whether or not the trial of the Plaintiff in its entirety followed due process.

The above issues will now be addressed in seriatim.

For the avoidance of doubt, and before the determination of the issues, it is imperative to point out that this court does not constitute itself as an appellate chamber to interfere with the findings of the national Courts. However, once human rights violation are alleged, it invokes its jurisdiction to examine whether or not there has been a violation. The Court will therefore concern itself only in cases of apparent non-compliance with the relevant laws which the member states have ratified, to ascertain whether or not there has been a violation by the member state.

The above caveat has been reiterated in a number of cases by this Court including **MUSA LEO KEITA V. MALI (2004-2009) pg. 65**, where the court declared that it had no jurisdiction to adjudicate on a judgment delivered by the court of a member state.

Also in **HADIJATOU MANI KORAOU V. REPUBLIC OF NIGER (2004-2009) CCJELR, pg. 232 para. 60**, the court held that it does not have the mandate to examine the laws of member states of the community in *abstracto* but rather, to ensure the protection of rights of individuals whenever such individuals are victims of the violation of those rights which are recognized as theirs, and the court does so by examining concrete cases brought before it.

The Court shall now proceed to consider the issue:

WHETHER OR NOT THE PLAINTIFF'S NATIONALITY ACCOUNTED FOR HIS DISLIKE BY MEMBERS OF THE GAMBIAN BAR WHICH RESULTED IN THE ALLEGED DISCRIMINATION AGAINST HIM.

The Plaintiff maintained that his nationality prompted dislike and discord by members of the Gambian Bar. The Defendant in debunking his claim argued that the Plaintiff had a good working relationship with the Bar Association since he stepped into office sometime in 2000, till his arrest and trial for abuse of office and other offences.

The Plaintiff reiterated emphatically that most of the members of the Gambian Bar were not happy with his appointment due to his nationality.

It is important that the context in this case relative to this issue be put to its rightful perspective. In doing so, the Court will reproduce verbatim the claims of the Plaintiff in respect of his allegation of discrimination as contained in paragraphs 5 and 6 of his Initiating Application filed at the Registry of the Court on 22nd January, 2018 as follows:

5. The Plaintiff further states that because he is not a Gambian citizen, most of the members of the Gambian Bar were not happy with his appointment.

6. That sometime in 2013 some members of the Gambia Bar Association including the then President Ms. Ubna Farage and the Minister of Justice Ms. Amie Joof went to the then President Alhaji Yahaya Jammeh and made frivolous allegation of corruption against the Plaintiff and without any investigation, the Plaintiff was removed from office.

Comparative information available to the Court gleaned from the pleadings of the parties clearly established that the Plaintiff was appointed by the Defendant as a judge, was assigned a role as the acting Chief Justice at a point in time and was eventually appointed as the Chief Justice. Throughout these stages of the Plaintiff's engagement with the Defendant, the Defendant was aware of the nationality of the Plaintiff and yet entrusted into his hands the highest office of the third arm of governance in the Defendant state.

The allegations of human rights violation in this suit is against the Defendant and not the Gambian Bar Association as a body. The Court notes that the fact that the decision to remove from office and to prosecute him emanated from the petition by the Gambian Bar Association – does not prove the allegation of discrimination by the Gambian Bar Association. The mere allegation of discrimination without more is itself sufficient to prove an issue of discrimination against the Defendant. What was important was the fact that the Plaintiff's guilt or innocence was determined by established legal framework in accordance with the evidence

presented and that the process leading to the Plaintiff's indictment and subsequent trial were neither hostile nor in breach of the established guaranteed procedural rights of an accused to such an extent that the fairness of his trial was prejudiced. Indeed, whether the Plaintiff's removal from office by the then President of the Defendant pursuant to the said petition by the Gambian Bar Association was without investigation or not, is an issue in itself to be interrogated by Court in this trial, and that fact does not impute discrimination on the part of the Gambian Bar Association.

Imputing to the Defendant an alleged hatred by the Gambian Bar Association on the ground of the Plaintiff's nationality, in the face of comparative information available to the Court including his appointment to the highest judicial functions, is far-fetched an attribution this Court considers unsustainable. In any case, the Plaintiff has not been able to discharged the burden of proof required of him as stated in the case of **FEMI FALANA, WAIDI MOUSTAPHA v. THE REPUBLIC OF BENIN & 2 ORS (2012) CCJELR 1.**, where this Court held that:

“as always, the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the Court to believe the statement of the claim”.

Discrimination in this context, even if presumable against the Gambian Bar Association, which has not been proven, cannot be attributed to the Defendant herein. The Court, therefore finds that the issue of discrimination based on nationality alleged by the Plaintiff has not been sufficiently proven and same is hereby dismissed.

The Court will now consider the next issue which the Plaintiff has placed much reliance on in establishing that his trial was bereft of the needed fairness as required by the various instruments underpinning his case:

WHETHER OR NOT THE TRIAL JUDGE'S REFUSAL TO RECUSE HIMSELF FROM THE TRIAL OF THE PLAINTIFF AMOUNTED TO A BREACH OF FAIR TRIAL RULES IN THE CIRCUMSTANCES OF THIS CASE.

It is trite that a charge or allegation of bias against a sitting judge must be satisfactorily proved on the balance of probabilities by the person alleging same and any flimsiest pretext should fail else accused persons would be choosing their own judges whenever a criminal case is instituted against them.

The evidence before the Court brings to light the Plaintiff's aspersions to the effect that the trial Judge before whom his matter was heard, had a likelihood of bias against him. The relevant portions of the Plaintiff's pleadings on the issue are as contained in paragraphs 25 and 26 of the Plaintiff's Initiating Application cited above reads as follows:

25. ***"The Plaintiff states that Justice Mabel Agyeman who replaced him and Ms Amie Joof who was the Minister of Justice at the time of the plaintiff's supposed trial were aware that the trial judge, Justice Emmanuel Nkea was having some pending corruption allegation matter before the plaintiff as the Chief Justice and everybody knows the zero tolerance policy of the plaintiff, still Justice Mabel Agyeman assigned the trial judge to try the plaintiff which was a gross violation of the plaintiff's human right.***

26. The Plaintiff further states that his counsel filed a motion for the trial judge to recuse himself due to the above reason and the prosecution, knowing it was a fact did not file any affidavit in opposition to dispute the fact, still the trial judge refused to recuse himself which is a clear gross violation of the plaintiff human rights. The plaintiff will rely on the said motion and ruling at the trial of this case”.

In effect, the gravamen of the Plaintiff’s allegation is that while he was in office, there was a pending case before him on corruption to which the trial Judge was involved and that the Chief Justice who replaced him assigned his own trial to the said judge. Another perplexing concern is that the Plaintiff’s case had been assigned to one Legenju Vitalis, a state Counsel who is a nephew to the trial Judge and at that time, was living in the same house with the trial judge.

In response to this assertion, **the Defendant denied the existence of any pending case** and maintained that the prosecution was led by a special litigation counsel, one Mr. Agiah and assisted by a state counsel Legenju Vitalis, who for all intents and purposes was a state counsel at the Attorney General’s Chamber.

One fundamental point which needs to be clarified by the Court is whether or not the trial judge was indeed a subject of corruption proceedings before the Plaintiff when the former was assigned as the trial judge over the Plaintiff’s trial. The Plaintiff who bears the burden of proof, in his pleading averred as reproduced above. When same was denied by the Defendant, the Plaintiff in his oral evidence before the Court on the 22nd November, 2018, at page seven (7) of the verbatim, stated as follows:

“Yes, the judge, Justice Emmanuel Nkea was undergoing a corruption proceedings before me. And when the matter came up in the Gambia, my lawyers filed a motion that the judge recuse himself based on two (2) major grounds. That the judge was undergoing a corruption proceeding under me, and that the nephew of the judge, Legunju was the one prosecuting. And because I was not in the (...) at the time of my trial; I finished work on Friday, and the next day Saturday was when I received a letter from the Security Agents that I have been relieved of my duties. So when the case commenced, I was not having access to all the files”.

The Defendant’s counsel who was given opportunity to cross examine the Plaintiff did not dispute this piece of evidence of the Plaintiff.

Again, the Plaintiff attached to his initiating application the said motion filed against the trial judge to recuse himself and the ruling by the Court as **ANNEXURE “1” & “2”**. At page four (4) of the ruling by the trial judge (**Annexure “2”**), the judge commenting on the allegation that he was undergoing corruption proceeding before the Plaintiff which has generated hostility and animosity stated as follows:

“It must be noted that the allegation of hostility and animosity are issues which allegedly occurred long before the 1st accused/applicant was charged to court, talk less of being made to appear before me. And suffice I tot state that the 1st accused/applicant has appeared before me three times at the pre-trial phase of this matter.”

From the above pieces of evidence adduced by the Plaintiff, and contrary to the denial by the defendant, the Court finds as a fact duly proven, that the trial judge was undergoing corruption proceedings before the Plaintiff when he was the

Chief Justice. The allegation made that one Vitalis Legunju was also a nephew of the trial judge, the Court finds relevant to the issue of controversy.

In determining whether there is a legitimate reason to fear that the Judge lacked independence or impartiality, it is important to ascertain the standpoint of the accused and whether his doubts can be held to be objectively justified.

In **GABRIEL INYANG & ANOR V. FRN (2018)**, the court stated that:

“For the applicants to succeed in an application for a violation of their right to fair trial, (...) it must be shown that the trial was in breach of international standard”.

The Plaintiff maintained that he objected to the determination of his fate by the trial Judge vide an application which he annexed as evidence before the Court. The trial Judge however failed to recuse himself and stated that the Plaintiff has not disclosed any reasonable ground to warrant a recusal.

The Defendant on the other hand argued that the Plaintiff did not disclose any fact that will warrant the trial Judge to be seen to have breached any Section of the **Judges Supplementary Code of Conduct Act Cap 7:09 of the laws of The Gambia** particularly Section 5 which basically provides the duty of a judge to be impartial and fair in the exercise of his judicial duties by according every person a right to be heard. The Defendant concluded that the allegations made by the Plaintiff are mere speculations.

The right to be heard guaranteed under **Article 7** of the African Charter provides as follows:

“Every individual shall have the right to have his cause heard. This comprises:

- a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c) The right to defence, including the right to be defended by counsel of his choice;
 - d) The right to be tried within a reasonable time by an impartial court or tribunal
- ”.

In **AMOUZOU HENRI & ORS V. REPUBLIC OF COTE D’IVOIRE (2009) CCJELR pg. 297 para 57-58**, the Court stressed that the right to fair hearing is guaranteed by **Articles 10 of the UDHR, Article 7 of the ACHPR, and Article 14 of the ICCPR (Cited above)**. That the UDHR and the ACHPR are legal instruments that all ECOWAS Member States, including the Defendant are signatories. At the community level, their eminent importance has been underlined, notably by the affirmation from member states which vowed to expressly respect them.

It is imperative to point out the provisions of **Section 10 (4) of the Judges Supplementary Code Act Cap 7:09 of The Gambia** which provides:

“a judge must disqualify himself or herself from sitting in a case where there is actual conflict of interest or where the circumstances are such that a reasonable-fair minded and informed person would reasonably apprehend a perceived conflict”

In ANNEXTURE “1”, the Plaintiff inter-alia expressed his fears observing the occurrences especially the attitude and utterances of the Judge in the matter,

which extended to the Plaintiff's Counsel and made him uncomfortable to which he threatened to withdraw from his case. The Plaintiff also reiterated that the trial Judge had served under him both as acting chief justice and chief justice and on the two occasions, the Plaintiff had issued instructions to him to which the Judge was hostile and questioned such instructions. The Plaintiff further made mention of the petition against the trial Judge to which the Plaintiff expressed certain views not favorable to the trial Judge.

In the said affidavit, the Plaintiff stated that he raised and argued a preliminary objection against the state to which the Judge overruled and granted the application without hearing on the merit. Furthermore, the Plaintiff stated that at times during the trial, the Judge tried to reshape the prosecution's questions for witnesses to his detriment especially when the case was handled by the Judge's nephew who to the best of the Plaintiff's knowledge lives with him.

An allegation of bias in any adjudication process is a matter that courts take very seriously. The assertions made on oath must be viewed from an objective and reasonable standpoint. It is often impossible to determine with any measure of precision the state of mind of an adjudicator who has rendered a verdict. Accordingly, the courts take the position that an appearance of impartiality is in itself an essential component of procedural fairness.

The test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of a reasonable apprehension of bias was enunciated in **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS V SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS. 1 [1999] ZACC 9; 1999 (4) SA 147 (CC)** para 48. In that case the Constitutional Court said:

'It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of counsel.(...). It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.

The European Court of Human Rights in **DAVIDSON SAVINS V. LATVIA (2016) ECHR**, reiterated that impartiality, within the meaning of Article 6 (1) of the Convention, (which is in pari materia with the provisions in ACHPR) normally denotes the absence of prejudice or bias. There are two tests for assessing whether a tribunal is impartial: the first consists in seeking to determine a particular judge's personal conviction or interest in a given case (subjective test); and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (objective test). In the first test, the impartiality of a judge must be presumed until there is proof to the contrary. The second test determines whether there are ascertainable facts which may raise doubts as to the impartiality of a body sitting as a bench. In this respect, even appearances may be of some importance, but what is decisive is whether the fear can be held to be

objectively justified. See also **PANYIK V. HUNGARY, (2011) APP NO 12748/06 ECHR** Strasbourg. Again in **MORICE v. FRANCE (2015) APP NO. 29369/10, ECHR**, it was stated that an Applicant who had argued nevertheless that the very presence of a judge on the bench presiding over his case had created a situation which justified his fears of lack of impartiality, the court thus examined the case from the perspective of the objective impartiality test, addressing the question whether the Applicant's doubts could be regarded as objectively justified in the circumstances. The Court held in the affirmative that due to the previous judicial proceedings between the judge and the Applicant, the Applicant's fears were objectively justified. Thus any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.

The Court is convinced that the grounds disclosed by the Plaintiff were sufficient to ground his fears of bias and impartiality and the judge ought to have withdrawn from the case. The mere stating that the Plaintiff has not disclosed reasonable grounds does not portray objectivity on the part of the Judge.

The Court is of the considered view that the powers exercised by the trial judge were done arbitrarily eschewing improper influences. The Court therefore finds that there were no sufficient guarantees provided to exclude legitimate doubt as to the trial Judge's impartiality towards the Plaintiff. Consequently, it is the finding of the Court that the act of the Defendant in maintaining the said judge to try the Applicant's case, violates the provisions of Article 7 of the African Charter on Human and Peoples Rights.

WHETHER OR NOT THE TRIAL OF THE PLAINTIFF IN ITS ENTIRETY FOLLOWED DUE PROCESS IN LAW.

The Plaintiff's argument in support of this issue was categorized into three; that his appointment was terminated without regards to due process and he was convicted without proper investigation; that he was denied access to the records of proceedings to enable him pursue his appeal; and that there was no access to his counsel while in Mile 2 prison.

The Defendant submitted that the trial of the Plaintiff started with an investigation by the investigating body which formed the basis of the Plaintiff's arrest and trial and that the trial was in accordance with due process.

As regards the pre-trial stage (inquiry, investigation), **the Court considers criminal proceedings as a whole, including the pre-trial stage** of the proceedings since the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with the necessary pre-trial procedural rights of the accused.

In the case of **VERA FERNÁNDEZ-HUIDOBRO V. SPAIN, APP. NO. 108114**, the ECHR reiterated this point when it delivered itself as follows:

“Although investigating officers do not determine a “criminal charge”, the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial. Accordingly, Article 6 (1) may be held to be applicable to the investigation procedure conducted by an investigating officer, although some of the procedural safeguards envisaged by Article 6 (1) might not apply”.

Due process of law is interpreted here as rules that are administered through courts of justice or tribunals in accordance with established and sanctioned legal principles and procedures; with safeguards for the protection of individual rights.

It has not been disputed that the Plaintiff was at some point the acting Chief Justice and Chief Justice of The Gambia. The defendant has a statutory legal framework dealing with persons who occupy such judicial positions and the said legal framework has its own prescribed set of rules and procedures as well as sanctions. Thus, it can be rightly said that where there is an allegation against a Judge of a superior Court, a procedure is in place for the investigation, discipline and appropriate sanctions where the circumstance of the case so demand.

To this end, **Section 141 (2) (c) of the 1997 Constitution of The Gambia** as amended provides that:

“Subject to the provisions of this section, a Judge of a Superior Court may have his or her appointment terminated by the President in consultation with the Judicial Service Commission”.

Section 141 (4) of the said Constitution provides that:

“The Chief Justice, a Justice of the Supreme Court, the Court of Appeal and the High court and members of the Special Criminal Court may only be removed from office for inability to perform the functions of his or her judicial office, whether arising from infirmity of body or mind, or for misconduct”.

By virtue of **Section 141 (5) of the Gambian Constitution**, a Judge may be removed from his or her office if notice in writing is given to the Speaker, signed by not less than one-half of all the voting members of the National Assembly, of a motion that the judge is unable to exercise the functions of his or her office on any of the grounds stated in subsection (4) and proposing that the matter should be investigated under this section.

Even though the Defendant contended that there was investigation into the allegations against the Plaintiff, this Court observes that the Defendant did not annex any report in proof that there was an investigation *stricto sensu*. The only document relevant to this issue from the Defendant's pleadings is the Charge Sheet from the national Courts. In the said Charge Sheet, the Court observes that charges contained in counts 6, 7, 8 & 9 on false information are those connected with the investigation report annexed to the Plaintiff's application as **ANNEXURE "5"**.

There is neither a Caution Statement nor investigation report on the allegations of abuse of office, criminal fraud and breach of trust, conspiracy to defeat justice, offences relating to judicial proceedings and false assumption of authority as contained in the said Charge Sheet particularly Counts 1, 2, 3, 4 and 5. There is also no evidence of the Plaintiff being subjected to the Judicial Service Commission or a judicial tribunal as the case may be in his capacity as a former Chief Justice.

Lord Phillips in a hearing on the Report of the **Chief Justice of Gibraltar [2009] UKPC 43** stated at paragraph 1 stated that:

"The independence of the judiciary requires that a judge should never be removed without good cause and that the question of removal be determined by an appropriate independent and impartial tribunal. The principle applies with particular force where the judge in question is a Chief Justice."

The Defendant maintained that the petition was addressed to the Judicial Service Commission alleging serious malpractices by the Plaintiff based on certain revelations contained in an audio recording published by the press. That the

Plaintiff's removal was effected after investigations and due deliberations in consultation with the Judicial Service Commission.

The Plaintiff on the other hand argued that the petition from the Gambian Bar dated 2nd July, 2013, against him was addressed to the Attorney General and Minister of Justice, and not to the Judicial Service Commission. The Plaintiff further contends that the Attorney General is not a member of the Judicial Service Commission and placed reliance on the provisions of sections 145, 146, 147 and 148 of the 1997 Gambian Constitution as amended.

In buttressing his position, the Plaintiff maintained that as the Chief Justice at that material time, he was the chairman of the Judicial Service Commission and there was no deliberation or consultation with the President before his removal, neither was there any investigation in that regard. More to this is the fact that he was in the office performing his duties until the close of work on Friday, 19th July 2013, and the letter terminating his employment which emanated from the Attorney General and Minister of Justice, on the directives of Security operatives was received on Saturday, the 20th of July, 2013.

Pursuant to **Section 141 (7)** of the Defendants Constitution, the National Assembly shall by a resolution appoint a tribunal consisting of three persons, at least one of whom shall hold or shall have held high judicial office, who shall be the chairman of the tribunal, who shall investigate the matter and shall report to the National Assembly through the Speaker whether or not it finds the allegations specified in the motion to have been substantiated.

Where the Tribunal finds any such allegation substantiated and reports to the National Assembly, the National Assembly shall consider the report at the first

convenient sitting and if, on a motion supported by the votes of not less than two-thirds of all the members, the National Assembly resolves that the judge be removed from office, the judge shall immediately cease to hold office.

In **RE: JUDGE PAMELA J. WHITE** Court of Appeals of Maryland in Misc. No. 5 February 22, 2017, it was stated that an accused Judge is entitled to these elements of procedural due process: ***notice, an opportunity to respond, a fair hearing – regardless of the outcome – i.e., whether the Commission ultimately decides to dismiss the charges, reprimand the judge, or recommend that we censure, discipline, or remove the judge.*** The Court further stated that an accused judge is entitled to a fair proceeding, but not necessarily a perfect proceeding.

From the facts and evidence adduced by both parties, there is nothing to show or prove that the relevant provisions as cited above were complied with by the Defendant relative to the Plaintiff. The Plaintiff states that there was no investigation, neither was there any consultation with the Chairman of Council with regards to his removal. The Defendant on the other hand merely stated that due process was complied with without adducing evidence in proof. No copies of the investigation report, and other relevant documents in compliance with the provisions of section 141 of the constitution above.

On the issue of the investigation, the Defendant has not sufficiently discharged the requirement of proof upon it as stated in the case of **FEMI FALANA, WAIDI MOUSTAPHA v. THE REPUBLIC OF BENIN & 2 ORS (cited supra)**.

In **ASSIMA KOKOU INNOCENT & ORS v. REPUBLIC OF TOGO (2013)** CCJELR 187 pg. 201 & 202 para 59, this Court insisted that *“before it concludes on the issue of occurrence of human rights violation, the concrete proof of the fact upon which the Applicants’ based their claims must be established with high degree of certainty, or at least there must be a high possibility of the claims appearing to be true upon scrutiny. In this regard, mere allegations do not suffice to elicit the conviction of the Court”*.

The Court recalls its earlier affirmation that it considers the pre-trial stage (investigation) as an essential component of a criminal proceedings since the quality or otherwise of investigation is likely to affect the overall fairness of the trial. To this end, the Court holds that the Plaintiff was removed from office as Chief Justice of The Gambia and subsequently tried and convicted without proper investigation which compromised the due process required in the case of the Plaintiff.

In the decided case of **CAN V. AUSTRIA, NO. 9300/81, COMMISSION’S REPORT OF 12 JULY 1984, § 48, SERIES A NO. 96)**, the ECHR had this to say;

*“Compliance with the requirements of a fair trial must be examined in each case having regard to **the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings “***

This Court is not unaware of the fact that the Plaintiff has equally raised other aspects of his trial that compromised the required due process and fairness provided for under the international instruments he has cited in support of his case. Among others,

the Plaintiff has raised issues of the impartiality and independence of the judges who presided over his proceedings both at the trial Court and the Appellate courts, improper evaluation of legal points raised in the proceedings, refusal and/or failure to make the records of proceedings accessible to him and finally his inability to consult freely his lawyer while at the Mile 2 Prisons.

Indeed, the defendant merely denied the plaintiff's assertion that he applied for the trial records to enable him appeal, but the defendant/its agents made it extremely difficult for him to obtain them. The issue of not permitting the plaintiff's lawyers to visit him in prison was also rebuffed by the defendants. However, this court deems them very serious allegations against the due process of trial of accused persons. Though the burden of proof lies on the plaintiff to lead further evidence in proof of these denied pleadings, the court also resorts to the credibility of the plaintiff's evidence on the other issues as well as the mere incredible denials of the allegations by the defendant and comes to the conclusion that it believes the plaintiff's evidence in its entirety, and therefore concludes that the plaintiff has established credibly that the defendant failed to allow his access to his lawyers whilst in prison, and also that the defendant frustrated the appeal process.

There is nothing before the Court to suggest that the trial Court acted under the recommendation of the National Assembly, the Tribunal or the Judicial Service Commission as the case may be. There is also no evidence of a fair trial or proceeding before a duly constituted tribunal in line with Section 141 of the Defendant's Constitution. In light of the above, whereas the 1997 Constitution of Gambia provides the methods of initiating proceedings for the removal of a Supreme Court Judge, and whereas the provision requires the tribunal to conduct independent investigations before making a conclusion, and whereas the

Defendant has not complied with this requirements, the Court in considering the texts creating the Judicature and in line with the principles of fair trial, holds that the acts of the Defendant was unconstitutional, biased, lacking in independence, amounts to non-compliance with due process and in breach of natural justice and thereby constitute a gross violation of the Applicant's right to fair trial.

COMPENSATION

The Plaintiff per his reliefs, prayed this Honourable Court to order the Defendant to pay to him the sum of Twenty Million US Dollars (US\$20,000.000) plus six percent (6%) interest per annum for violation of his human rights. He further prayed for payment by the Defendant of successful Attorney's fees.

In the case of **CHIEF EBRIMAH MANNEH v. THE REPUBLIC OF THE GAMBIA (2004-2009) CCJELR 181 pg. 194 para. 32**, this Court held that:

“Having concluded that the Plaintiff's right to his personal liberty has been abused, the Plaintiff is entitled to some damages for the wrongs that he has suffered. The amount of damages, however, is dependent on the facts of this application and the relevant rules governing the award of damages”

The Court in the above case reviewed cases of the European Court of Human Rights which are of persuasive effect and can help in determining the basis and quantum of damages to be awarded. In **AHMED SELMOUNI v. STATE OF FRANCE (2005) CHR 237** and **MIOSLAV CENBAUER v. REPUBLIC OF CROATIA (2005) CHR 429** the ECHR awarded damages to the successful Plaintiffs whose human rights were violated. However, the Court, in awarding the damages; was emphatic that in awarding

general damages, the circumstances of each case must be thoroughly examined since the object of such an award is only to ensure “**just satisfaction**” and no more. In this application, the Plaintiff has not demonstrated any special pecuniary damages he suffered as a result of the violation of his rights. The closest he came to in that direction was when he alleged that he has not been able to secure employment as a result of his conviction by the Defendant. He was granted a remission of sentence by the Defendant after serving part of his sentence.

In consonance with the object of human rights instruments, in cases where the abuse has already taken place, restoration of the rights in question is paramount. In this case, the Court is mindful of the fact the claims of the Plaintiff’s inability to secure employment will be substantially ironed out by the findings of this Court in this judgement. The Court considers that as enough “just satisfaction” to the Plaintiff. The time spent by the plaintiff in prison when he was wrongfully tried and sentenced [though he has been cleared of any stigma and cannot now be described as an ex-convict] is the major concern of this court for which he must be compensated. The court will exercise its discretion to award him nominal damages, having regard to the circumstances of this case. The plaintiff is awarded compensatory damages of One Hundred and Fifty Thousand United States Dollars [US\$150 000.00] or its equivalent in Dalasi, The Gambian currency.

The prayer for payment of successful Attorney’s fees will equally receive a favorable consideration by the Court since the Plaintiff has been unemployed after his removal from office and may be financially constrained in footing the bills of his attorney and the costs of this litigation. Under this head, the plaintiff is also

awarded the sum of Fifty Thousand United States Dollars [US\$50 000.00] or its equivalent in Dalasi

DECISION OF THE COURT

1. The Court has found that the Plaintiff's trial by the trial judge who was undergoing some corruption allegation proceedings before him was a violation of his human rights to fair trial.
2. Whereas the 1997 Constitution of Gambia provides the methods of initiating proceedings for the removal of a Supreme Court Judge, and whereas the provision requires the tribunal to conduct independent investigations before making a conclusion, and whereas the Defendant has not complied with this requirements, the Court in considering the texts creating the Gambian Superior Court of Judicature and in line with the principles of fair trial enshrined in International Instruments particularly UDHR and ACHPR, has found that the acts of the Defendant relative to the Plaintiff's removal from office, trial and conviction were biased, lacking in independence, amounts to non-compliance with due process and in breach of natural justice and thereby constitute a gross violation of the Plaintiff's right to fair trial.
3. The Court awards the plaintiff nominal damages for violation of his rights to fair hearing and for his incarceration as prayed for considering the fact that the findings of the court are restorative enough to give just satisfaction to the Plaintiff and clear any impediment in his efforts to secure employment.
4. The Court finds that there is justification for payment of Plaintiff's Attorney's fees as a successful Attorney since the Plaintiff has not been working after his removal from office and may be constrained in meeting the financial obligations of his attorney.

COSTS

The Plaintiff is adjudged to be entitled to costs of this application to be borne by the Defendant, as will be assessed, under and by virtue of Article 66 of the Court's Rules of Procedure.

REASONS

For the reasons canvassed above, the Community Court of Justice, sitting in public after hearing the parties, and their submissions duly considered in the light of Article 7 and Article 10 of ACHPR and UDHR respectively, and also the Supplementary Protocol of the Court and the Court's Rules of Procedure, declares this application to be admissible in human rights and the Court enters judgment for the Plaintiff against the Defendant, who is liable for the violation of the plaintiff's rights.

ORDERS

Consequently, the Court orders:

- i. That the Republic of The Gambia pays damages to the Plaintiff as well as his Attorney's legal fees as assessed by this court.
- ii. That the Defendant pays the costs of this action to be assessed.

THIS DECISION IS MADE, ADJUDGED AND PRONOUNCED PUBLICLY BY THIS COURT, COMMUNITY COURT OF JUSTICE, ECOWAS; SITTING AT ABUJA, NIGERIA ON THE DAY 27TH FEBRUARY, 2019.

HON. JUSTICE EDWARD AMOAKO ASANTE - PRESIDING

HON. JUSTICE GBERI-BE QUATTARA - MEMBER

HON. JUSTICE KEIKURA BANGURA - MEMBER

MR. TONY ANENE-MAIDOH - CHIEF REGISTRAR