

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



No. 10 DAR ES SALAAM CRESCENT
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**COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES
(ECOWAS)**

HOLDEN IN ABUJA, NIGERIA

ON FRIDAY, JULY 10th, 2020

SUIT No ECW/CCJ/APP/41/17

JUDGMENT No ECW/CCJ/JUD/17/2020

- 1. MRS RUTH BABA-OCHANPKA (widow of LIEUTENANT COLONEL OA BABA-OCHANKPA)**
- 2. MAJ GEN IN IJIOMA**
- 3. MAJ GEN EJEMAI**
- 4. MAJ GENERAL LC ILO**
- 5. MAJ GEN MY IBRAHIM**
- 6. MAJ GEN SD ALIYU**
- 7. MAJ GEN FO ALLI**
- 8. MAJ GEN EJ ATEWE**
- 9. MAJ GEN LI WIWA**
- 10. BRIG GEN AGHACHI**
- 11. BRIG GEN B FIBUONUMA**
- 12. BRIG GEN LM BELLO**
- 13. BRIG GEN IM LAWSON**
- 14. BRIG GEN ASH SAAD**
- 15. BRIG GEN KOKO-ESSIEN**
- 16. BRIG GEN D ABDUSALAM**
- 17. BRIG GEN ONOYVIETA**
- 18. BRIG GEN AI ONIBASA**

19. BRIG GEN MORMONI-BASHIR
20. COLONEL FD KAYODE
21. COLONEL DR HASSAN
22. COLONEL TT MINIMAH
23. COLONEL FE EKPENYONG
24. COLONEL MA SULEIMAN
25. TN COL CO AMADI
26. TN COL E EGEMOLE
27. TN COL KO ADIMOHA
28. TN COL DB DAZANG
29. TN COL T ARIGBE
30. TN COL A MOHAMMED
31. TN COL AS MOHAMMED
32. TN COL C EMEMECHUKWU
33. TN COL GC NYEKWU
34. MAJOR TA WILLIAMS

APPLICANTS

AGAINST

FEDERAL REPUBLIC OF NIGERIA

DEFENDANT

COMPOSITION OF THE COURT PANEL

Hon. Justice Dupe ATOKI –

Presiding

Hon. Justice Keikura BANGURA –

Member

Hon. Justice Januária Tavares Silva Moreira COSTA - Member/Rapporteur

Assisted by Aboubacar DIAKITE -

Registrar

REPRESENTATION OF THE PARTIES

1. On Behalf of the Applicants

Abdul Muhammed Esq. and Mr. O.A. Adegboye Esq.

2. On Behalf of the Defendant

Maimuna Lami Shiru (Mrs.) Federal Ministry of Justice

ON THE PROCEDURE

3. By application dated 23rd November 2017 and registered at the Registry of this Court on 24th November 2017, **Mrs RUTH BABA-OCHANPKA**, widow of Lt. COL OA BABA-OCHANKPA, **MAJ GEN IN IJIOMA, MAJ GEN EJEMAI, MAJ GENERAL LC ILO, MAJ GEN MY IBRAHIM, MAJ GEN SD ALIY, MAJ GEN FO ALLI, MAJ GEN EJ ATEWE, MAJ GEN LI WIWA, BRIG GEN AGHACHI, BRIG GEN B FIBUONUMA, BRIG GEN LM BELLO, BRIG GEN IM LAWSON, BRIG GEN ASH SAAD, BRIG GEN KOKO-ESSIEN, BRIG GEN D ABDULSALAM, BRIG GEN ONOYVIETA, BRIG GEN AI ONIBASA, BRIG GEN MORMONI-BASHIR, COLONEL FD KAYODE, COLONEL DR HASSAN, COLONEL TT MINIMAH, COLONEL FE EKPENYONG, COLONEL MA SULEIMAN, TN COL CO AMADI, TN COL E EGEMOLE, TN COL KO ADIMOHA, TN COL DB DAZANG, TN COL T ARIGBE, TN COL A MOHAMMED, TN COL AS MOHAMMED, TN COL C EMEMECHUKWU, TN COL GC NYEKWU, MAJOR TA WILLIAMS**, all retired, Nigerian citizens, brought the present action before this ECOWAS Court of Justice against the **Federal Republic of NIGERIA**, a Member State of ECOWAS, claiming the violation of their human rights guaranteed and provided for in Articles 7 (Right to a fair trial), 14 (Right to property), 21 (Right to free disposal of their wealth and natural resources) all from the African Charter on Human and Peoples' Rights and Articles 8 (Right to a fair trial) and 17 (Right to property) of the Universal Declaration of Human Rights and in Articles 2 (3) and 12 (Right to free movement) of the International Covenant on Civil and Political Rights.

4. The Defendant State, the Federal Republic of Nigeria, duly served, came on November 29th, 2017, by applications dated January 31st, 2018 and registered on the same date at the Registry of this Court, to request an extension of the time limit to present its defense and to plead a preliminary objection and simultaneously deposit its defense.

5. The Applicants, duly notified of the aforementioned applications on February 6th, 2018, made no comment.

6. After several postponements, the Applicants came to express their intention to request an extension of time in order to respond to the preliminary objection raised by the defendant State, requesting the adjournment of the hearing, which was granted.

7. Thus, on October 28th, 2019, the Applicants came to deposit, at the Registry of this Court, their request for an extension of time to answer the objection raised by the defendant State and, simultaneously, their response to the preliminary objection, which were notified to the respondent on the same date.

8. On November 20th, 2019, the Applicants came to submit their request to present witnesses, whose hearing they requested. This request was notified to the defendant State on November 22nd, 2019, without any pronouncement from de defendant.

The parties were heard on the preliminary objection raised at a hearing held on November 28th, 2019.

10. At the hearing held on March 4th, 2020, the Court issued the RULING No. ECW/CCJ/RUL/04/2020, in which it decided the preliminary objection, dismissing it and ordering the continuation of the proceedings.

11. Thus, on the appointed date, the witnesses offered by the Applicants were examined, as stated in Verbatim of 19th March 2020, and the parties were suggested to submit their written submissions, which only the Applicants did, on 6th July 2020.

ON THE FACTS CLAIMED BY THE APPLICANTS:

12. In order to substantiate their case, the Applicants alleged that:

13. The Army 38 includes all other applicants as well as Lieutenant Colonel OA Baba-Ochankpa (deceased, husband of the first applicant).

14. On the Army 38's list (senior army officers) there are nine (09) Major General, ten (10) Brigadier Generals, seven (7) Colonels, eleven (11) Lieutenant Colonels and one (1) Major.

10. They were all punished with a compulsory retirement penalty on 9th June 2016.

16. Within 30 days of the compulsory retirement, at least 23 members of Army 38 wrote to the President, through the Chief of Defense Staff, requesting the review of the 9th June 2016 decision.

17. Army 38 soldiers were all forced to retire by means of 38 letters dated 9th June 2016 and the basis for their compulsory retirement, according to those letters, is: *“for disciplinary reasons, i.e. serious offense”*.

18. That the first step in bringing disciplinary proceedings against any officer involved in any investigation is always (and beyond all questions) deployment to the place where the necessary investigation will take place. They maintain that they were never deployed to another place for investigation.

16. That the Defendant, acting through several agents or by delegation, or even personally, made several publications or had some made against them, as part of a group of senior army officers, also punished by the Defendant.

20. That the Defendant did not present any reasonable legal justification for the treatment inflicted on the Army 38.

21. It demonstrated a pattern of systemic abuse and violation of the Applicants' rights. In addition, the defendant acted deliberately, maliciously, violently, oppressively, fraudulently and arbitrarily, punishing them for so-called disciplinary reasons, when in fact they were never involved in any disciplinary matter.

22. The Defendant State, through its agents, violated the fundamental rights of the Applicants:

1. to be heard before the committee of inquiry into: (a) matters relating to partisanship in the 2015 general elections in Nigeria; (b) matters relating to arms trade fraud in the office of the National Security Counselor;
2. to the presumption of innocence, in the absence of a hearing;
3. not to be subjected to arbitrary treatment when they were sanctioned with a compulsory retirement sentence on June 9th, 2016, even when Army 38 was not accused by any panel, nor condemned by a military court, and when the Council of the Nigerian Army met to examine and apply the sanction against Army 38, taking into account the law that enables the Council to analyze the affirmation of a punishment is a military court and not a military Council, for the latter to act as an instance or military judge.

23. Furthermore, when the Military Council decided to approve the sanction imposed on the Army 38 it had no factual, legal or constitutional basis to act as a court of inquiry, military court and as a confirming authority, all in one.

24. The powers of the Military Council in relation to the discipline of military personnel in accordance with the law, the Constitution and the Statutes is limited to the power to confirm and/or affirm and/or review a disciplinary measure taken by a competent judicial panel, in this case a military tribunal.

25. That the Defendant State violated their fundamental rights to be heard before the commissions of inquiry, the military court refused them a review of their case, according to its own legal rules as set out in paragraph 09.02 and in the 2012 Harmonized Terms and Conditions of Service for officers.

26. The agents of the Defendant State took part in the review process to ensure that the Applicants' right of appeal was completely suppressed, by refusing to forward the request for review to the President and Commander-in-Chief.

27. The defendant deliberately and unintentionally interrupted and compromised the applicants promising careers, and by acting intentionally and maliciously against them, without fair trial, without due process and without respect for their constitutional rights and human rights, it intentionally caused them losses and damages, thus jeopardizing their subsistence rights.

28. That the applicants suffered traumas and pains.

29. That the first applicant suffered the loss of her husband, Lieutenant Colonel OA Baba-Ochankpa, who passed away waiting endlessly for the quick resolution of his own appeal to the President.

30. That the damage suffered by the Applicants constitutes mental anguish, tarnished reputation, public ridicule, sleepless nights and extreme anxiety as human beings, as a direct and immediate consequence of the Defendant's illegal and unjust acts; acts that are contrary to morality, good conscience and public policy.

31. That the unlawful acts and/or omissions of the Defendant against the Applicants were an assault on their dignity, personality and peace of mind.

32. That the Defendant has caused unnecessary and unfair intrigue against the name, honor and reputation of the Applicants, as senior officers of the Armed Forces of the Federal Republic of Nigeria, among their colleagues in the group of former officers of various Armed Forces from different countries with whom the Applicants enjoyed a professional and personal friendship throughout their international service and training, and especially among their subordinates, who regard them with respect.

33. They claimed also the following publications as additional facts:

Leadership Newspaper of June 11th, 2016, page 5, entitled "The Army Retires Senior Officers"; ii) The Nation Newspaper of June 12th, 2016, page 4, entitled: "Tension as Army Council retire 35 officers"; iii) Sunday Vanguard newspaper of June 12, 2016, page 6, entitled: "Dismay: the Army Dismisses 200 Officers"; iv) Sunday Punch newspaper of June 12, 2016, page 2, entitled: "Jonathan's Field Assistants, Yar'Adua and 58 others Dismissed by the Army".v) New Telegraph of June 13, 2016, pages 1 and 2, entitled: "Arms Scandal: the Air Force Forces AVM and Commodores to Retire"; vi) Punch Journal, Tuesday, June 14, 2016, page 9, entitled: "Retired Soldiers Accused of Corruption"; vii) Vanguard Newspaper, June 14, 2016, page 5, entitled: "Retirements: Army, 38 Officers Engaged in a War of Words"; viii) Newspaper New Telegraph of June 14, 2016, page 7, entitled: "Buratai Defends Mass Reform"; xi) The Guardian newspaper, Tuesday 14 June 2016, page 3, entitled "Professionally Corrupt Retired Officers", says the Minister of Defense; x) Daily Sun newspaper of Wednesday, June 15, 2016, page 6, entitled: "Reasons Why the Army Fired 38 Officers". xi) Daily Trust newspaper on Sunday, June 19, 2016, pages 11 and 12, entitled: "The reasons for our compulsory retirement, the Army officers speak"; (xii) Punch Journal of June 14th, 2016, in which the seventh defendant stated that the applicants were accused of corruption; (xiii) The Guardian newspaper of June 14th, 2016, where the seventh defendant claimed that the applicants were dismissed for being considered to be professionally corrupt; (xiv) The New Telegraph Newspaper of June 14th, 2016, in which the seventh defendant held that the applicants are among the 38 officers fired for corruption and misconduct;

34. And they maintain that:

1. In a press release, read by Army spokesman Colonel SK Usman, it was publicly stated on behalf of the defendant that the purpose of its reforms was to purge the Nigerian Army of corrupt officers, accused by the presidential panel set up to investigate illegal arms sales, or by the electoral litigation panel.

2. That the Army Chief of Staff, while intending to corroborate the Army spokesman's statement, also reiterated and was quoted in the newspapers that they were fired for corruption.

RELIEFS SOUGHT BY THE APPLICANTS

35. The Applicants concluded requesting from the Court the following orders:

1. A declaration that the punishment imposed on the Army 38, the compulsory reform for disciplinary reasons (serious offense), is completely unfounded, illegal and violates their human rights.
2. A declaration that the punishment imposed on the Army 38, the compulsory reform for disciplinary reasons (serious offense), was applied in the absence and on the basis of non-respect of a fair trial and therefore constitutes a violation of their human rights.
3. A declaration that as a direct result of the non-submission of Army 38 to the Military Court, the Nigerian Armed Forces Council was not competent to act as an appeal committee to condemn and approve the decision to punish the Army 38 with compulsory retirement on disciplinary grounds (serious offense).
4. A declaration that there is no legal basis for the compulsory retirement imposed on the Army 38.
5. Declare as arbitrary the Defendant's refusal to disclose to the Applicants the specific grounds of its alleged violations that justify the punishment with compulsory retirement, which was imposed on them since June 2016.
6. A declaration that the actions and omissions of the Defendant from 9th June 2016 until the filing of this application were designed to perpetuate the violations of the Applicants' rights to an effective remedy against the primary violation of their respective fundamental rights.
7. A declaration that the policy, practice and/or custom of the Defendant to use compulsory retirement as a punishment without factual basis and/or without recourse

to due process of law, which is/are contested here, is/are unconstitutional and in flagrant violation of the fundamental rights of the applicants.

8. A Declaration that the implementation, application and sanction imposed by the Defendant is the direct and immediate cause of the Applicants' trauma, pain and suffering.

9. A Declaration that the refusal to refer the Applicants' appeal to the competent authority, in particular the President of Nigeria, constitutes a violation of their rights.

10. A Declaration that the delaying tactics used by the Defendant to prevent the examination of the applicants' cases in the different panels constitute an infringement of their rights.

11. An order commanding the Defendant to refrain immediately from continuing its policy, practice and/or custom of subjecting Army officers to disciplinary sanctions and/or punishments that go beyond the scope of respect for their fundamental rights.

12. An Order granting a compensatory damages to the Applicants in the amount of 10 BILLION NAIRA each, or in fair and reasonable amounts to be determined when examining the application.

13. An Order demanding the Defendant to pay all reasonable counsel's fees and/or full coverage of expenses.

14. Any other order(s) or decision(s) that the Court deems fair and appropriate, including an injunction in the interest of the administration of justice.

The Applicants gathered 28 documents.

THE PLEAS IN LAW PLEADED BY THE DEFENDANT STATE

36. In its defense, the Defendant State challenged the facts alleged by the Applicants, claiming that:

37. They were either involved in party politics during the 2014 and 2015 elections in Ekiti, Osun State of Nigeria, or implicated in the infamous \$2.1 billion arms deal scandal; that there were incontrovertible evidences of the Applicants' involvement with politicians; that such acts constituted serious violations of the military's code of conduct.

38. Subsequently, the Defendant established a Committee of Inquiry to investigate the above facts; after the investigation, the Committee submitted its findings to a legal review to ensure that no innocent officer was indicted.

39. After several deliberations and presentations to the Commission by different individuals, including the Applicants, who were authorized to make their defense before the Committee of Inquiry, the Committee of Inquiry found all officials, including the Applicants, guilty of one or other offense.

40. The Commission recommended that it would not be conducive to keep the so-called officials as part of the system, since keeping them would be to pollute such vocational service.

41. After the Commission had presented its conclusions to the Army Council, the latter gave to those concerned the option of applying for reform in a subtle way, some retired on their own decision, and others, like the applicants, waited to be dismissed.

42. Those who voluntarily refused to retire were recommended to have compulsory retirement in accordance with the 2012 Terms and Conditions of Service for Officers, so the Defendant followed the due legal procedures, in accordance with the Military Service, as far as the Applicants are concerned.

43. The Defendant submitted that, contrary to the Applicants' arguments, their rights under Article 7 of the African Charter were not infringed by the Defendant, since their case was heard by the competent authority, i.e., the Army Council.

44. That the provisions of Articles 14 and 21 of the African Charter and 17(2) of the Universal Declaration, cited by the Applicants, have no relevance here. That such norms deal with individuals' right to property and that in this case, no one has been deprived of his/her property;

45. That also the invocation of Article 12 of the International Covenant on Civil and Political Rights, which deals with freedom of movement and residence within the borders of a State, is irrelevant because it has no factual link with the case, since the Applicants reside and move within Nigeria without any impediment from the Defendant State.

46. The rights of the Applicants under Article 7 of the Charter have not been infringed by the Defendant State. That the Applicants' case was heard by the competent authority, i.e., the Army Council, and that the appeal right was not denied either as they had the option of appealing to the President and the Commander-in-Chief of the Armed Forces through the Chief of Defense Staff, within 30 days, to have their case reviewed.

47. At no time does the Applicants' application show that they requested such a review. The Applicants did not attach any evidence to that effect.

48. The Applicants failed to state in clear terms how the Defendant's actions, inaction, commissions or omissions led to the violation of their rights and failed to state in clear terms the rights that were allegedly violated by the Defendants.

CONCLUSIONS BY THE DEFENDANT STATE

49. The defendant State concluded by arguing that the case is inadmissible.

ISSUES FOR DETERMINATION

50. It is for the Court to decide whether:

- a) The facts as alleged by the Applicants constitute a violation by the Defendant State of the claimed fundamental human rights;
- b) And, consequently, whether the Defendant State should be condemned to indemnify the Applicants as requested.

ANALYSIS BY THE COURT

51. Let us now examine whether the facts, as claimed by the Applicants, make it possible to conclude that the alleged human rights have been infringed.

53. Firstly, it should be noted that the general principle of evidence imposes a burden of proof on the person making the allegations.

53. In other words, as a rule, the party claiming such a violation must provide evidence of the fact, and will fail if he cannot meet the standard of proof capable of persuading the Court to believe the truth of the averment.

54. This Court wrote in Judgment No. ECW/CCJ/JUD/01/10, delivered in the case **Daouda Garba with République du Bénin**, that “it is a general rule in law that during trial the party that makes allegations must provide the evidence. The burden of constituting and demonstrating evidence is therefore upon the litigating parties. They must use all the legal means available and furnish the points of evidence which go to support their claims. The evidence must be convincing in order to establish a link with the alleged fact.” (page 12 § 35)

55. It follows that cases of violation of human rights must be supported by evidence that allows the Court to verify and sanction such violation, when it occurs.

56. So, this Court upheld in the Judgment rendered in the case **Wiayao Gnandakpa et autres v. Etat du Togo**» Judgment No ECW/CCJ/JUD/18/15, that: “Considering that, as a general rule, it is up to the applicant to present evidence of his claims and that, in application of this principle, the ECOWAS Court has consistently held (...) that all cases of human rights violations invoked before it, by an applicant, must be demonstrated in a specific manner, by sufficiently convincing and unambiguous evidence.” (see §10). (translation ours)

57. It is certain that this rule is reversed when there is presumption of law, dispensation or release of the burden of proof, situations in which this same burden falls on the opposite party.

58. Thus, in a case where the party to whom the burden of proof is incumbent fulfills it, the latter will enjoy the benefit of the presumption and, as such, it will be for the counterpart to challenge the evidence produced.

59. Therefore, the burden of proof falls on the Applicants, who must prove the facts on which they rely. (See also, **Femi Falana and others v. Republic of Benin**, and others, JUDGMENT ECW/CCJ/JUD/02/12, para 34).

60. The applicants, in order to support their claims, may use all legal means and provide all evidence. However, there must be a factual link between the evidence and the alleged facts, which makes them convincing.

61. It is a settled case-law that the facts can be proved by documents.

62. In the instant case, the Applicants have gathered to the case-file a set of documents to support their claims. And they presented oral testimony.

63. The Court proceeds to examine each of the human rights allegedly violated by the Defendant State and to ascertain whether, in the face of the evidence offered, such allegations can be considered proven.

a) O the alleged violation of the right to a fair trial

64. In support of their claim that their right to a fair hearing has been infringed, the applicants merely plead, in essence, that:

65. In summary, the Applicants claim that in the context of the disciplinary proceedings initiated against them, which culminated in their compulsory retirement by the decision of the Council of the Armed Forces, they were not heard by the Commission of Inquiry, and that such a measure was applied to them without being condemned by a judge entertaining jurisdiction, and that they were refused the right of appeal to the President of the Federal Republic of Nigeria and Commander-in-Chief of the Armed Forces.

66. They concluded that the Defendant State violated their rights to be heard and, consequently, that of the presumption of innocence; not to be subjected to arbitrary treatment when sanctioned without charge or conviction by a military court; they contested the competencies of the Military Council, claiming that it could not act as: (a) a court of inquiry, (b) as a military court and (c) as a confirming authority, all in one; they argued that the competence of the Military Council in relation to the discipline of military personnel, in accordance with the law, the constitution and the statutes, is limited to the power to confirm and/or assert and/or review a disciplinary measure taken by a competent judicial panel, in the instant case, a military court.

67. In turn, the Defendant State argued in its defense that the Applicants were either involved in party politics during the 2014 and 2015 elections in Ekiti, Osun State of Nigeria, or implicated in the infamous \$2.1 billion arms deal scandal; that there was incontestable evidence of the Applicants' involvement with politicians; that such acts constituted serious violations of the military's code of conduct; that it subsequently established a Commission of Inquiry to investigate the above facts; that after the inquiry, the Commission submitted its findings to a legal review to ensure that no innocent

officer was indicted; that after several deliberations and presentations before the Commission by different individuals, including the Applicants, who were allowed to make their case before the Commission of Inquiry, it found all officers guilty of one or another offense. That the Commission recommended that it would not be conducive to maintaining so-called officers as part of the system; That after the Commission presented its findings to the Army Council, the latter gave to those concerned the option of requesting retirement in a subtle way, some of them requested retirement on their own, and those who voluntarily refused to retire were recommended to have compulsory retirement in accordance with the 2012 Terms and Conditions of Service for Officers, so the appropriate legal procedures was followed, in accordance with the Military Service, as far as the Applicants were concerned. That the Applicants' right to appeal was not denied either, as they had the option to appeal to the President and Chief Commander of the Armed Forces through the Chief of Defense Staff, within 30 days, to have their case reviewed. That at no time does the Applicants' application show that they requested such a review.

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68. The Applicants seek to rely on the invalidity of the administrative procedure which led to their compulsory retirement, in order to sustain the infringement of their right to a fair hearing, making use of a general and conclusive argument.

69. **The right to a fair trial** is guaranteed by Articles 7 of the African Charter on Human and Peoples' Rights and 10 of the Universal Declaration of Human Rights.

The article 10 of the Universal Declaration of Human Rights states: *“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.”*

70. The Article 7 of the African Charter on Human and Peoples' Rights, establishes that:

“1. 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.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”

71. Also, the **Article 26** African Charter, provides that:

“States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”

72. The same right is expressly enshrined in several international instruments, in Articles 14 and 15 of the International Covenant on Civil and Political Rights, 6 of the European Convention on Human Rights, 8 and 9 of the American Convention on Human Rights.

73. The right to a fair trial is a fundamental principle of any democratic society, deeply intertwined with the Rule of Law, and there is no basis for any restrictive interpretation, which aims, above all, to defend the interests of the parties and those of the administration of justice, so that litigants can present their case to the court in an effective manner.

74. It has as basic meaning that the parties to the case have the right to submit any observations they consider relevant to the assessment of the case which must be properly examined by the court, which has a duty to carry out a careful and diligent examination of the claims, arguments and evidence presented by the parties and that fairness of the administration of justice, in addition to being substantive, should be evident (*justice must not only be done, it must also be seen to be done*).

75. For such examination, the Court must verify whether the judicial procedures carried out were fair, ensuring the specific guarantees laid down in the rule contained in Articles

7 and 10 cited above. In other words, the examination must relate only to procedural or adjective matters - for the heart of the matter is the existence of a fair trial and the requirements arising therefrom, and it is not for the court to examine the substantive matter.

76. Nor is it a question of alleging procedural irregularities with a view to altering the court's decision, but only to request a general appraisal of whether or not the trial was fair and whether the specific requirements of the conventional norm set out in Articles 7 of the African Charter on Human and Peoples' Rights and 10 of the Universal Declaration of Human Rights were met.

77. And should the Court conclude that this right has been infringed, it shall not of itself invalidate national deliberations and may, among other measures, award indemnification.

78. Therefore, the right to a fair trial, as guaranteed by the African Charter and the other above-mentioned international instruments for the protection of human rights, requires the existence of an effective judicial remedy that allows the person to exercise his rights in criminal or civil matters.

79. And this has been the understanding of this Court.

80. For in this regard, this Court has ruled in the case of ***Chief Ebrimah Manneh v. The Republic of the Gambia***, JUDGMENT No. ECW/CCJ/JUD/03/08, of June 5th, 2008, delivered in Suit No. ECW/CCJ/APP/04/07, CCJ, RL (2004-2008), p. 191, para. 21, that: *"Article 7 (1) clearly states that every individual shall have the right to have his cause heard and this comprises among other things the right to be presumed innocent until proven guilty by a competent Court or tribunal, the right to defense, including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial Court or tribunal."*

81. The Court also wrote in JUDGMENT No. ECW/CCJ/JUD/07/11, delivered in the case ***Ocean King Nigeria Limited v. Republic of Senegal***, that: *"...the right to fair hearing which is a fundamental right, open to any party who is affected by a tribunal's decision."*

82. And reiterated on the Judgment No ECW/CCJ/JUD/14/18 of 21st May 2018, rendered in the case **Aminata Diantou Diane v. Republic of Mali**, (par. 42), that *“The significance of such right resides in the obligation placed upon every State concerned to fashion out its judicial system in such manner as to fulfill the requirement of a prompt delivery of justice, failing which the State becomes liable for default.”*

83. This same understanding is followed by the African Commission (see Communication No. 313/05 in the case **Kenneth Good v. Botswana**) while ruling that: *“the right to be heard requires that the complainant has unfettered access to a court of competent jurisdiction to hear the his cause. It also requires that the matter be brought before a court with the competent jurisdiction to hear the case.”*

84. Also from principle 1 *“Fair and Public Hearing”* in **“Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa”**, Adopted by the African Commission, states that *“In the determination of any criminal charge against a person or of a person’s rights and obligations, everyone shall be entitle to a fair and public hearing by a legally constitute competent, independent and impartial judicial body.”*

85. Furthermore the above-mentioned **“Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa”**, In Section 2, includes, as one of the essential elements of *“Fair hearing “(a)equality of arms between the parties to a proceedings, whether they are administrative, civil, criminal or military”*.

86. Still in its Article 4, under the title *“Independent Court”*, paragraph (e) it provides that: *“Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies.”*

87. The European Court in the case **Bryan v. United Kingdom** , of November 22, 1995 (para.44) maintained that: *“A fair trial is a right which does no more than enable na aggrieved person to have recourse to a supra national court, so that the one who governs him may be condemned if the proof of a violation of his rights is established; the court must have jurisdiction to examine the points of facts and of law in the case which has come before it, in order that it may reform it...”*

88. An examination of Article 7 of the Charter and the case-law cited above shows that the right to a fair trial, in its various aspects, comprises *“the right to bring an action before the competent national courts for any act violating the fundamental rights enshrined in the conventions, laws, regulations and customs in force.”*

89. In the instant case, the Applicants claim that their right to be heard in the disciplinary proceedings brought against them and which culminated in the decision on their compulsory retirement, as well as their right of appeal were infringed.

90. The case-law of this Court also makes it possible to conclude that Article 7 of the Charter be interpreted in a wide way by admitting that it is applicable even in purely administrative procedures, where it is pleaded.

91. Thus, it can be seen from JUDGMENT No. ECW/CCJ/JUD/11/2015, delivered in the case **Mohammed EL Tayyib Bah v. Republic of Sierra Leone**, where this Court, while considering a case brought by a Police Officer claiming that he was not given an opportunity to be heard in the procedure that led to his dismissal, wrote that *“... the rule of fair hearing consists of two basic components, namely: (i) The rule against bias (nemo judex in causa sua) or that no man should be a judge in his own cause and (ii) the right to a fair hearing (audi alterem partem) or hear the other side.”* ... *“These principles are encapsulated in Article 7 of the African Charter. In a nutshell, the rule is that an individual should not be penalized by decisions affecting his rights or legitimate expectations without being given prior notice of the case, a fair opportunity to answer and/or the opportunity to present their own case. The fact that a decision affects rights or interests of a person is sufficient to subject the decision to the procedures required by natural justice.”*(Pag.11)

92. This same Judgment underlined the position of this Court in JUDGMENT No. **ECW/CCJ/JUD/03/05 IN THE CASE OF JERRY UGOKWE V, FEDERAL REPUBLIC OF NIGERIA AND OTHER**, which upheld the principle that the parties should be afforded the opportunity of being heard on any matter affecting their interests, as follow: *“The right to fair hearing is a human right derived from the concept of fair hearing; in this regard a fair trial is not only seen as an additional instrument for the protection of the rights of defence largo sensu, but also in a political context, where the legislative and*

jurisdictional activity, the judicial organization, and even the judicial institutions of the signatory states are subjected to scrutiny, as regards requirements of the community. The minimum standards required of all institutions exercising powers that may affect the legitimate interest of the parties or one or more of them is to act fairly.” (page 15).

93. This same position was defended in the case **His Lordship Justice Paul Uter Dery v. Republic of Ghana**, Judgment No. ECW/CCJ/JUD/17/19, of April 29th, 2019, delivered in case ECW/CCJ/APP/42/16.

94. In the same vein, this Court followed in JUDGMENT No. ECW/CCJ/JUD/21/19, of May 15th, 2019, rendered in the case **SGT Mikah Rango & 243 Ors v. The Federal Republic of Nigeria**, in which the Applicants alleged that they were dismissed from the services of the Nigerian Armed Forces, without due process having been adopted, since they were neither accused nor tried or convicted by a properly constituted martial court. They thus claimed that their dismissal occurred in violation of Article 7 of the African Charter, which protects their right to a fair trial. In that Judgment the Court understood that: *“On this note and based on the references and authorities stated and relied on by the parties, this Court is of the opinion that the Applicants’ right to fair hearing was also compromised and breached and therefore such conduct constitutes a violation of the Applicants’ right to fair hearing and the Court so holds.”*

95. In this case, it remains to be seen whether, in view of the facts invoked and the evidence produced by the Applicants, it can be concluded that the Defendant State has violated the alleged human right invoked.

96. As we have seen, the Applicants alleged that they were not heard by the Commission of inquiry, and that the penalty of compulsory retirement was applied to them without having been convicted by a competent court; that they were denied the right to appeal to the President of the Federal Republic of Nigeria and Chief Commander of the Armed Forces. They also contested the competencies of the Military Council, arguing that it could not act as (a) court of inquiry, (b) military court and (c) confirming authority, all in one.

97. As seen, the burden of proof falls on the Applicants.

98. They gathered as evidence the documents making up pages 1 to 28 (annexed to doc.1) and 3 to 23 (annexed to doc.7) and presented witnesses (doc.7), which were examined as shown in the verbatim report of 19 March 2020.

99. These documents include copies of news published in newspapers regarding the reform of the Army 38; (annexure 6 to 15 of the application initiating proceedings and 3 to 11 of doc. 7) a letter from the Nigerian Army Headquarters addressed to Abdulfatai Mohammed (Lt.Col-Ret), informing him that his compulsory retirement was approved (annexure 5); the Open letter to the President of Nigeria published in newspaper (annexures 12 and 13 of doc.7; copies of sentences handed down by the National Industrial Court of Nigeria in cases brought by: Abdulfatai Mohammed (Lt.Col-Ret) (annexure 20) Ositadinma Uche Nwankwo (RTD) (annexure 21); JUDGMENT delivered by the “Nigerian Court Of Appeal” in the Ositadinma Uche Nwankwo case; Office of the Federal Ministry of Justice acknowledging receipt of the Appeal lodged by Ositadinma Uche Nwankwo; (annexure 22) Subscribed missives by law firm Abdul Muhammed LP and addressed to “The Presidency Office Of The Secretary To The Government Of The Federation” (annexure 23) and to Prof. Yemi Osinbajo SAN (annexure 25) president Muhammadu Buhari, GCFR President and Commandant in Chef (annexure 26); Open Letter to the President (annexure 27) and an article published under the title “CRY FOR JUSTICE...” (annexure 28).

100. From this list of documents, those contained in annexures 5, 20, 21, 22 relate to third parties, that is, they are not the Applicants in the instant proceedings, so they have no evidential relevance.

101. The answers given by the witnesses at the hearing, the content of which is contained in Verbatim dated 19th March, were exclusively reports of personal facts by the respondents. In other words, the witnesses offered and examined by this Court did not specify anything about the facts relied on by the Applicants, since they only reported facts which were their own, and the Court therefore could not give any evidential relevance to their giving of evidence.

102. On the other hand, the Applicants were unable to counter the Defendant State's claim that a Commission of Inquiry was created to investigate the facts imputed to the

Applicants and *“that after several deliberations and presentations made before the Commission by different individuals, including the Applicants, who were authorized to render their defense before the Commission of Inquiry, it found all officers guilty of one or another offense.”*

103. The Applicants, despite having admitted the existence of the Commission of Inquiry, did not appear before this Court to counter the fact invoked by the Defendant State, in the sense that they were given the opportunity to present their defense before the Commission of Inquiry.

104. Therefore, there is no evidence in the case file that would allow this Court to convince itself that, in effect, the Applicants were not heard by the Commission of inquiry, or that they were not given the opportunity to present their defenses before the Commission of inquiry.

105. On the other hand, the aforementioned Armed Force Act, Chapter A20 Article 5 (1) provides that *“Subject to the provisions of subsection (2) of this section, The Forces Council shall be responsible, under the general authority of the President, for the command, **discipline** and administration of, and for all other matters relating to the Armed Forces”*.

106. The ***Harmonized Terms And Conditions Of Service For Officers 2012***, Chapter 9 part I 09.02., establishes that: *“Compulsory retirement or resignation may be affected for any of the following reason (s):*

a. An officer may, at any time be removed from the service, be called upon to retire or resign his commission on disciplinary grounds.

b. (...)

c. An officer may be compulsorily retired from service by the Army Council (...) for any of the following specific reasons:

(...)

(4) On disciplinary grounds i.e. Serious offence(s)

(...)

- d. Notwithstanding the foregoing, an officer earmarked for compulsory retirement, except in accordance with paragraph 09.02 (c) (4) (...) shall be called upon to retire voluntarily, failure of which he would be compulsorily retired (...)*
- e. An officer called upon to retire, resigned or to relinquish his commission shall if he so desires, appeal to Mr. President C-IN-C through the CDS within 30 days to have his case reconsidered.”*

107. The examination of such provisions leads to the conclusion, on the one hand, that the disciplinary measure of compulsory retirement applied to the Applicants was determined by the competent authority, the Armed Forces Council, that the application of such a measure did not require the intervention of a military court and, on the other hand, that situations considered “serious offenses” constitute grounds for the compulsory retirement of officers.

108. On the other hand, the Applicants claimed that their right of appeal was violated, since it was not referred by the competent authority to the President of Nigeria as Chief Commander.

119. In this regard, the Applicants alleged that within 30 days of the date of compulsory retirement, at least 23 members of Army 38 wrote to the President of Nigeria, through the Chief of Defense Staff, to request review of the 9th June 2016 decision.

110. The documents in the casefile do not include any copies of letters signed by any of the Applicants, possibly addressed to the Chief of Defense Staff, requesting from the President of the Federal Republic of Nigeria, the Commander-in-Chief, a review of the disciplinary measure applied.

111. The possibility of appeal is provided for in paragraph (e) of Chapter 9 part I 09.02. of the Harmonized Terms And Conditions Of Service For Officers 2012.

112. However, the Applicants have not provided any evidence that they have made use of such a prerogative.

113. In fact, it is in a general and imprecise manner that the applicants state that within 30 days of the compulsory retirement date, at least 23 members of the 38 Army wrote to the President, through the Chief of Defense Staff, requesting review of the decision of 9 June 2016.

114. This means that they admit that not all the Applicants did so.

115. In the light of the foregoing, the Court considers that it has not been established that the Applicants' right to a fair hearing has been infringed by the Defendant State.

b) On the alleged violation of Articles 14 (Right to property), 21 (Right to free disposal of their wealth and natural resources) of the African Charter on Human and Peoples' Rights, (Property Right) of the Universal Declaration of Human Rights and Articles 2 (3) and 12 (Right to free movement) of the International Covenant on Civil and Political Rights

116. In relation to these alleged human rights violations, the Applicants have not put forward any facts on which they are based.

117. In fact, the African Court in the case *Thobias Mang'ara Mango and Shukurani Masegenya Mango v. United Republic of Tanzania*, Application No. 005/2015 of May 11th, 2018, para. 145 and 146 wrote that *"The Court has reiterated that, general statements to the effect that this right has been violated are not enough. More substantiation is required. The Court notes that, in the instant case, the Applicants are making general claims regarding the violations of these rights without substantiation. Accordingly, the Court finds that the alleged violations have not been substantiated and they are therefore dismissed."*

118. Therefore, in view of the general and unsubstantiated allegations, the Court considers that these claims must be dismissed.

119. Thus, this Court concludes that the Applicants' claim must be considered unfounded.

ON THE DECISION

120. In light of the foregoing, the Court:

- a) **Declares** the applicants' allegations of human rights violations unproven.
- b) **Dismisses** all other pleadings, orders and other form of order sought by the Applicant.

121. On the Legal expenses:

In accordance with Articles 66 (1) and (2) of the Rules of Procedure of the Court of Justice, the parties are to bear their own expenses.

122. This Judgment was delivered and pronounced in a public court hearing holden in Abuja by the Court of Justice of the Community on the 10th day of July 2020.

By the Judges:

Hon. Justice Dupe **ATOKI** - Presiding _____

Hon. Justice Keikura **BANGURA** - Member _____

Hon. Justice Januária T. S. Moreira **COSTA**- Member/Rapporteur _____

Assisted by Aboubacar **DIAKITE** - Registrar _____