



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

In the Matter of

**MRS. HELEN JOSHUA & ANOR. V FEDERAL REPUBLIC OF  
NIGERIA**

*Application No: ECW/CCJ/APP/13/18 Judgment No: ECW/CCJ/JUD/02/22*

***JUDGMENT***

ABUJA

15 February, 2022

**JUDGMENT NO. ECW/CCJ/JUD/02/22**

**MRS. HELEN JOSHUA & ANOR.**

**- APPLICANT**

**V.**

**FEDERAL REPUBLIC OF NIGERIA**

**- RESPONDENT**

**COMPOSITION OF THE COURT:**

Hon. Justice Gberi-Be OUATTARA

- Presiding

Hon. Justice Keikura BANGURA

- Member/Rapporteur

Hon. Justice Januaria T. Silva Moreira COSTA

- Member

**ASSISTED BY:**

Dr. Athanase ATANNON

- Deputy Chief Registrar

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***REPRESENTATION OF PARTIES:***

Ballason Gloria MABELAM ESQ. } Counsel for the Applicant

Maimuna Lami SHIRU (Mrs.) } Counsel for the Respondent


## **I. JUDGMENT:**

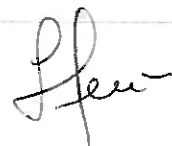
This is the judgment of the Court.

## **II. DESCRIPTION OF THE PARTIES:**

1. The First Applicant is the mother of Solomon Andy and a community citizen of Nigerian origin, the Second Applicant is the Estate of the late Solomon Andy, a citizen of the Community and of Nigerian origin.
2. The Respondent is the Federal Republic of Nigeria, a Member State of ECOWAS.

## **III. INTRODUCTION**

3. The Applicants filed a claim in the registry of the Court for the following:
  - a. Unlawful killing of Solomon Andy by a soldier in the Nigerian Army on the 9<sup>th</sup> June, 2017 which amounts to a violation of his right to life.
  - b. A confiscation and continuous retention in a dilapidated form of the corpse of the deceased Solomon Andy by the Nigerian Army, which violates the right to dignity of the human person.



#### IV. PROCEDURE BEFORE THE COURT

4. The Applicants filed an Initiating Application in the Registry of the Court on the 22<sup>nd</sup> February, 2018.
5. An application for Default Judgment was filed by the Applicants on the 7<sup>th</sup> May, 2018.
6. A Court session was held on the 4<sup>th</sup> March, 2020, 1<sup>st</sup> July, 2020 and 7<sup>th</sup> October, 2020 respectively with the Respondent absent.
7. A Motion on Notice was filed by the Respondent on 12<sup>th</sup> October, 2020 requesting for leave to defend the claim and a Defense in Opposition to the Applicant's Application was filed on the same day.
8. A Counter Affidavit was sworn to by the Applicant and filed on the 12<sup>th</sup> October, 2020.
9. A Court session was held on the 14<sup>th</sup> October, 2020 with both parties present.
10. The Applicant filed a Reply to the Respondent's Defense and Arguments of facts on the 11<sup>th</sup> November, 2020.
11. The Respondent filed a Motion on Notice on the 19<sup>th</sup> March, 2021 praying that the Court grants leave to amend the Statement of Defense.
12. The Applicant filed a Counter Affidavit on the 18<sup>th</sup> May, 2021.



13.A Court session was held on 4<sup>th</sup> June, 2021 during which the matter was adjourned for judgment.

## V. APPLICANT'S CASE

### a) Summary of facts

14. It is the claim of the First Applicant that she is the biological mother of the deceased Solomon Andy and is bringing this claim against the Respondent for violating her son's right to life and dignity.

15.The Applicants claim that the deceased, Solomon Andy, was accosted on the 9<sup>th</sup> June, 2017 by Nigerian soldiers serving in Kakuri, Kaduna in the Northern territory of the Federal Republic of Nigeria at his place of work. That two soldiers believed to be Private Ocheme Abel and another (unnamed) were at the scene of the deceased's work place on that day when Private Ocheme Abel forced the deceased and his colleagues frog jump and were flogged whilst the unnamed soldier looked on.

16.It is the claimed further by Applicants that a co-worker of the deceased, Moses John, pleaded with the unnamed soldier, to release the deceased from the unjust corporal punishment. That the said soldier requested cigarettes as an incentive to intervene and in the process of procuring the cigarettes the deceased unfortunately had his back to Private Abel who had returned to the scene after failing to chase down two boys. That upon seeing a seemingly retreating Solomon Andy, Private Abel fatally shot him in the back. This act resulted in a panic



situation that saw everyone seeking safety initially but returning immediately to the scene to meet the wriggling body of the deceased on the floor. That Private Ocheme Abel proceeded to point his gun at Moses John but the unnamed soldier threatened to shoot him and thereupon disarmed him.

17. It is the claim of the Applicants that the body of the deceased was taken to hospital with the help of one Mr. Godwin Augustine, the Manager of the sand dune. That the first hospital refused to accept the injured man but the second, Bengola Hospital, admitted the injured man after demanding a police report or the presence of the perpetrator. The deceased was subsequently certified dead at this hospital. That after this the unnamed soldier ordered that the party (which included Moses John, Deborah Stephen and the two soldiers) move to the Command Secondary School, which is the Military High School where both soldiers were attached, to report the incident to the Commandant of the school.

18. It is submitted that in response to the incidence, angry youths protested and demanded for justice for the deceased. That in response the Nigerian Army released a statement sometime on the 9<sup>th</sup> June, 2017 which was signed by Colonel Kingsley Umoh, Deputy Director, Army Public Relations 1 Division Nigeria Army confirming the incident at the same location stating that the deceased was shot and killed as averred. This press release was reported by several newspapers.

19. The Applicants claim that the body of the deceased was held in custody by the Respondent and that sometime in July 2017 they followed a lead to the 44 Army Reference Mortuary where they confirmed that the body was being held in a badly decaying state. The Applicants submit that the mortuary attendants informed them that they had orders not to release the body of the deceased.



20. That between 16<sup>th</sup> – 20<sup>th</sup> October, 2017 a Presidential Investigation Panel on Review Compliance of the Armed Forces with Rights and Obligations and Rules of Engagement sat in Kaduna and a petition in tandem with the facts herein was made before them by the Applicants. The Panel advised that the Nigerian Army (which maintained representation at the hearing) should release the body and try to ensure fairness in resolving the matter.

21. The Applicants aver that based on the decision of the Panel, they submitted two letters dated 23<sup>rd</sup> October and 15<sup>th</sup> November, 2017 seeking the release of the corpse of the deceased. Following this, the Army invited the Applicants' Counsel and the family for a meeting and confirmed that the deceased had been killed by a soldier who is an agent of the Respondent. That the Respondent promised to assist with burial costs but failed to make good on this promise as the Commandant later informed the family that the matter had been referred to higher authorities.

b) Pleas in law

22. The Applicant relies on the following instruments:

- i. Article 15 of the Revised Treaty of ECOWAS
- ii. Article 12 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap 10, Laws of the Federation of Nigeria, 1990
- iii. Articles 4, and 5 of the African Charter on Human and People's Rights





- iv. Article 2 of the Protocol (A/P1/7/91) on the Community Court of Justice
- v. Article 9 of the Supplementary Protocol (A/SP.1/01/05) amending the Protocol (A/P1/7/91) relating to the Community Court of Justice
- vi. Article 33 of the Rules of the Community Court of Justice.

c) Reliefs sought

23. The Applicant prays the Court for the following reliefs:

- a. A declaration that the death of the deceased (Solomon Andy) was by the act of Private Ocheme Abel; an official and agent of the Nigerian Army who is in the employment of the Federal Republic of Nigeria as agent of the Nigerian State, is unlawful and a breach of Article 4 of the African Charter on Human and People's Rights adopted by the Federal Republic of Nigeria in 1990.
- b. A declaration that the act of killing a defenseless, harmless and innocent citizen in an ECOWAS Member State by an agent of the Federal Republic of Nigeria is a violation of the deceased's (Solomon Andy) right to life and right against cruel, inhuman and degrading treatment as provided for in the African Charter on Human and People's Right to which Nigeria is a signatory.
- c. An order of the Honorable Court awarding damages in the sum of \$900,000.00 (Nine Hundred Thousand Dollars) to the Applicants and against the Respondent for the wrongful, arbitrary and unjustifiable killing of the deceased Solomon Andy.

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- d. An order of the Honorable Court awarding \$500,000.00(Five Hundred Thousand Dollars) to the Applicant and against the Respondent for the willful, intentional and perpetual refusal to recognize the inherent right to dignity of the human person of the deceased Solomon Andy.
- e. An order of the Honorable Court awarding \$700,000.00 (Seven Hundred Thousand Dollars) to the Applicants and against the Respondent as exemplary damages for the state to refrain its agents, privies and assigns from violating the rights of law abiding citizens of Member States.
- f. A mandatory order of the Honorable Court against the Respondent to release the corpse of the deceased (Solomon Andy) to the family for proper burial rites and for the Respondents to finance the burial of the deceased Solomon Andy who died untimely as a result of the reckless actions of agents of the Federal Republic of Nigeria.

## VI. RESPONDENT'S CASE

### a) Summary of facts

24. The Respondent, in its defense, restated the facts as presented by the Applicants seriatim and denies all the allegations contained therein including paragraph 1, which is the status of the First Applicant as a Nigerian and the mother of the deceased.

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25. The Respondent restates its duty and obligation to promote and protect the rights of its citizens or nationals against human rights violation by any community institution or an official of the community.

26. It is submitted by the Respondent that the Nigerian Army is an institution/agent which is statutorily empowered, amongst others, to suppress insurrection and acting in aid of civil authorities to restore order when called upon to do so.

27. It is the contention of the Respondent that the Applicant failed to show any evidence in the narration of facts that officers of the Nigerian Army sporadically shot three (3) men as averred. Further it is the claim of the Respondent that the Applicants have failed to submit evidence that the deceased died in Bengola Hospital as claimed in the narration of facts. Also, the Respondent submits that the Applicants have not adduced evidence supporting the allegation that the Respondent has custody of the deceased's corpse.

28. The Respondent confirms that the fact submitted by the Applicants that a Presidential Investigation Panel was set up but claims that the Applicants have not evidenced their petition submitted to this panel and the panel's response.

29. The Respondent amended its Statement of Defense and maintains its denial of all the averments of the Applicant including paragraph 1 of the Applicants Narration of Facts. It has been submitted in the amendment that an officer of the Nigerian Army has the power to set down corporal punishment on any person in breach of the peace and public order. It however admits the averments made towards

paragraph 1 and the act of shooting and killing the deceased unlawfully at the hearing of the application

30. The Respondent confirms that Gnr. Ocheme Abel in the company of Olabode Oladiren of the Command Secondary School, Kaduna shot Solomon Andy (the deceased) whilst on patrol. That event though an officer has powers to set corporal punishment in breach of peace or public order around a military zone or facility, Gnr. Ocheme Abel was immediately arrested and investigated.

31. It is submitted that an investigation was undertaken on the 9<sup>th</sup> June, 2017 in which a post mortem was requested and it was revealed that Gnr. Ocheme Abel had gone beyond the school boundary. It is reported that he had an encounter with the deceased and some miscreants who were engaging in the sale of illicit drugs and in the process of arresting them he shot the deceased. A copy of the investigation report is tendered as FMOJ1A.

32. The Respondent submits that a post mortem revealed that the deceased died as a result of a gunshot wound.

33. The Respondent contends that Gnr. Ocheme Abel, on the 5<sup>th</sup> September, 2017 had a case of murder established against him and was subsequently charged for murder, whilst the accompanying officer was charged with disobedience. That Gnr. Ocheme Abel acted unprofessionally and beyond his duty.

34. It is further submitted by the Respondent that the case was submitted to the Criminal Investigation and Intelligence Department in Kaduna in 2018 and the latter wrote a letter requesting to take possession of the corpse to carry out a post

mortem and subsequently release same to the family. That the Army in turn conveyed its approval of the request

35. The Respondent corroborated the Applicants' narration of facts that a Presidential Panel was set up to review the compliance of the Army with its human rights obligations and rules of engagement. It further confirmed that the Applicant was called as a witness before the panel and that the Army submitted a report attesting to the culpability of the soldier. That the recommendation of the Panel was that the soldier should be prosecuted, compensation be paid to the victim's family, a letter of condolence should be sent to the family from the Chief of the Army and the release of the corpse to the family for burial. That the recommendations of the Presidential Panel cannot be enforced as it is subject to the approval of the President.

36. Notwithstanding this, it is submitted by the Respondent that the soldier has been prosecuted and convicted by the State and sentenced to death by hanging. That due to his conviction the Respondent cannot be held vicariously liable for the actions of the soldier as the concept of vicarious liability is not applicable in criminal matters.

b) Pleas in law

37. The pleas in law submitted by the Respondent are:

- Article 4 of the African Charter on Human and People's Rights (hereinafter ACHPR)
- Article 5 of the ACHPR

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- Article 12 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap. A9, LFN, 2004
- DOUDA GARBA V REPUBLIC OF BENIN (2010) CCJELR
- Evidence Act, 2011
- ASSIMA KOKOU INNOCENT & 6 ORS. V TOGOLESE REPUBLIC (2013) CCJELR

c) Reliefs sought

38. The Respondent prays for the following from the Court:

- A declaration that the Respondent has not violated the provisions of the African Charter on Human and People's Rights and any international human rights treaties.
- A declaration that the Applicants' application is frivolous and lacking in merit.
- An order dismissing the Applicants suit in its entirety.

## VII. JURISDICTION

39. The application before this Court is premised on the unlawful killing of a community citizen and the confiscation and continuous retention of the corpse of the deceased which has been submitted as a violation of the right to dignity of the human person.



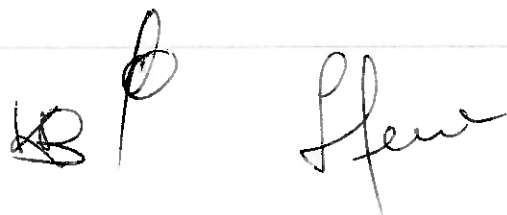
40. This has prompted the Applicant to plead various violations of African Charter on Human and People's Rights (hereinafter ACHPR), the Revised Treaty of ECOWAS and the African Charter on Human and People's Rights (Ratification & Enforcement) Act, Cap. A9, LFN, 2004. Based on this it has come under the umbrella of Article 9 of the Supplementary Protocol (A/SP.1/01/05) amending the Protocol (A/P1/7/91) relating to the Community Court of Justice.

41. The Court recalls at this juncture that the Respondent has not submitted any arguments questioning the competence it's to hear and determine the application. More so, the Court has competence pursuant to Article 9 (4) of the Supplementary Protocol (A/SP.1/01/05) to determine allegations of human rights violation against a Member State of the Community. This power has been consistently explained and adhered to in the jurisprudence of the Court especially in the decision of the Court in ALADETOYINBO V. FEDERAL REPUBLIC OF NIGERIA JUDGMENT NO ECW/CCJ/JUD/18/20 at page 8 (Unreported), where it held that a mere allegation of human rights violation is enough to confer jurisdiction on the Court.

42. The Court therefore, noting that the application has been brought pursuant to Article 9 (4) of the Supplementary Protocol (supra), declares that it has jurisdiction to determine the application.

### **ADMISSIBILITY**

43. In determining the admissibility of the application, the Court is guided by the relevant law which is Article 10 (d) of the Supplementary Protocol of the Court 2005 to wit:

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*“Individuals on application for relief of violation of their human rights the submission of which shall:*

- i. Not be anonymous nor*
- ii. Be made while the same matter has been instituted before another international Court for adjudication”.*

44.Over time the jurisprudence of the Court has distilled three parameters from the aforementioned article into the following:

- i. Whether the Applicants are victims*
- ii. Whether the application of the action is not anonymous*
- iii. Whether the application is not before another international Court for adjudication.*

45.On the issue of determination of the victim status, the Court is guided by the Basic Principles and Guidelines on the Rights to Remedy and Reparation for Survivors of International Human Rights and Humanitarian Law GA. Res. No 60/147 Preamble Sec IX UN Doc A/RES/60/147 March 21<sup>st</sup> 2006 to wit:

*“A victim is anyone who suffers individual or collective harm (or pain) such as physical or mental injury, emotional suffering, economic loss or generally any impairment of human right as a result of acts or omissions that constitute gross violation of humanitarian norms.”*

46.It is clear from the above that for any action initiated before the Court the Applicant must possess the *locus standi* following which the application will be adjudged inadmissible. *Locus standi* here connotes an interest or right to be

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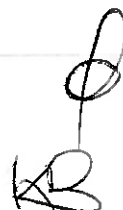
protected which was explained in ALHAJI MOHAMED HASSAN V GOVERNOR OF GOMBE STATE & ANOR (2012) CCJELR at page 83 (5) the Court had this to say:

*“Applicant not being a victim of the violation of human right has no locus to institute the action.”*

47. The Court has in series of decided cases made possible exceptions to the principle of an Applicant having to prove his victim status. In the case of STELLA IFEOMA & 20 ORS. V FEDERAL REPUBLIC OF NIGERIA (2015) CCJELR at page 7 the Court had this to say:

*“When it becomes impossible for him whose right is violated to insist on that right or to seek redress either because he is deceased or prevented in one way or the other from doing so it is perfectly normal that the right to bring his case before the law Court should fall on another person close to him.”*

48. This decision merely amplified what had been succinctly stated by the Court in THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS & ACCOUNTABILITY PROJECT (SERAP) V FEDERAL REPUBLIC OF NIGERIA & 20 ORS. (2014) CCJELR where it was held that if for any reason the direct victim of the violation cannot exercise his or her right in particular for being irreversibly incapacitated or having died as a result of the violation the closest family member can do so while assuming the status of indirect victims.



49. Notwithstanding this, the Court in REV. FR. SOLOMON MFA & 11 ORS. V FEDERAL REPUBLIC OF NIGERIA & 4 ORS. (2019) JUDGMENT NO. ECW/CCJ/JUD/06/19 (Unreported) at pages 16 & 17 emphatically articulated its position that it will as a matter of law require the proof of relationship from the Applicant with the dead victim to maintain an action before the Court.

50. The First Applicant, in the instant case, avers that the deceased is her biological son and she is bringing this action against the Respondent for violation of the right to dignity of the person and to the right to life. To support her claim of being the biological mother of the victim, the First Applicant submits Exhibit 1, which is a Birth Certificate of the deceased identifying the Applicant as the biological mother of the deceased.

51. In view of the principle laid down in the case STELLA IFEOMA & 20 ORS. V FEDERAL REPUBLIC OF NIGERIA (2015) supra, the First Applicant has met the requirement of close relation being that she has proven, in Exhibit 1 which is a Birth Certificate of the deceased, that she is the biological mother of the deceased, the victim. In conclusion the First Applicant has the locus standi to initiate this application she being a closed relationship of the deceased. The Court so holds.

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52. The Second Applicant is the estate of the deceased which comprises of the deceased's father, Mr. Andy Ita Ukpe, Blessing Solomon (seven years old daughter of the deceased) and other persons not clearly identified. That Court notes that whilst international law has established that a victim can be direct or indirect by way of legal authority, the said legal authority should be established.

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The said 'victim' should have legal personality for legal authority to be vested in it. Black's Law Dictionary 9<sup>th</sup> Edition defines legal personality as "*the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacity*". The Court considers that a legal person has legal rights and capacity to bring an action before a Court or tribunal and will consider whether the Second Applicant so qualifies.

53. The Second Applicant has referred to itself as the Estate of the deceased, Solomon Andy, yet the Court has not gleaned any authority/affidavit on oath supporting or establishing the identity of this Second Applicant as a victim. However, the Court recalls that father's identity is stated in Exhibit 1 but notes that the said father has not claimed in an individual capacity but as part of the Estate of the deceased.

54. It is noteworthy to state here that when a claim is brought forward by an entity that claims to possess the ability to enjoy rights and be bound by obligations (which is a legal personality), that entity must have gained its legal personality by law. In *NOSA EHANIRE OSAGHAE & 3 ORS V. REPUBLIC OF NIGERIA* JUDGMENT NO. ECW/CCJ/JUD/03/17 (Unreported) at page 18, the Court held that "*Human rights are human centered, and the admissibility of an application is linked among other criteria to the status of the victim. This condition necessarily entails the Applicant, acting on personal grounds as a result of a legally protected injured interest, or in a representative capacity, having the mandate to act on behalf of an identifiable group whose legally protected interest have been harmed.*" In the instant case, the Second Applicant (the Estate of the deceased) who is claiming as an entity must demonstrate before this Court, its capacity to act.

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55. This Court has stated in *FEDERATION OF AFRICAN JOURNALISTS & 4 ORS V. REPUBLIC OF THE GAMBIA JUDGMENT NO. ECW/CCJ/JUD/04/18* at page 15 that “*In all nascent system of law, legal personality whether natural or juridical is a requirement for bringing an action before a Court or tribunal. It is a pre-requisite for legal capacity.*” The Second Applicant in the instant case has failed to adduce evidence (documentary and testimonial) of such legal personality that will enable it dispense with the pre-requisite for capacity.

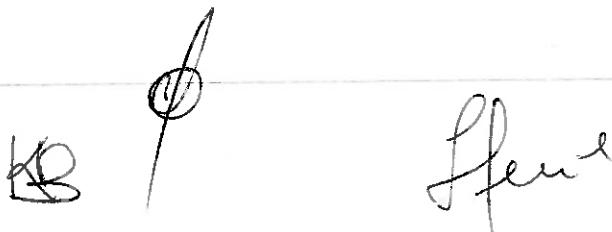
56. It is imperative that in claims before the Court the parties possess the required locus standi to be admitted pursuant to Article 10 (d) of the Supplementary Protocol (supra). Therefore, evidence supporting the legal personality of the Second Applicant would have sufficiently enabled this Court in determining its status as a victim (direct or indirect) in this claim.

57. Consequently, having failed to properly establish its locus standi in the application, the Court finds that the Second Applicant lacks capacity and is therefore struck out.

## **VIII. PROCEEDINGS BEFORE THE COURT**

### *Application for Default Judgment*

58. The Applicant filed an application for the default Judgment pursuant to Article 90(1) and 35(1) of the Rules of the Community Court of Justice on the 7<sup>th</sup> May, 2018.

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59. However, the Court being seised of the processes, especially the application for extension of time, proceeded to hear the motion. Having not dispensed with judgment at this stage and owing to the fact that the Respondent stated that the extension of time would not prejudice the Applicants' application in anyway if the Court were to grant its request, the Court saw reason in allowing same. In the quest for justice, the Court cannot ignore equality of arms which will aid a rich decision especially as it does not goes contrary to the Rules of the Court. The Court therefore proceeded to hear the case on its merits.

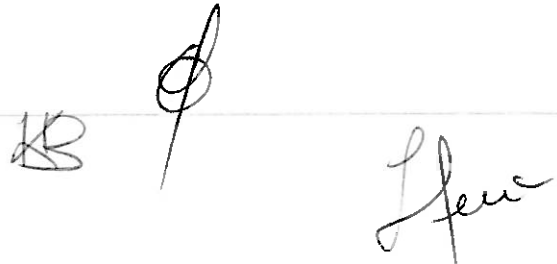
## IX. MERITS

60. The Court has formulated the a single issue for determination:

- *Whether from the evidence before this Court the Applicant has proven its case*

**ISSUE:** *Whether from the evidence before this Court the Applicant has proven its case*

61. The subject matter of the claim brought by the Applicant is for the unlawful killing of a community citizen by an agent of the Respondent and the confiscation of his body. The Applicants' prayers are therefore couched around several declaratory reliefs and orders of compensation and a mandatory order for the return of the corpse of the deceased.



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62. The Court notes that the Respondent recognized the act of shooting by its agent and the prolonged custody of the corpse of the deceased (Solomon Andy). However, the Respondent submits that it has investigated and prosecuted the act therefore it cannot be held liable and the claims must be dismissed.

63. Having distilled the issues, particularly “*Whether from the evidence before the Court and the provisions of the African Charter on Human and People’s Rights the acts alleged can be considered a violation*” the Court will adumbrate on the same issue under the following sub- issues:

- Respondent’s responsibility pursuant to the African Charter on Human and People’s Rights.
- Violation of Article 4 and 5 of the African Charter on Human and People’s Rights has been violated as claimed by the Applicants.

*a. Respondent’s responsibility pursuant to the African Charter on Human and People’s Rights*

***Applicants’ Case***

64. The Applicants claim that Solomon Andy, the deceased herein, was unlawfully killed by an agent of the Respondent in violation of his right to life. That the Respondent has confiscated the corpse and is still in possession of same which violates the right to dignity of the human person.

65. Articles 4 and 5 of the African Charter on Human and People’s Rights (ACHPR) are claimed to have been breached by the Respondent due to the acts of its agents.

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That the Respondent having enacted the ACHPR has also breached the Article 12 of the African Charter on Human and People's Rights (Ratification and Enforcement Act) Cap. A9, LFN, 2004

66. The Applicants are therefore praying for the Court to declare the act of killing the deceased unlawful and therefore a violation of its international obligations and order compensation and the release of the corpse.

***Respondent's Case***

67. The Respondent denies all the averments in his written defense but admitted same at the hearing and confirms that the agent was indeed a soldier in its employ who carried out the act during the scope of his employment.

68. The Respondent has corroborated the fact that a Presidential Investigation Panel was established to investigate the shooting of the deceased. The Respondent states it submitted to this panel that the matter was investigated and concluded with the finding that the soldier was culpable of acting outside its designated area. That he was consequently remanded and Court Martialed with a charge of murder.

69. The Respondent submits that the corpse of the deceased is still in the custody of one of its agents.

70. However, it is their contention that in a criminal matter there is no vicarious liability as the ex - soldier acted outside the scope of his duty and has since been convicted and he is serving his terms of imprisonment. That the said soldier was

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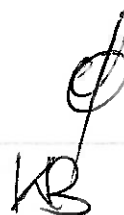
mentally sound when his act or omission was done and is therefore personally liable.

71. As a result the Respondent prays the Court to declare that it has not violated the provisions of the African Charter on Human and People's Rights and any other international treaty as claimed by the Applicants. That the Court should in turn dismiss the claims as they are frivolous.

### ***Analysis of the Court***

72. It is trite that the Court in the examination of a dispute "*...shall apply, as necessary, the body of laws as contained in Article 38 of the Statutes of the International Court of Justice.*" (Article 1 of the Protocol (A/P1/7/91) on the Community Court of Justice.

73. Article 38 of the Statute of the International Court of Justice reads: "*The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations ; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.*"

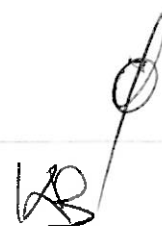




74. The Court therefore employs “*international custom, as evidence of a general practice accepted by law*” as a standard in this analysis, particularly the ‘*Draft Articles on Responsibility of States for Internationally Wrongful Acts*’ (2001, adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10).

75. Article 1 of Draft Articles (supra) reads “*Every internationally wrongful act of a State entails the international responsibility of that State.*” This was explained in the “*Rainbow Warrior*” Case (Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990)), the arbitral tribunal stressed that “*any violation by a State of any obligation, of whatever origin, gives rise to State responsibility.*” The term “*international responsibility*” has been interpreted to include the wrongdoing a State or to other subjects of international law, and whether they are centered on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures. (Commentaries on the Draft articles, in the Yearbook of the International Law Commission, 2001, vol. II, Part Two).

76. In the *Dickson Car Wheel Company Case*, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is “*that an unlawful international act be imputed to it, that is, that there exists a violation of a duty imposed by an international juridical standard.*” (*Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931)).

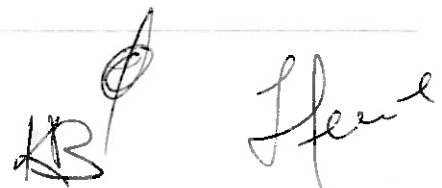


77. It is worth noting here that attributing responsibility to a State is based on criteria determined by international law and not by factual causality. The Draft Articles (supra) in its Article 4 attributes responsibility for acts done by organs of the state whilst in Article 5 it attributes conduct of entities empowered to exercise governmental authority of a State. Article 7 of the Draft Articles (supra) makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions.

78. This brief background on the international practice that apportions liability to States for wrongful acts forms the basis of the Court's determination in the claim before it. The Applicant has claimed a violation of human rights pursuant to the ACHPR to which the Respondent is a signatory and has domesticated the same. It is the claim that an agent of the state through his unlawful actions claimed the life of someone unlawfully and arbitrarily which is contrary to its obligations in international law. This action is considered a wrongful act in international law for which liability can be attributed to the State.

79. The Respondent in its rebuttal recognizes the act of unlawful killing and describes it as an unprofessional one outside the scope of assigned duty of its agent. The Respondent also claims to have investigated and convicted its agent therefore there is no cause of action as the agent's act cannot be tied to the Respondent. Furthermore, the Respondent confirms possession of the corpse of the deceased herein as submitted by the Applicants in the narration of facts.

80. The Court is mindful to recall Article 1 of the African Charter on Human and People's Rights which establishes the obligation of States therein:

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*“The Member States...shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”*

81. The rights within the ACHPR, especially Article 4 & 5 on which the claims herein are premised, must at all times be protected by State parties pursuant to Article 1 of the ACHPR. This apportions responsibility on the Member States for which a breach may result in liability. Overtime the Court has steadfastly laid down the responsibility of states in its jurisprudence particularly in TIDJANE KONTE & ANOR V. REPUBLIC OF GHANA (2014) CCJELR at page 16 where it stated that: *“The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activities.”*

82. The Court further stated in FESTUS A. O. OGWUCHE V. FEDERAL REPUBLIC OF NIGERIA JUDGMENT NO. ECW/CCJ/JUD/02/18 at pg. 37 that the act of State agents are attributable to the States. Also, in CHIEF DAMIAN ONWUHAM & 22 ORS V. FEDERAL REPUBLIC OF NIGERIA & ANOR JUDGMENT NO. ECW/CCJ/JUD/22/18 at page 27 this Court stated that *“The state is responsible for the acts of its agents in the course of their employment whether authorized or not.”*

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83. It is therefore correct to state here, following the above submissions, that the wrongful acts or omissions of States (organs, agents) are attributable to the State as it possess the responsibility to ensure that its obligations under international law are not breached. In *HEMBADOON CHIA & 7 ORS V. FEDERAL REPUBLIC OF NIGERIA & ANOR* JUDGMENT NO. ECW/CCJ/JUD/21/18 at page 16 this Court held that *“It is a well-established rule of international law that, the conduct of any organ of a State is regarded as the act of that State. State responsibility means that the act committed by an organ, agents and State officials should be attributed to the state party. A state cannot take refuge on the notion that the act or omissions were not carried out by its agents in their official capacity or that the organ or official acted contrary to orders, or exceed its authority under internal law.”*

84. In the instant case, where the obligation of the Respondent has been clearly recognized pursuant to Article 1 of the ACHPR and the act upon which the claim is premised has been firmly established, attributing responsibility is possible based on evidence and not only on factual causality. This Court considers that the Respondent owes a duty to its citizens pursuant to Article 1 of the ACHPR and any breach thereto will render it responsible for a wrongful act/omission. That a State is responsible for all internationally wrongful acts of its organs, agents etc. was settled by Article 7 of the Draft Articles (supra) which reads: *“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”*

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85. Consequently, the Court holds that the Respondent is responsible for the wrongful act of its agent pursuant to international law and practice.

*b. Violation Article 4 and 5 of the African Charter on Human and People's Rights as claimed by the Applicants*

*Applicants' case*

86. The Applicants have submitted that the deceased, Solomon Andy, was unlawfully shot and killed by an agent of the Respondent after subjecting him to some cruel treatment. They claim that after the unlawful killing, the Respondent confiscated the corpse and has continued to maintain custody of the same to date.

87. It is the claim of the Applicants that the shooting which resulted in the death of the deceased is contrary to Articles 4 and 5 of the ACHPR and Article 12 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act. The Applicants are therefore claiming a violation of the right to life and the right to inherent dignity of the person.

88. It is submitted that the unprofessional act of the Respondent's agent caused the unlawful killing of the deceased and the custody of the decaying corpse. That these acts are tantamount to violation of rights to life and inherent human dignity.

89. For the reasons stated they are praying that the Court grants several declarations and orders as listed in paragraph 20 above.

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### *Respondent's Case*

90. It is the contention of the Respondent that the act of shooting which caused death occurred but that it was carried out by an agent outside the scope of his duty and unprofessionally. That the post mortem examination conducted on the deceased revealed that the cause of death was as a result of hemorrhagic hypovolemic shock resulting from a ruptured left subclavian artery from penetrating gunshot injuries. That the matter was investigated and the said agent was charged and convicted for murder and discharged from the Army.
91. The Respondent therefore submits that the agent acted personally and therefore it (the Respondent) cannot be held liable for his action. That having investigated, convicted and discharged the agent there is no violation of any international treaty. That the Nigerian Army has conveyed approval for the Criminal Investigation and Intelligence Department of the Nigerian Police Force, Kaduna to collect the corpse of the deceased at the 44 Nigerian Army Reference Hospital, Kaduna.
92. The Respondent submits that the Applicants have failed to prove the violations of Article 4 and 5 of the ACHPR and Article 12 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act.
93. Consequently, the Respondent prays that the Court declares that it has not violated the provisions of the African Charter on Human and People's Rights and any other international treaties. Further, that the Court should dismiss the application as it is frivolous and lacking in merit.



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### *Analysis of the Court*


94. The claim is for the violation of Articles 4 and 5 of the ACHPR to which the Respondent is a signatory.

#### *Article 4 of the ACHPR*

95. Article 4 of the ACHPR reads: “*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*”

96. This Court has previously held that “*The right to life imposes an obligation on States to investigate all acts of crime and bring the perpetrators to book. A State will be neglecting its obligation under international law and treaty if it does not carry out effective investigations into crimes committed on its territory.*” (See DEYDA HYDARA JR & 2 ORS V. REPUBLIC OF THE GAMBIA JUDGMENT NO. ECW/CCJ/JUD/17/14 at page 6.)

97. It is evident from the provision in Article 4 ACHPR that it created a universally recognized fundamental human right that covers the arbitrary deprivation of life and is recognized as a *jus cogens* norm in customary international law and is universally binding at all times. Therefore, any and all arbitrary killings committed within a State are considered grave and should be treated according to international standards. The standard is therefore set alongside the responsibility of the State within the Charter, which mandates States to implement legal and practical framework to respect, protect, promote and fulfil

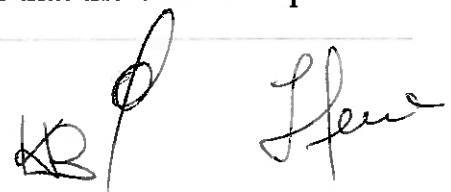
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the right to life. This responsibility entails tangible steps that prevents against arbitrary deprivation of life and the onus of conducting prompt, impartial investigations where any an act of arbitrary deprivation of life has occurred.

98. In *MRS MODUPE DORCAS AFOLALU V. REPUBLIC OF NIGERIA* JUDGMENT NO. ECW/CCJ/JUD/15/14 at page 13 this Court held that “*The components of the right to life may equally be sub-divided to include explicit obligation upon the State to institute proceedings into any matter to which the State is connected, notably by conducting an effective inquiry into the violent incidents, and into the death which occurred.*” This translates to a requirement of accountability for any allegation for the deprivation of the right to life, pursuant to Article 4 of the ACHPR. This necessitates that a State must conduct a transparent and impartial investigation that should follow due process and basic human rights guarantees.

99. In the instant case, the facts depict that there was a shooting which was done by an agent of the Respondent in the course of his duty and the said shot was aimed at the deceased (Solomon Andy). This act was perpetrated against a civilian in an arbitrary manner that goes against the customary norms of international law. Arbitrary in this sense means that the act is impermissible under law, both municipal and international. As a result of the shooting, death occurred which amounts to the unlawful killing of a person.

100. The evidence that the Respondent has put before this Court is that the agent acted unprofessionally and outside the scope of his duty therefore, liability for the killing is the sole responsibility of the agent. The Court must reiterate that the obligation pursuant to customary international law is that the State is responsible

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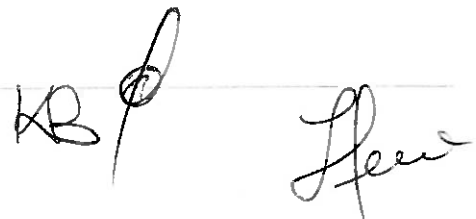


for all violations of Article 4 of the ACHPR committed by all its organs (executive, judiciary and legislative).

101. In STELLA IFEOMA NNALUE & 20 ORS V FEDERAL REPUBLIC OF NIGERIA (2015) CCJELR at page 9 this Court stated that *“Every State Party to the Charter and more generally any State Party to any legal instrument prescribing respect for right to life, physical integrity of human beings and prohibition of torture, remains under obligation to employ all the means at its disposal to prevent all acts and practices which tend to go contrary to those obligations. The State shall guarantee the actual implementation of the stipulated rights, notably within the context such as submitted before this court in the instant case, where it is against the States agents, i.e. against persons acting directly under the States’ authority- State police and security forces – that the complaints are made against.”*

102. Notwithstanding the various submissions by the Respondent in trying to sever its liability from the act of its agent and the actions taken subsequently in trying to discharge its obligations pursuant to international law, the Court finds that Respondent is not absolved as there was an unlawful killing of a human being.

103. The Court notes further that the Respondent confirms the setting up of a Presidential Investigation Panel to investigate the alleged violation but submitted that the recommendations were not binding as they needed Presidential approval. It is similarly noted that the Respondent submits that an investigation was undertaken which culminated in the prosecution and conviction of its agent. However, the Court is mindful that the accountability criteria requires that

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measures such as reparation, ensuring non-repetition and making sure that the victims have access to effective remedies for violations are imperative.

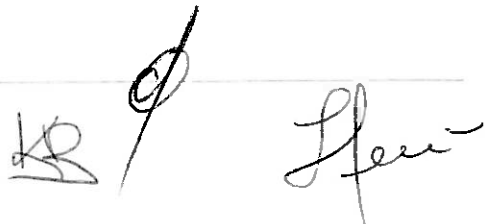
104. The facts and evidence show that whilst the Respondent claims that there was a process of investigation, prosecution and conviction there was no mention that the First Applicant was included in the process. The Court affirms that it is not enough that the process is seen to be done but it should be done in a manner that conveys total condemnation of arbitrary killing and gross violation of an international norm.

105. It is the Court's considered finding that there was a breach of Article 4 of the ACHPR which resulted in a violation.

#### ***Article 5 of the ACHPR***

106. Article 5 of the ACHPR reads: "*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading treatment shall be prohibited.*"

107. The Applicant alleged that before the fatal shooting of the deceased (Solomon Andy) was subjected to cruel treatment by the Respondent agent. That following his death from the gunshot, the body of the deceased (Solomon Andy) was taken possession of by the Respondent and remained in its custody throughout this litigation in Court.

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108. The Respondent in its submission admitted that the deceased was shot and killed by its agent. The Court notes that the Applicant complained that the state of the corpse of the deceased (Solomon Andy) whilst in the custody of the Respondent was horrible.

109. The Court notes further that the Respondent did not deny being in possession of the corpse of the deceased (Solomon Andy) at the hearing. Therefore, the Court is of the opinion that the act of continued retention of the corpse is grossly humiliating and amounts to a violation of the right to dignity of the dignity of the victim, Solomon Andy.

110. The dignity of the human being encompasses both moral and physical aspects which translates to the guarantee of both aspects being preserved during life or after death (dignified death). The enjoyment of this guarantee by a human being includes persons who can be determined as indirect victims of a person who may (as in this instance) find themselves suffering when they are deprived of being able to give a respectable burial and to pay their last respects to the memory and body of a loved one.

111. It is noteworthy to recall the facts submitted by the Applicant that the deceased's (Solomon Andy) body was already in an advanced state of degeneration, which reinforces the urgent need for its release and delivery to the loved ones for burial.

112. The Court therefore deems the act of the Respondent of retaining the corpse of the deceased for an unreasonably long time as a violation that robs the

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deceased of the dignity of a decent and befitting burial in accordance with the deceased's customary and traditional practice.

113. In view of the above the Court holds that the Respondent violated the right to dignity of the body of the deceased (Solomon Andy) and the Court so holds.

## **X. REPARATIONS**

114. Being very certain that the life lost cannot be recovered neither can the soiled dignity of the deceased be erased, the Court will award compensation as a remedy for the violation of the right to life and the respect for human dignity.

115. The Court in this regard considers Twenty Five Million Naira (N25, 000,000) a minimum compensation to be paid by the Respondent to the First Applicant for the violation of the right to life of the deceased (Solomon Andy) pursuant to Article 4 of the ACHPR.

116. The Court also orders payment of Five Million Naira (N5, 000,000) as costs to be incurred for the burial of the deceased.

117. This Court also orders the immediate release of the corpse of the deceased, Solomon Andy, to the First Applicant for immediate burial.

## **COSTS**

118. The Applicants have not prayed the Court for costs neither has the Respondent requested deterring costs.

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119. Article 66 (1) of the Rules of the Court provides that “[A] decision as to costs shall be given in the final judgment or in the order which closes the proceedings.”

120. Having not prayed for costs the Court will rely on Article 66 (11) of the Rules of Procedure of the Court which states: “If costs are not claimed, the parties shall bear their own cost.”

## **XI. OPERATIVE CLAUSE**

For the reasons stated above the court sitting in public after hearing both parties:

### **As to jurisdiction:**

- i. Declares that it has jurisdiction.

### **As to admissibility:**

- ii. Declares the First Applicant has the capacity to act and the Second Applicant lacks the capacity to so act.

### **As to merits of the case:**

- i. Finds a violation of pursuant to Article 4 of the African Charter on Human and People’s Rights.
- ii. **Finds** a violation of pursuant to Article 5 of the African Charter on Human and People’s Rights.

### **As to reparation:**

- iii. **Orders** the Respondent to pay to the First Applicant the sum of Twenty Five Million Naira (N25, 000,000) as compensation.

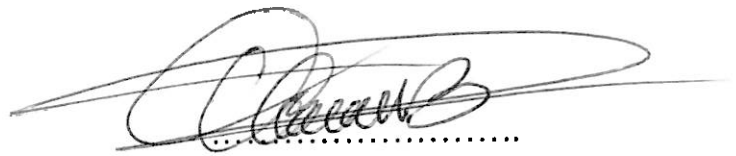


- iv. **Orders** the Respondent to pay costs of Five Million Naira (N5, 000,000) to the First Applicant to cover the cost of burial.
- v. **Orders** the Respondent to immediately release the corpse of the deceased Solomon Andy to the First Applicant.
- vi. **Dismisses** all other claims.
- vii. **Orders** the Respondent to immediately implement and comply with the above orders.

**COSTS:**

- i. Orders the parties to bear their own costs.

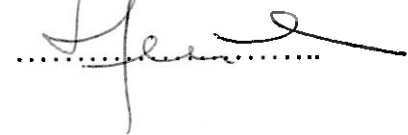
Hon. Justice Gberi-Be OUATTARA



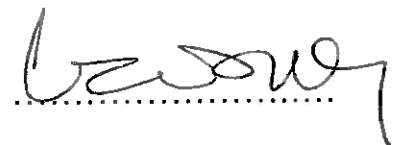
Hon, Justice Keikura BANGURA



Hon. Justice Januaria T. Silva Moreira COSTA



Dr. Athanase ATANNON - Deputy Chief Registrar



Done in Abuja, this 15 day of February 2022 in English and translated into French and Portuguese.

