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

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

HOLDEN AT ABUJA, NIGERIA

ON FRIDAY, THE 11TH DAY OF OCTOBER 2019

SUIT NO: ECW/CCJ/APP/44/2016

JUDGMENT NO: ECW/CCJ/JUD/29/19

BETWEEN:

PRIVATE BARNABAS ELI ---------- APPLICANT

AND

THE FEDERAL REPUBLIC OF NIGERIA----------RESPONDENT

COMPOSITION OF THE COURT

Hon Justice Gberi-Be OUATTARA - Presiding Judge
Hon. Justice Dupe ATOKI - Judge Rapporteur
Hon Justice Januaria COSTA - Member

Assisted by:

Tony ANENE-MAIDOH - Chief Registrar

REPRESENTATION TO PARTIES

Sola Egbeyinka, Esq. LLM - For Applicant

The Federal Government of Nigeria was not represented.

JUDGMENT

This is the judgment of the Court, which was rendered in default in open Court

PARTIES

1. Private Barnabas Eli (hereinafter referred to as "the Applicant) is a citizen of the Federal Republic of Nigeria by birth and is therefore a community citizen of the Economic Community of West African States (ECOWAS).

2. The Application was filed against the Federal Republic of Nigeria (hereinafter referred to as "the Respondent State"), a member State of the ECOWAS and signatory to the ECOWAS Treaty.

SUMMARY OF FACTS

3. The Applicant avers that he was recruited into the Nigerian Army, a military institution of the Respondent State on 14 August 2009. Subsequently, he was commissioned as a soldier of the Nigerian Army, following a successful recruitment exercise, on 14 January 2010 and issued with Army Number 09NA/64/4667.

4. The Applicant states that after he was commissioned as a soldier, he was drafted to 1 Battalion of the Nigerian Army. He states that sometime in January 2011, he was detailed to participate in a National Assignment known as Special Task Force (STF), Operation Save Haven in Jos Plateau State and he resumed at the STF headquarters in Jos. He states that while he was on the said national assignment, he was posted to Kassa checkpoint sector 7.

5. The Applicant further states that on 6 April 2012, while on duty at the Kassa checkpoint, he suddenly developed a stomach upset, which became uncontrollable. He then went to the nearest chemist to get medication. He states that upon his return, he discovered that unknown persons had burgled his

residence and a rifle allocated to him, belonging to the Nigerian Army was stolen.

6. He then lodged a complaint with his after which he was led to the Barkin Ladi Police Station where was detained. He was later moved to the 3 Division of the Nigerian Army in Jos, which had jurisdiction over the matter. On 9 December 2013, he was arraigned before a Military Court Martial and sentenced to a term of two years imprisonment.

7. The Applicant alleges that he was first detained at the Provost Group Guardroom in Jos and thereafter transferred to Jos Main Prison where he served the remaining part of his sentence. He states that on 8 December 2015, he was released from prison after having served the two-year prison term.

8. The Applicant alleges that the Confirming Authority of the Nigerian Army till date has not confirmed the sentence of a term of two years passed on him by the Military Court Martial, as provided for under Section 148 of the Armed Forces Act.

9. The Applicant further states that since his release from prison, he has not been reinstated into the Nigerian Army, despite concerted efforts and letters through his Counsel to the Nigerian Army requesting his reinstatement. The Applicant alleges that the GOC only responded to one of the letters, dated 27 August 2012, via a letter dated 4 September 2014, wherein he declined to accede to the Applicant's formal request for a release on the grounds that the sentence of the Applicant was still running. The last letter by his Counsel, dated 24 March 2016, was written to the Chief of Army Staff, wherein the Counsel requested the Nigerian Army to review the case of the Applicant with a view to readmitting

him into the Nigerian Army and that all arrears of salaries and other entitlements should be paid to him. The Applicant alleges that Chief of Army Staff did not respond to the said letter neither was action taken in respect of the requests.

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10. The Applicant states that following his irregular and unlawful dismissal from the Nigerian Army, he has become an idle young man residing at Bandawa Lugere Lamurde Local Government Area of Adamawa State with no reasonable and feasible means of sustenance.

Alleged Violations

11. The Applicant alleges the following violations of his rights:

i. That while in the custody of the Respondent State, he was physically, psychologically, mentally and emotionally traumatized, in violation of Article 5 of the African Charter on Human and Peoples' Rights (the Charter).

ii. That the Respondent State failed to substantiate the false and baseless allegation of missing rifle made against him before the General Court Martial till date.

iii. That the Respondent State failed and willfully refused to confirm the spurious findings of the General Court Martial till date.

iv. That the Respondent State violated the following fundamental human rights under Articles 1, 2, 3, 4, 5, 6, 7 and 15 of the Charter; Articles 1, 2, 4, 5,6,7,9 and 23 of the Universal Declaration of Human Rights (UDHR); Articles 5 and 6 of the International Covenant on Economic Social and Cultural Rights; Principles 1, 5, 6, 8,32, 35, 36, 37 and 38 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

RELIEFS SOUGHT BY THE APPLICANT.

12. The Applicant prays the Court to order the following reliefs:

a. Declaration that the arrest and subsequent detention of the Applicant at the Barkin Ladi Station in Plateau State on 7 April 2012, at the instance of the Respondent State without being duly informed of the nature and reason for his arrest is illegal, unlawful, null and void as same is contrary to the provisions of Article 7 of the African Charter on Human and Peoples' Rights, Principles 10 and 12 of the Body of Principles for the Protection of all Persons under any form of Detention or imprisonment, Section 35 (3) of the 1999 Constitution of the Federal Republic of Nigeria (Third Alteration Act) As Amended.

b. A Declaration that the continuous detention of the Applicant at the Special Task Force Guard Room in Jos, Plateau State from 8 April 2012 to November 2013 without being charged before any Court of Competent Jurisdiction in Nigeria for a written offence, is contrary to the provision of Section 35 (4), (5), (6) of the 1999 Constitution of the Federal Republic of Nigeria (as Amended) Third Alteration Act, Principle 11 of the Body of Principle for the Protection of all Persons under Any Form of Detention or Imprisonment and Principle 36 of the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.

c. A Declaration that the arraignment of the Applicant before the General Court Martial on 4 December 2013 and the subsequent sentence of a term of two years imprisonment passed on the Applicant thereafter on 9 December 2013 without the confirmation of the designated Nigerian Army Authority is illegal, ultra vires, null and void, as same contravenes the provisions of

Article 6 of the African Charter on Human and People Rights, Principle 2 of the Body of Principles for the Protection of all Persons under Any form of Detention or Imprisonment, Principles 3, 4, 9 and 39 of the Body of Principles of the Protection of All Persons under any form of Detention or imprisonment.

d. An Order of this Honourable Court compelling the Respondent State, its agents, assigns, privies, servants and by whatsoever name called to pay over to the Applicant, the sum of N 10 000, 000.00 (Ten Million Naira) only as general damages for the psychological, physical, mental, inhuman and degrading treatment the Applicant was subjected to following his illegal arrest and subsequent detention at various military formations and Police cell at the instance of the Respondent State.

e. An Order of this Honourable Court compelling the Respondent State, its agents, assigns, privies, servants and by whatsoever name called to immediately reinstate the Applicant into the Nigerian Army as a soldier on the rank his colleagues with whom he was commissioned into the Nigerian Army as soldiers on the same date are presently occupying.

f. An Order of this Honourable Court compelling the Respondent State, its agents, assigns, privies, servants and by whatsoever name called to pay over to the Applicant, his monthly salaries from the month of March 2015 in the sum of N45, 000.00 (Forty Five Thousand Naira) only, as operation allowance being a Soldier that participated in the Special Task Force Federal Government National Assignment from the month of April 2015 to the date the Judgment of this Honourable Court is enforced.

g. An Order of this Honourable Court by way of a perpetual injunction restraining the Respondent State, its agents, assigns, privies and by whatsoever name called, from intimidating, harassing, arresting or incarcerating the Applicant in respect of this suit as presently constituted.

h. And for such or further orders as this Honourable Court may deem fit and proper to make in the circumstance.

APPLICATION FOR A DEFAULT JUDGMENT

13. The Respondent State did not file a Defence to the Application. Consequently, by Motion on Notice dated 10 October 2018, the Applicant prayed the Court to enter a default judgment for the Applicant against the Respondent State, for the failure of the latter to file a Defence to the Application and prays the Court to grant the following:

i. An Order entering a default judgment in this suit in favour of the Applicant, against the Respondent State for failure to file a defence to the suit;

ii. An Order deeming that a default judgment has been entered in favour of the Applicant in this suit;

iii. And for such order or further orders as this Court may deem fit and proper to make in this circumstance."

14. The grounds adduced by the Applicant in support of the prayers are as follows:

i. That the Applicant filed the originating process in this suit on 14 December 2016 at the Registry of the Court;

ii. That the Respondent State was duly served with the Applicant's originating process by the Registry of the Court;

iii. That the time stipulated by the Rules of the Court for the Respondent State to file a Defence has since elapsed;

iv. That it is almost two years that the Respondent State received the originating process.

ISSUES FOR DETERMINATION

The court has formulated the following issues for determination

i. Whether the Application for a default judgment satisfies the requirements of Article 90 (4) of the Rules of the Community Court of Justice ECOWAS (hereinafter referred to as "the Rules").

ii. Whether the sentence of the Applicant to two years imprisonment following his conviction by the military court martial without the required confirmation by the appropriate authority as provided in Section 148 of the Armed Forces Act is unlawful and therefore void and contrary to section 6 of the African Charter.

iii. Whether the allegation of violation of other rights of the Applicant as claimed has been proved.

iv. Whether in the light of the facts and evidence adduced, the Applicant is entitled to the reliefs sought.

ANALYSIS OF THE COURT

ISSUE NO 1

Whether the Application for a default judgment satisfies the requirements of Article 90 (4) of the Rules of the Community Court of Justice ECOWAS.

15. The initiating application in the present case was filed at the Registry of the Court on the 14th of December 2016. On the 16th of December 2016, the Defendant was duly served with the initiating application. Under the Rules of Procedure of the Court, the Defendant is obliged to lodge its defence or enter appearance within

one month of service on him of the initiating application. The Defendant has however failed, refused and or neglected to put up a defence.

16. In compliance with Article 90 of the Rules, the Plaintiff on the 18th of October, 2019 filed at the Registry of the Court its application for default judgment. Again, the Defendant though duly served with the application on the 24th October 2018 failed to put up a response.

17. In the absence of compliance by the Defendant with the procedure, the Court is entitled to reach a default decision. In so doing, the Court will be guided by the provisions of the Rules to determine whether or not the case of the Plaintiff meets the criteria for judgment to be entered in default.

18. Article 35 of the Rules provides that: **"*Within one month after service on him of the Application, the defendant shall lodge a defence…"***

19. Article 90 (1) of the Rules provides: *"**If a defendant on whom an application initiating proceedings has been duly served fails to lodge a defence to the application in the proper form within the time prescribed, the applicant may apply for judgment in default."***

20. Article 90 (4) further provides that: ***"Before giving judgment by default, the Court shall, after considering the circumstances of case, consider: Whether the initiating application initiating the proceedings is admissible; whether the appropriate formalities have been complied with; and whether the application appears well founded".***

21. In *Chude Mba v The Republic of Ghana,* Judgment N°ECW/CCJ/JUD/10/13, the Court spelt out conditions to be satisfied for the Court to grant an application for default judgment in the following words:

> ***"Pursuant to the provisions of Article 90(4), this Court in deciding whether or not to grant the application for default judgment has to consider the issue of admissibility of the action, the fulfilment of the procedural requirements as well as the sufficiency of facts adduced by the applicant to warrant the granting of the default judgment".***

22. In the same vein, in *Mohammed El Tayibbah v. Republic of Sierra Leone*, ECW/CCJ/JUD/ 11/15 the Court found that in determining an application for default judgment, it must consider issues of competence, admissibility and proof before determining the case on its merits.

23. The Court will now analyse the facts of the case to determine compliance with these requirement.

On admissibility of the Application

24. In determining this requirement, the court must establish that the subject matter is within the competence of the court, that the parties can access the court and that they have the requisite standing.

i. Jurisdiction

25. Jurisdiction is the authority the Court has to decide matters litigated before it. It serves as the lifeline and the only channel that rationalizes any adjudication. Thus where a Court has no jurisdiction, its proceedings however well conducted remain a nullity. Article 9 of the 2005 Supplementary Protocol of the Court

stipulates the jurisdiction of the Court with Article 9 (4) of the said 2005 Protocol being the most relevant and it provides:

> *"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."*

26. This Court has in its flourishing jurisprudence held that the mere allegation that there has been a violation of human rights in the territory of a member state is sufficient to justify its jurisdiction on the dispute, surely without any prejudice to the substance and merits of the complaint which has to be determined only after the parties have been given the opportunity to present their case, with full guarantees of fair trial. See SERAP v. FRN & 4 Others ECW/CCJ/JUD/16/14.

27. Also in Kareem *Meissa Wade v. Republic Of Senegal,* ECW/CCJ/JUD/19/13, at pg. 259 Para. 95 (3), this Court held that: "*Simply invoking human rights violation in a case suffices to establish the jurisdiction of the Court over that case."* See also *Bakare Sarre v Mali* (2011) CCJELR pg. 57 and Dr. George S. Boley v The Republic Of Liberia & 3 Ors. ECW/CCJ/JUD/24/19.

28. The claim of the Applicant is premised on a plethora of allegation of violation of his rights as listed in paragraph 13 iv supra. In line with the above jurisprudence of the Court vis-à-vis the facts of the present application, it is our view, that the Court has the requisite competence to determine the application submitted by the Plaintiff same been premised on allegation of human rights contained in his initiating documents.

ii. Access to court

29. In determining persons who can access the Court, Article 10 (d) grants access to:

"Individuals on application for relief for violation of their human rights; the submission of application for which shall:

i. Not be anonymous; nor

ii. Be made whilst the same matter has been instituted before another International Court for adjudication.

30. The application is obviously not anonymous and the Court has no record that the same matter has been instituted before another International Court for adjudication

31. In light of these considerations, the Court finds that the Application has met the requirements for admissibility and so declares.

On whether the application has met the appropriate formalities.

32. Article 35 of the Rules provide that "***Within one month after service on him of the application, the defendant shall lodge a defense…"***

33. The Court notes that in the settlement of a dispute before any domestic or international court, there are certain formalities that must be complied with at the commencement of a suit. One of such requires the initiating party to serve all processes on the party against whom such a suit is instituted. Article 34 of the Rules, provides that "***an application shall be served on the defendant".*** The purpose of service of a process is to give appropriate notice to the other party and adequate time for response to the allegations. It also enables the judicial body to assert its jurisdiction over the case. In this vein the Court in the case of Chude Mba supra stated that,

"the first formality that must be observed throughout the process has to do with the adversary principle which aims at notifying the defendant that an application has been filed against him/her at the court and offering him/her the opportunity to defend"

34. In the instant case, the initiating application was filed at the Registry of the Court on the 14th of December 2016. On the 16th of December 2016, the Defendant was duly served with the initiating application. Having failed to file a response the Applicant filed an Application for Default Judgment, which was equally served on the Respondent. The Court therefore holds that all appropriate formalities have been complied with.

On whether the Application is well founded

35. Regarding this requirement, the Court must consider the sufficiency of the facts adduced by the Applicant to ground the default judgment. To ground a well-founded application, the Court must come to a conclusion that the facts are sufficient to support the claims against the Respondent State. This principle was reflected in the case of *Vision Kam Jay Investment Limited v President of ECOWAS Commission,* when the Court stated that,

"…entering judgment is not a matter of course. The Court must examine the totality of the evidence provided by the plaintiff to determine whether there is a cause of action and if the claim has been satisfactorily proved"

36. Similarly, in *Mohammed El Tayyib Vs Republic of Sierra Leone,* the Court held:

"However, the granting of the application for default judgment against the Defendant does not automatically mean entering judgment on the substantive suit in favour of the Applicant. The court must

consider issues of competence, admissibility and proof before determining the case on merit."

37. The Court will on no occasion give judgment in favour of an applicant based on mere application for a default judgment; the facts in this case, though uncontroverted must establish the merits of the case. In the words of the Court in the above referred case it concluded and held that:

> ***"As earlier noted, in considering the merits of the case, it is necessary to evaluate the evidence adduced by the Applicant so as to determine whether it is sufficient to ground a decision of this court in his favour"***

The court will now proceed to consider the merits of the case.

MERITS

ISSUE NO 2

Whether the allegation that the sentence of the Applicant to two years imprisonment following his conviction by a military court martial without the required confirmation by the appropriate authority as provided the Armed forces Act, is unlawful and therefore void and constitutes violations of Article 6 of the provisions of the African Charter and other international human rights instruments ratified by the Respondent State.

38. From the facts presented for consideration, the Applicant, was a member of the Nigerian Army posted to sector 7 Riyom, in Plateau State. The Applicant averred that sometime in 2012, in the course of his official duty, a Rifle belonging to the Nigerian Army in his possession was stolen at his duty post. On this premise, the Applicant was arrested, detained and subsequently tried and convicted to a term of 2 years imprisonment by a Court Martial. The Applicant further states that his

conviction was not confirmed by the relevant confirming authority and as such is illegal and amounts to a nullity. Consequently, the Applicant approached this Court to adjudge that his arrest, detention, trial, conviction and subsequent dismissal by the Respondent is illegal, ultra vires, null and void and contravenes the provisions of Article 6 of the African Charter, Principle 2 of the Body of Principles for the Protection of all Persons under Any form of Detention or Imprisonment, Principles 3, 4, 9 and 39 of the Body of Principles of the Protection of All Persons under any form of Detention or imprisonment . The Respondent did not put up a defense in rebuttal to the claims of the Applicant.

39. The following sections of the Armed Forces Act (AFA) Cap A20. Laws of the Federation of Nigeria (LFN) are relevant in determining the issue raised above.

40. Section 68 (1)(a) of the Armed Forces Act provides,

> "***A person subject to service law under this Act who loses a public or service property of which he has the charge or which forms part of the property of which he has the charge or which has been entrusted in his care, is guilty of an offence under this section and liable, on conviction by a court-martial to imprisonment for a term not exceeding two years or any less punishment provided by this Act."***

41. Section 148 of the Armed Forces Act also provides that any finding of guilt and sentence for a criminal charge by a court-martial must be transmitted to the confirming authority for confirmation of the finding and sentence. It also provides in Subsection (2) that *"**where the record of proceedings of a court-martial… are not transmitted within sixty days as aforesaid, and the accused remains in custody, he shall be released unconditionally pending such confirmation or review."*** It further states that until the required confirmation is

made, such finding or sentence shall not be treated as a finding or sentence (Subsection 3). The said Section 148 (3) provides:

> ***"A finding of guilty or sentence of a court-martial shall not be treated as a finding or sentence of the court-martial until it is confirmed: Provided that:***
>
> ***a) this subsection shall not affect the keeping of the accused in military custody pending confirmation, where the sentence is a term of imprisonment or a higher sentence, or the operation of sections 149 and 150 of this Act, or the provisions of this Act as to confirmation or approval;***

42. Section (a) above contemplates that when the sentence is a term of imprisonment a confirmation at some point is necessary though detention within the waiting period is authorized. In the instant case, the Applicant remained in detention without a confirmation order. More importantly, he served his two years prison term without the said confirmation. The question to be determined at this point is whether the sentence passed on the Applicant is deemed valid in the absence of a confirmation order from the confirming authority?

43. It is evident from the provisions of the AFA that the Confirming Authority plays an indispensable role in virtually all matters relating to the Court Martial. Also, the wordings of the AFA in relation to the confirming authority embodies a continuous use of the word "shall" which denotes the doing of a mandatory act. To buttress this assertion, Section 151 (1) of the AFA provides the responsibilities of the said confirming authority in relation to the court martial in the following word***s:***

"Subject to the provisions of section 150 of this Act and to the following provisions of this section, a confirming authority shall deal with the finding or sentence of a court-martial—

1. ***by withholding confirmation, if of the opinion that the finding of the court-martial is unreasonable or cannot be supported, having regard to the evidence or to the fact that it involves a wrong decision on a question of law or that on any other grounds there was a miscarriage of justice; or***
2. ***by confirming the finding or sentence; or……..***

(c) by referring the finding or sentence or both for confirmation to a higher confirming authority".

44. From the above provisions, the Court notes the following:

a. The loss of a public or service property by a person subject to service is criminalized and subject to prosecution by a court martial

b. Upon conviction, records of proceedings must be transmitted to the authorizing authority within 60 days of conviction

c. The concerned person if in custody must be released unconditionally pending such confirmation or review.

d. Even where the sentence is a term of imprisonment and therefore authorized to be detained, a confirmation must still be made.

e. Where no confirmation is made, such finding or sentence shall not be treated as a finding or sentence.

45. A careful perusal of section 150 (a) of the above provision shows that a confirmation by the confirming authority can be withheld where it finds the decision of the court martial to be unreasonable, or where such finding/sentence

will lead to a miscarriage of justice. It can therefore be deduced that the role of the confirming authority is key as it holds the powers to confirm, withhold, or make a referral in the circumstances of each case. The confirming authority is thus in a position of an appellate or reviewing authority over the decision of the court martial. The decision of the court-martial can therefore not be executed without such approval or confirmation by the reviewing authority. Where therefore the authority neither confirms nor approves the decision, the position presents itself as a "no show" which is analogous to what will be referred to under the juris system as a "hung jury". Consequently, such a decision by the court martial becomes inoperative. See the decision in *United States v. Perez* (U.S) 579 (1824). See also *Logan v. United States*, 144 (U.S) 148 (1891).

46. In the instant case, there was no confirmation by the confirming authority to validate the decision of the court martial and no this court has no records to show that the court martial acted within the exemptions under section 150 of the AFA. The failure to confirm the decision of the court martial is therefore tantamount to its rejection without cause. It follows therefore that the judgment of the court martial, which is subject to, and dependent on the confirmation by the confirming authority was improperly executed. The execution of that judgment is thus a violation of the right of liberty of the Plaintiff.

47. In conclusion, we are of the view that though the arrest, and trial of the Applicant were in order, the conviction having not been confirmed as required by the AFA above is null and void. In the absence of any defense by the Respondent, this allegation is well founded. The Court therefore finds that the detention in prison of the Applicant was arbitrary and consequently a violation of his right to liberty contrary to the Section 6 of the African Charter.

ISSUE NO 3

Whether the allegation of violation of other rights Applicants as claimed have been proved.

Apart from the allegation of the violation of the right to liberty already analysed above, The Applicant also alleges the violation of the following rights: right to non-discrimination (Article 2 of the Charter); equality before the law and equal protection of the law (Article 3 of the Charter), right to life and integrity of his person (Article 4 of the Charter), right to respect of dignity inherent in a human being and prohibition from torture, cruel, inhuman and degrading punishment and treatment (Article 5 of the Charter); to have his cause heard (Article 7 of the Charter); right to work (Article 15 of the Charter, Article 23 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Economic, Social and Cultural Rights). He also alleges the violation of his rights as protected under the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, as regards to the way he was treated while in detention and his detention prior to his trial and conviction.

As earlier noted, the Court will examine the facts adduced to determine if they avail the applicants of his claims**.**

On the right to non-discrimination

48. The Applicant alleges that his right to non-discrimination was violated by the Respondent State, contrary to Article 2 of the Charter and Article 2 of the UDHR. They provide for the enjoyment of human rights and freedoms without discrimination based on race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

For an allegation under this head to succeed, there must be established a different treatment in a similar or identical case. The Court recalls the case of *Justice Paul Uuter Dery v. The Republic of Ghana* Jud. No. ECW/CCJ/JUD/17/19, para, 88 in which it stated thus

"For an action of discrimination to succeed under the articles listed above, there must be established a difference of treatment in an identical or similar case."

The facts of the case as presented by the Applicant does not show that he was discriminated against on the grounds, on race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status, neither has he presented any evidence to show a similar case where a different treatment was effected. The Court is of the view that it is not sufficient to make sweeping allegations but such allegations must be substantiated with sufficient facts and evidence. Based on this consideration, the allegation of discrimination not been well founded, fails and is accordingly dismissed.

49. **On the right to equality before the law and equal protection of the law.**

a) Right to equality before the law

The Applicant alleges that his right to equality before the law was violated by the Respondent State. Article 3 of the Charter provides:

"1. Every individual shall be equal before the law

2. Right to equal protection of the law"

The Court recalls its finding in *Badini Slafo v The Republic of Burkina Faso*, Judgment No ECW.CCJ/JUD/13/12, where it stated that,

"Equality before the law presupposes that equal treatment is accorded people finding themselves in similar situations. Thus, examining the allegation of the violation of the principle of equality requires that at least two similar legal situations be put

side by side as to compare and find out whether an ill treatment was concretely meted out to either one or both of them."[1]

The Court notes from the facts of the case that the Applicant has not shown any proof that the treatment he received from the Nigerian Army, was different from the treatment meted to another person who was tried and convicted of a similar offence. In other words the Applicant has not proved that the Respondent's action towards him during his trial by the Military Court Martial was discriminatory under the applicable law, which is the Armed Forces Act. The Applicant having not established this claim, the relief sought fails and is therefore dismissed and the Court so holds.

b) **Right to equal protection of the law.**

On the other hand, the right to equal protection of the law in the context of the right to a fair trial, as provided for under Article 14(5) of the ICCPR states that, **"*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."***

The court is unable find any documentary evidence before it to reach a conclusion that this allegation has been established. The claim being unfounded and is therefore dismissed and the Court so holds.

50. **0n the right to life**

The Applicant alleges that his right under Article 4 of the Charter was violated. Article 4 of the Charter provides:

> "*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."*

The Court notes that this provision deals exclusively with the fundamental right to life and the prohibition of the deprivation of this right arbitrarily. It envisages a complete annihilation of a human being which though must not be arbitrary, in other words a victim of the violation of the right to life is expected to be dead and not able to speak for him/her self. From the submissions of the Applicant, it is clear that he is very much alive and well. Specifically, the Court notes his averment in paragraph xl of his statement of fact, in which he stated that, *"The Applicant aver that following his irregular and unlawful dismissal from the Nigerian Army, he has been made to be an idle young man residing at Bandawa Lugere Lamurde Local Government Area of Adamawa State without no reasonable and feasible means of sustenance."* This is a clear indication that the Applicant is alive and resides in Adamawa state.

The Court finds that the Applicant's claim is baseless, unfounded and therefore holds that the Applicant's right to life has not been violated.

51. **On The right to respect of the dignity inherent in a human being and prohibition from torture.**

The Applicant alleges that while he was in detention, he was physically, psychologically, mentally and emotionally traumatised, which is a violation of his rights under Article 5 of the Charter. Article 1 (1) of the United Nations Convention Against Torture (UNCAT), which is the internationally recognised instrument on torture, defines torture as:

> ***"…any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or***

intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

52. With regards to the allegation of torture, the Court recalls that an allegation of torture will be established when an Applicant provides a medical report which shows that injury is consistent with the torture alleged, as stated in the case of *Federation of African Journalists and Others v. The Republic of the Gambia*, Judgment No: ECW/CCJ/JUD/04/18, Pg. 54 this court held that,

> **"*It is trite that the burden of proof rests on he who asserts the affirmative and not on he who denies."***

Furthermore, the Court stated that,

> ***"The burden therefore, lies on the Applicant to establish their allegation. The 4th and 5th Applicants in establishing their claim attached a medical report from an independent forensic experts group. In the report, the experts stated that the 4th and 5th Applicants suffered from chronic physical issues as well as heavy symptoms of post-traumatic stress disorder. The physical and psychological findings when considered separately and together are highly consistent with the act of torture and ill-treatment that they allege. This report has not been contested by the Defendant and in the absence of any refute, this amounts to an admission."***

53. The Court notes that in the instant case, the Applicant has not shown any proof, including a medical report that indicates that the Respondent State through the

Nigerian Army carried out any of the acts listed amounting to torture during his detention. The Court will not conclude that detention automatically amounts to being tortured within the meaning of the provisions of the UNCAT. Such allegation must be proved. The Court therefore holds that the allegation of torture fails

54. **Allegation of cruel, inhuman and degrading punishment and treatment**

Cruel, inhuman and degrading treatment and punishment entails acts which do not fall within the ambit of torture but which nonetheless dehumanize and degrades the human being. Instances of overcrowding in detention places, sleeping on bare wet floor, and inappropriate clothing in extreme weather. See European Court of Human Rights' Judgment in A*pplication no. 2346/02 Pretty v United Kingdom*, Judgment of 29 April 2002, para 52 and Application no. 44558/98 para 117 *Valasinas v Lithuana, Judgment of 24 July 2001, para 117, where it was held that,*

> "*Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3…"*

55. In addition, the Court further notes the European Court's case law, which refers to ill treatment as *"ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering."*

The Court notes that the Applicant has also not adduced any evidence that shows he was subjected to any cruel, inhuman and degrading treatment or punishment by the Respondent State during his detention. The Court will not hold that his detention alone meets the required threshold of severity and intention established

under international law for establishing cruel, inhuman and degrading treatment or punishment. The Court therefore finds that the Applicant's right under Article 5 of the Charter as it relates to any cruel, inhuman and degrading treatment or punishment has not been violated as the claim is unfounded and the Court so holds. The claim is therefore dismissed.

56. **On the right to have his cause heard within a reasonable time.**

The Applicant contend that the Respondent State violated his right to have his case tried within a reasonable time contrary to the provisions of Article 7 of the Charter, having been detained for a period of 19 months from April 2012 prior to his trial, to 9 November 2013, without trial. Section 7 1(d) of the C53harter guarantees the right of an accused to be ***"tried within a reasonable time by an impartial court and tribunal".*** This guarantee is one of the fundamentals of the right to fair hearing. This Court recognizes this guarantee when it held in *Tandja v. Republic of Niger (*2010 CCJELR) pg. 130 and in *Federation of African Journalists and Others v. The Republic of the Gambia Pg. 50 that* "***A person detained on a criminal charge has the right to trial within a reasonable time or to be released pending trial."*** The Court also held In *Col. Mohammed Sambo Dasuki (Rtd) V. Federal Republic of Nigeria* ECW/CCJ/JUD/23/16 Unreported, that:

> *"Deprivation of a person's liberty must at all times be objectively justified in that the reasonableness of the grounds of detention must be assessed from the point of view of an objective observer and based on facts and not merely on subjective suspicion".*

57. Other international law jurisprudence have affirmed same as seen in decisions of the Inter-American Court on Human Rights, in Application No 17140/05, Judgment of 24 April 2008; *Kempf and others v Luxembourg*, para 48; European Court of Human Rights in Ruiz *Mateos v Spain*, Judgment of 23 June 1993 para 30; Application No 21444/11, Judgment of November 5 2015, *Henrioud v*

France, para 58; and the African Court on Human and Peoples' Rights in AfCHPR Application No 005/2013 *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2017, para 104.

58. Under this principle, three elements should be taken into account to access reasonableness of time to conclude judicial proceedings. These elements are: a) the complexity of the matter, b) the procedural activities carried out by the interested party, and c) the conduct of judicial authorities – See *Alex Thomas v Tanzania* (supra). In *Buzadji V. The Republic of Moldova* application No.23755/07 Judgment Strasbourg, 5 July 2016 Para. 91 the ECHR held that:

> ***"It primarily falls on the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time".***

59. In the instant case, the Court is of the considered opinion that the matter regarding the Applicant was not one of such serious complexity, to justify the incarceration of the Applicant for 19 months before trial and conviction. After all it was a case of a missing rifle which the applicant himself reported. The Respondent State had the responsibility under international law, to ensure the Applicant was tried promptly.

60. Furthermore, it is instructive that the Armed Forces Act itself has clear provisions with regards to timeline for detention of persons subject to service. **Section 122 of the AFA** provides:

> *"Subject to the provisions of subsection (2) of this section, the allegations against a person subject to service law under this Act who is under arrest shall be duly investigated within reasonable time and as soon as may be, either proceedings shall be taken for punishing his offence or he shall be released from arrest within 24 hours.*

(2)The commanding officer shall have power to determine whether further detention shall continue beyond a period of 24 hours.

(3)Where a person subject to service law under this Act, having been taken into service custody, remains under arrest for a longer period than eight days without a court-martial for his trial being assembled—(a) a special report on the necessity for further delay shall be made by the commanding officer to the prescribed authority in the prescribed manner; and(b)a similar report shall be made to the like authority and in the like manner every eight days until a court-martial is assembled or the offence is dealt with summarily or the person is released from arrest, the total period of such further detention not exceeding ninety days".

From the above provision, it is clear that a person under service law who has been remanded in custody must be brought before a court-martial within a period not exceeding ninety (90) days. The Applicant in this case was detained from 8th April 2012 to 9th November 2013 approximately 19 months without trial. This is in clear violation of the laid rules in the AFA as shown above.

61. From the analysis deriving from this Court, the international jurisprudence and the provision of the Armed Forces Act on the reasonableness of detention period, The Court can only come to the inevitable conclusion that the pre-trial detention of the Applicant for 19 months was The Court finds was inordinate and unjustified. The allegation is well founded and the Court holds that the Respondent has violated the Applicant's right to have his cause heard within a reasonable time contrary to Article 7 of the Charter.

62. **On the right to be promptly informed of the charges at the time of arrest.**

Article 9 (2) of the International Covenant on Civil and Political Rights provides:

> ***"Everyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.***

The Human Rights Committee in its General Comment 35 on Article 9 of the ICCPR (Liberty and Security of Person), has recognized that not only must the deprivation of liberty be in accordance with laid down laws, but must also be accompanied with procedural safeguards to ensure that such deprivation is not arbitrary. One of these procedural safeguards is that an arrested person must immediately be informed at the time of arrest, of the reasons for his arrest and charges against him. See African Court decision in Application No 005/2013 *Alex Thomas v United Republic of Tanzania*

63. In the instant case, The Applicant states that at the time of his arrest, he was not informed of the nature and reasons for his arrest before he was detained. It is curious that the Applicant who is a military man and who reported the loss of the rifle allocated to him pursuant to which, he was arrested can deny knowledge of the reason for his arrest. In light of this consideration, the Court finds that this allegation is unfounded and it is therefore dismissed.

64. **On the alleged violation of the right to work**

The Applicant alleges that the Respondent State violated his right to work because of his irregular and unlawful dismissal from the Nigerian Army. He claims that after he had served his prison sentence and was released, he was not reinstated to his position at the Nigerian Army, despite several letters demanding his reinstatement, written by his counsel to the authorities of the Nigerian Army.

Article 23 of the Universal Declaration of Human Rights, which is reechoed in Article 15 of the Charter and Article 6 of the International Covenant on Economic, Social and Cultural Rights provides:

> ***"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."***

The Court recalls its jurisprudence the case of *Justice Paul Uuter Dery and others v Republic of Ghana,* Judgment No. ECW/CCJ/JUD/19, para 82, where it stated, ***"The violation of the right to work contemplates a severance from work which permanently deprives the employee of the job under a condition that is manifestly unfair".***

In the instant case, The Applicant's contention is that he is entitled to be restored to his position haven served the requisite sentence. All entreaties by his legal representatives to the Nigerian Army to that effect have failed. The Court notes that Section 68(1) of the AFA which prescribes 2 years imprisonment or less for the loss of a service property does not preclude a reinstatement after prison sentence has been completed. The Court also notes its earlier holding that the prison sentence was unlawful comes to the conclusion that the refusal of the Respondent to reinstate the applicant is a violation of his right to work contrary to Art 15 of the Charter,

65. **On the violation of Article 1 of the Charter**

Article 1 of the Charter obligates all States Parties to the Charter to take measures to guarantee respect for human rights. It provides as follows:

> ***"The member States of the Organisation of the African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."***

The Court notes that though the Applicant has not made any submissions in support of the contention that Article 1 of the Charter was violated by the Respondent State, the Court will however exercise its discretion to consider whether this Article has been violated. Article 1 of the Charter places responsibility on all States Parties to take legislative and other measures to ensure that rights in the Charter are respected.

66. In the instant case, the Court has found the Respondent State in violation of several rights contained in the Charter, which means that the Respondent State did not take measures to ensure that the rights in the Charter are respected. The violation of the abovementioned rights therefore brings about the concurrent violation of Article 1 of the Charter. The Court therefore finds that the Respondent State has violated the provisions of Article 1 of the Charter.

ISSUE NO 4

67. **Whether in the light of the facts and evidence adduced the Applicant is entitled to the reliefs sought.**

It is an established principle recognised in international law, which has been reiterated by the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, that when a State has violated the rights of an individual as enshrined in the Charter, it should **"*take measures to ensure that the victims of human rights abuses are given effective remedies including restitution and compensation.*"** See Communications 279/03 and 296/05 *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan,* Twenty Eighth Activity Report: November 2009-May 2010 para 229 (d); *Reverend*

Christopher R. Mtikila v United Republic of Tanzania (reparations)(2014) 1 AfCLR 72, para 29.

The Court in the course of its analysis above, has come to the conclusion that the following rights has been violated for which appropriate remedy are ordered: The right to liberty (Article 7) of the Charter), to have his cause heard (Article 7 of the Charter); right to work (Article 15 of the Charter) and Article 1of the Charter.

68. Having found that the Respondent State has violated several rights of the Applicant contrary to the provisions of the Charter and other international human rights instruments ratified by the Respondent State, the Court finds that the Respondent State is liable and responsible under international law for remedying the violations against the Applicant.

69. The court however notes that with regards to the applicant's application for an order for payment of his monthly salary in the sum of 50,000 naira from March 2015 to date of judgment and also the sum of 45,000 naira as operation allowance from March 2015 to date of judgment, no documentary evidence was provided to support these amounts. In that wise the Court is unable to award the claimed sum. However, since the applicant would have been entitled to salary and the operation allowance within these periods, the court directs the Respondent who is the natural custodian of these information to calculate and pay the Applicant the applicable amount up to the time of release from detention.

COSTS

70. Article 66 (11) of the Rules provides, ***"If costs are not claimed, the parties shall bear their own costs."*** The Court notes that the Applicant did not make any claim as to costs; the Court therefore decides that he shall bear his own costs.

DECISION

71. The Court declares:

i. That the Application meets the requirements for a default judgment under Article 90 (4) of the Rules;

ii. That the Respondent State violated the Applicant's right to liberty;

iii. That the Respondent State *violated* the Applicant's right to be heard within a reasonable time;

iv. That the Respondent State *violated* the Applicant's right to work;

v. That the Respondent State *violated* Article 1 of the Charter;

vi. That the Respondent State *did not violate* the Applicant's right to equality before the Law;

vii. That the Respondent State did not *violate* the Applicant's right to equal protection of the law;

viii. That the Respondent State did not *violate* the Applicant's right to non-discrimination;

ix. That the Respondent State *did not violate* the Applicant's right to protection from torture, cruel, inhuman and degrading treatment and punishment;

x. That the Respondent State *did not violate* the Applicant's right to life

72. The court orders the Respondent State to:

a. Calculate and pay all salary arrears and other entitlements owed to the Applicant from March 2015 to the date of judgment.

b. Pay the sum of ten million naira only (NGN 10, 000,000), to the Applicant as compensation for the violation of his rights.

On Costs:

102. Decides that the Applicant shall bear his own costs.

Thus pronounced and signed on this 11th Day of October, 2019 in the Community Court of Justice, ECOWAS, Abuja, Nigeria.

AND THE FOLLOWING HAVE APPENDED THEIR SIGNATURES:

Hon justice Gberi-Be OUATTARA Presiding Judge

Hon. Justice Dupe ATOKI Judge Rapporteur

Hon Justice Januaria COSTA Member

Assisted by

Tony ANENE- MAIDOH Chief Registrar.