

COMMUNITY COURT OF JUSTICE,

ECOWAS

COUR DE JUSTICE DE LA COMMUNAUTE,

CEDEAO

TRIBUNAL DE JUSTIÇA DA COMUNIDADE,

CEDEAO



No. 10 DAR ES SALAAM CRESCENT,

OFF AMINU KANO CRESCENT,

WUSE II, ABUJA-NIGERIA.

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

HOLDEN AT ABUJA, NIGERIA ON THE 09TH DAY OF NOVEMBER, 2016

SUIT N°: ECW/CCJ/APP/25/15.

JUDGMENT NO: ECW/CCJ/JUD/27/16

BETWEEN:

Nnenna Obi

On behalf of other death row Prisoners in Nigeria } Plaintiff

AND

Federal Republic of Nigeria } Defendant

1. COMPOSITION OF THE COURT;

Hon. Justice Friday Chijioke Nwoke Presiding Judge

Hon. Justice Yaya Boiro Member

Hon. Justice Alioune Sall Member

Assisted by:

Mr. Athanse Atannon Deputy Chief Registrar

2. COUNSEL FOR THE PARTIES AND ADDRESS FOR SERVICE ;

i. PLAINTIFFS

- a. Chinonye Edmund Obiagwu
- b. Stanley Chidubem Ugwuoke
- c. Melissa Omene (Ms)
- d. Augusta Nnajofofor (Mrs).

Ledap legal Defence and Associate project

Hb Christ Avenue, off Admiralty Road Lekki Phase 1 Lagos or 4 Manzini

Street Wuse Zone 4 Abuja FCT.

ii. DEFENDANTS:

I.T Hassan

C/o Hon. Attorney General of the Federation,

Federal Ministry of Justice Shehu Shagari way,

Central Area Garki, Abuja.

3. SUBJECT MATTER OF THE PROCEEDINGS:

i. Violation of Plaintiffs fundamental rights to life and dignity of human person guaranteed under S.33 and S.34 of the Constitutions of the Federal Republic of Nigeria and Articles 4 and 5 of the African Charter on Human and Peoples' Rights.

ii. Violation of the Plaintiffs fundamental rights to fair trial and appellate review under Article 7(1) of the African Charter on Human and Peoples' Rights.

lii. Violation of the Legal principles of separation of powers to the detriment of the Plaintiffs' under Article 26 of the African Charter on Human and People's Rights.

iv. Imposition of mandatory death sentence in the Defendant's statute books in violation of Articles 4 (g) and 5 of the Revised Treaty of ECOWAS, Article 1 of the African Charter on Human and People's Rights, The International Covenant on Civil and Political Right and Other laws of Treaties respecting the rights to life and the right to freedom from torture, cruel, inhuman and degrading treatment.

4. FACTS AND PROCEDURE :

4.1.1. The Plaintiff are Citizens of the Federal Republic of Nigeria (The Defendant). The Defendant is a signatory to the Revised Treaty of the Economic Community of West African States (ECOWAS) 1993.

4.1.2. The Plaintiff was charged and convicted of the offence of murder on 23rd April 2005 and was sentenced to death. Her Appeal to the highest Court of Appeal of the Defendant failed.

4.1.3. As a result of her conviction and sentence to death, the Plaintiff has remained in the death row till date.

4.1.4. The Plaintiff and other 'death row' prisoners have been mandatorily sentenced to death in accordance with S.319 of the criminal Code and S. 1(2) (a) and (b) of the Robbery and Firearms (special provisions Act, and have been on the death row since 23rd April, 2005.

4.1.5. The Plaintiffs were not given the opportunity to show why death sentence should not be applied to them.

4.1.6. The Plaintiff and other death row Prisoners are subjected to torture, cruel, inhuman and degrading treatment in Prison, where they are awaiting execution.

4.1.7. The Plaintiff brought this action challenging the legality of the Provisions relating to mandatory death sentence in the Defendant's statute books arguing that such provision violated her obligations under Articles 4(g) and 5 of the Revised Treaty of ECOWAS, Article 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) cap 10 laws of the Federation of Nigeria 1990, the International Covenant on Civil and Political Rights, and other laws and Treaties respecting the right to life and the rights to freedom from torture, cruel, inhuman and degrading treatment.

5. SUMMARY OF PLEAS IN LAW:

- i. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Cap 10 laws of the Federation of Nigeria 1990
- ii. Revised Treaty of ECOWAS 1993.
- iii. The Defendant have ratified the African Charter on Human and Peoples' Right and the ECOWAS Revised Treaty and thus bound by it. Article 4 of the African Charter provides that ;

Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No person shall be arbitrarily deprived of this right.

Article 7(1)

‘Every individual shall have the right to have his cause heard’.

This comprises;

- a. The right to an appeal to competent national Organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ;

The Plaintiff submits that Article 4 of the African Charter on Human and Peoples’ Rights was violated for the following reasons;

1. The imposition of death sentence on the Plaintiff is arbitrary because it was pre-determined by the legislature.
2. The death sentence provisions in the Criminal law statute of the Defendant subjected the Plaintiffs’ to torture, inhuman and degrading treatment.
3. Mandatory death sentence under the law violates the rights of the Plaintiff to fair trial as it derives the right to appellate review of their sentence contrary to Article 7 (1) (a) of the African Charter on Human and Peoples’ Rights.

4. The Provision on mandatory death sentence under the Defendant's Criminal law amounts to legislative judgment which deprives the Court of its inherent discretionary powers in sentencing.
5. Mandatory death sentence violates the Principle of Separation of Powers.

All these violates the Revised ECOWAS Treaty of 1993 and the African Charter on Human and Peoples' Rights.

6. ORDERS/ RELIEFS SOUGHT BY THE PLAINTIFFS :

Accordingly, the Plaintiff seeks the following reliefs from the Court;

- i. **A Declaration**, that the provisions for death sentence in the laws of Nigeria (The Defendant) particularly section 319 of the Criminal Code and S.1(2) (a) and (b) of the Robbery and Fire-Arms (Special Provisions) Act are inconsistent with the provisions of the Revised Treaty of ECOWAS, The African Charter on Human and Peoples' Rights, The International Covenant on Civil and Political Rights and other laws and treaties respecting the rights to life and freedom from torture, cruel inhuman and degrading treatment.

- ii. **A Declaration**, that the provisions of mandatory death sentence for anyone convicted of murder or armed robbery under S.319 of the Criminal Code and 1(2) (a) and (b) of the Robbery and Firearms (special provisions) Act respecting are gross violation of the rights of the Plaintiffs and other death row inmates as ECOWAS Citizens to be subject to mandatory death sentence under Nigeria law.

- iii. **An Order** directing the respondent to amend, revise and alter in all its statute books, at the Federal and State levels, the said mandatory provisions of sentencing under S.319 of the Criminal Code and S. 1 (2) (a) and (b) of the Robbery and Firearms Act or any other enactment with such mandatory death sentence provision and replace them with provisions that give the Court discretion of sentence in all matters.

- iv. **An Order**, directing the respondent to reconsider the sentences of the Plaintiffs and other death row inmates who are sentenced under mandatory sentence provisions in order to allow the Courts that convicted them to determine the appropriateness of their sentence and where necessary reduce their sentence to terms of imprisonment.

7. THE DEFENDANTS CASE :

The Defendant did not file a defence to the suit but rather brought a Preliminary objection pursuant to Articles 87 and 88 of the Rules of this Court as well as Articles 9 and 10 of the Supplementary Protocol A/SP./01/05 relating to this Court.

In the Preliminary Objection (Document No 2) the Defendant argued that the Court lacks jurisdiction to entertain the suit on grounds interlia.

- a. The suit challenges the exant criminal law provisions of the Defend and which have been judicially settled by Nigerian Courts.
- b. That the Supreme Court, (the final Court of the Defendant) has disposed fully the case on an appeal by the Applicant and this Application amounts to an appeal.
- c. The Applicant did not complain that she was denied the right to fair hearing or any other right relating to due process.

- d. The Applicant have not shown that she was subjected to torture or any form of inhuman treatment while in custody and thus the suit discloses no reasonable cause of action.
- e. The Applicant lacks the locus standi to challenge the constitutionality of the death sentence in Nigeria.
- f. That this Court can neither exercise supervisory jurisdiction over the National Courts nor act as an appellate Court over the decisions of National Courts of member States of ECOWAS.

In his legal argument, the Defendant submitted as follows;

- i. That by virtue of the Constitution of the Defendant (S.1 (1) the constitution is supreme and thus outside the jurisdiction of the Court. He cited a plethora of local Nigerian decisions to buttress her point, and it will be unnecessary to recite them here as they have no direct bearing on the jurisdiction of this as stated by the International instruments establishing it.
- ii. The Defendant also submitted that by Articles 9 and 10 of the Supplementary Protocol 2005 relating to this Court does not authorize the Court to deal with subject matter within the competence of National Courts of member States; and concluded that by virtue of the subject matter of the suit, the Court lacks jurisdiction to entertain it, and urged the Court to dismiss the suit as being inadmissible.

8. ANALYSIS BY THE COURT :

The crux of this case is that the Applicant who was sentenced to death for the offence of murder in accordance with the laws of the Defendant and who appealed up to the highest Court in Nigeria unsuccessfully against the sentence of death imposed on her, and who has been awaiting execution of the sentence for some years now, brought this Application before this Court, seeking a declaration against the Defendant for violation of her right to life and for cruel, inhuman and degrading treatment.

The Defendant did not file any defence to the action but have raised a preliminary objection; even without the preliminary objection which in most parts relies heavily on the provisions of the decisions of its Court, this matter can be determined, without considering the merits of the objection as in most parts, it raises substantive issues that can only be determined on the merits.

Accordingly, it is our considered view that the mandate of this Court is to determine interalia cases of violation of human rights occurring in territory of a Member State of ECOWAS and not to interpret its National laws. The laws that bind the Court in exercising its function in the ECOWAS Treaty, the Protocols and Supplementary Protocols relating to the Court and other Institutions of the Community,

instruments decisions and other subsidiary instruments. Where necessary, the provisions of Article 38 of the statute of the International Court of Justice, the African Charter on Human and Peoples' Rights and other International Human Rights Instruments to which a member State of ECOWAS is a party.

Accordingly, this Application, in our view calls for several remarks,

1. The request addressed to the Court refers, in several instances, to the Domestic laws of Nigeria (The 1999 Constitution, the Criminal Code Law among others) (see especially pages 1, 2, 4 etc. of the Application. It is appropriate to recall that the rules applied by this Court are international rules binding on States which have subscribed to those rules and not the domestic norms of States.

This Court has reiterated this established principles of International law in various cases. In its judgment of 24th April 2015 (unreported) in the case of **Bodjona Vs. Republic of Togo** at P. 37, the Court stated as follows;

"Similarly, the Court shall note as irrelevant all the references made to domestic law of Togo by the Parties in their written pleadings. The Constitution of Togo in particular was frequently cited by the two parties. Now the Court has no powers to access the

Constitutionality or legality of instruments adopted by national authorities. That mandate is assigned to domestic Courts of Member States, and the ECOWAS Court of Justice cannot assume their role. In examining the cases brought before it, the ECOWAS Court of Justice shall refer exclusively to the norms of International law as binding on Member States who have subscribed thereto”.

In **CPD and others Vs. Burkina Faso**, delivered on the 13th of July, 2015 at (pp 24- 25) ; The Court stated as follows ;

The Court has indeed always reiterated that it is not a body set up with a mandate for settling cases whose subject matter is the interpretation of the law or the constitution of the Member States of ECOWAS. (Unless where they have a direct bearing on the consideration of whether the law or Act constitutes a violation of States International human rights treaty obligation). The first is that the present judicial argument must be devoid of reliance on domestic law, be it the constitution of Burkina Faso or any other norms whatsoever related to the constitution of Burkina Faso (Words in parenthesis is ours).

2. The Applicants on two occasions (pages 3 and 9 of the Application) averred acting ‘for and on behalf of all the prisoners’ awaiting the enforcement of the capital punishment which has

been imposed on them. But, she did not show any evidence of the powers to act on behalf of such persons. This Court has held in several cases that such power of attorney to act for those persons shall be required in action brought on collective grounds See; **Bakare Sarre and 28 others Vs. Republic of Mali** (judgment of 17 March 2015 and **Saoro Victims Vs. Republic of Guinea** (ruling of 25th March 2015. It is thus appropriate to dismiss such action filed as a «**collective suit** ».

This is not to suggest that the Court cannot adjudicate on «**collective suit** » in appropriate circumstances especially where collective rights have been infringed upon.

With regard to the merits of the case, the main issue for determination is:

Whether the provisions for Death sentence in the Criminal laws of Nigeria are inconsistent with the provisions of the Revised Treaty of ECOWAS and other International human rights instruments to which Nigeria is a party.

To answer this question is, is it necessary to review briefly the status of death penalty as a punishment for crimes under international human rights law.

The right to life is provided for by Article 6 of the International Covenant on Civil and Political Rights (ICCPR), 1966 and

represents the most fundamental of all human rights. This rights is also protected by all international and regional human rights instruments, including the African Charter on Human and Peoples' Rights. The import of that Article is that every human being has the inherent right to life and no one shall be arbitrarily deprived of his life. Thus, Article 6 does not provide an absolute prohibition of taking life but only arbitrary deprivation of life. Article 6 does not abolish capital punishment.

Thus it can be stated that the most important treaty provision in international law relating to death penalty which is widely accepted as forming part of customary International law on the subject is Article 6 of the ICCPR. Under that Article as earlier noted, there are a number of clear limitations placed on the imposition of the death penalty especially in Countries where it has not been abolished, namely:

1. First, it may only be imposed for most serious crimes and cannot be imposed if ;
 - i. A fair trial has not been granted.
 - ii. Other ICCPR rights have been violated
- iii. The crime was not punishable by death penalty at the time the offence was committed.
- iv. The offender is not entitled to seek pardon or lesser sentence.

v. The offender is under the age of 18 years.

vi. The offender is pregnant

With regard to limitation of the death penalty to serious crimes, the term 'serious crimes' is devoid of any generally accepted definition and agreement. The United Nations General Assembly has endorsed the phrase to mean International crimes with lethal or other extremely grave consequences.

Death penalty cannot be imposed, if all the provisions of the ICCPR regarding due process have not been complied with. These include but not limited to, the presumption of innocence, informing the accused the nature of the offence committed by him, the accused right to counsel of his own choice, giving the accused reasonable time to which to prepare and present his defence, trial before an independent and impartial tribunal and the right to review by a higher tribunal.

The Application before the Court actually contests the very existence of capital punishment in the Nigeria judicial system. However, he does not provide any strict and concrete evidence of violation of her rights outside the general critique she made on capital punishment. There is no evidence before this Court that the Defendant have signed and or ratified any International human rights instrument bending on her with regard to the abolition of the death penalty. Granted that International human rights instruments especially the ICCPR and the African Charter on Human and

Peoples' Rights guarantees every human being the right to life, but such right is not absolute. The life of an individual can be taken in execution of a sentence of a Court of competent jurisdiction, provided there has been a fair trial.

The Applicant did not complain that she was not given a fair trial other than that the very existence of the punishment for death penalty does not give the Courts discretion matters of sentencing or that her right of appeal was violated but admitted that she exhausted her right of appeal up to the highest Court of the Defendant which upheld the death sentence imposed on her for murder; a very serious crime.

Thus the Applicant did not provide any evidence of rights violation outside the general critique, she made on capital punishment, the application therefore appears devoid of any substance.

For two reasons the Application must equally be dismissed. First, the Application would drag this Court into engaging in a theoretical discussion, an academic exercise, in principle, by way of having to examine the law in the absence of any relevant consideration for the violation of a right, which is the fulcrum of the Court's jurisdiction.

The Court has consistently stated that it adjudicates on concrete issues especially ones relating to the violation of human rights occurring in Member States of ECOWAS and not on violation of legislations.

The Court does not interpret the legislations of Member States or determine their violation; but acts or omissions of States which violates the rights of its citizens as contained in International obligations assumed by such Member States (See; judgment of 18 November, 2010 on Hissein Habre Vs. Republic of Senegal (48 and 49) and CPD Vs. Ors Vs. Burkina Faso (2015).

Further, as earlier noted, the Application does not cite any legal instrument binding on the Respondent in respect of the Prohibition of death sentence. Although such instrument(s) may exist in certain regional jurisdictions, (for example Additional Protocol No. 6 of 28th April 1983 and Protocol No 13 of 13th May 2002, relating to the abolition of death sentence within the States of European Union) but such convocations are neither found in Africa in general nor with the ECOWAS Region in particular.

Thus, the provision for the death sentence as punishment for certain offences within the jurisdiction of the Respondent States does not infringe on the human rights of the Applicant or any other person.

As for the thesis according to which the death sentence is contrary to the

'right to life, as envisaged by international Conventions, it is simply refuted by case law of comparable international Courts; particularly The European Court of Human Rights (which cites Article 2 of the European Convention, which after recognising the right to life, soon admits the death sentence under certain conditions), and the Inter-American Court of Human Rights (Judgment on Neira Algeria and others Vs. Peru 19th January 1995 series C. No 20.

The abolition of death sentence may be envisaged as a future project and as an ideal measure to be adopted, but nothing in law as of now, permits one to say that the Respondent violates human rights by maintaining the death penalty. This Court deals with *lex lata* and not *lex feranda* (i.e. law as it is not law as it ought to be).

Accordingly, mere existence of the death penalty in the Criminal laws of the Defendant does not amount to the violation of the human rights of the Plaintiff under the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights or any known International human rights instrument to which the Defendant is a party and therefore the action must be dismissed.

9. DECISION :

The Court adjudicating in public sitting, after hearing both Parties in the last resort, after deliberating in accordance with law.

10. AS TO THE PRELIMINARY OBJECTION :

The Court holds that the objection is not relevant to the determination of the suit and dismisses same.

11. AS TO THE MERITS OF THE CASE :

Rejects the case and declines to issue any of the declarations and orders sought for by the Plaintiff as the action of the Defendant did not violate any known human rights of the Plaintiff and dismisses the suit in its entirety as being an academic exercise and lacking in substance.

12. AS TO COST :

Orders each party to bear its own cost.

Thus made and adjudged and pronounced in a public sitting at Abuja on the 09th day of November, 2016 by the Community Court of Justice of the Economic of West African States.

THE FOLLOWING JUDGES HAVE SIGNED THIS JUDGMENT.

Hon. Justice Friday Chijioke Nwoke ----- Presiding Judge

Hon. Justice Yaya Boiro ----- Member

Hon. Justice Alioune Sall ----- Member

Assisted by:

Mr. Athanase Atannon ----- Deputy Chief Registrar

