



**IN COMMUNITY COURT OF JUSTICE OF THE ECONOMIC  
COMMUNITY OF WEST AFRICAN STATE (ECOWAS)  
HOLDEN AT ABUJA, NIGERIA.**

**SUIT NO: ECW/CCJ/APP/03/18**

**JUDGMENT NO: ECW/CCJ/JUD/20/18**

**BETWEEN**

1. GABRIEL INYANG

2. LINUS IYEME

APPLICANTS

**AND**

THE FEDERAL REPUBLIC OF NIGERIA

DEFENDANT

**1. COMPOSITION OF THE COURT**

Hon. Justice Yussif KABA	– Presiding
Hon. Maria Do Ceu Monteiro	– Member
Hon. Judge Friday Chijioke Nwoke	– Member

Assisted by Mr. Aboubakar Djibo Diakite –Registrar

**JUDGMENT OF THE COURT**

**2.0. PARTIES AND REPRESENTATION**

2.1. The applicants are Nigerian nationals currently incarcerated at Enugu State prison managed by the Government of the Federal Republic of Nigeria on death row. The Applicants were represented by Noah Ajare Esq. and other counsels of the Victory Chambers in Abuja, the Federal Capital of Nigeria. The defendant is the Federal Republic of Nigeria, a member state of the Economic Community of West African States represented by the Office of the Attorney

### **3.0. FACTS OF THE CASE**

- 3.1.** On the 17<sup>th</sup> of January 2018, the applicant herein file with this court a fourteen counts initiating application pursuant to Article 10 of the Supplementary Protocol A/SP/01/05 amending the protocol A/P1/7/91 relating to the Community Court of Justice, and Article 33 of the Rules of the Community Court of Justice. Substantially, the applicants averred that they are citizens of the Federal Republic of Nigeria who are among people on death row in Nigeria after been sentenced by a Tribunal set up by the Military Government of Nigeria in 1995. That the applicants were arrested on October 11, 1989 and were convicted on December 14, 1995 after their trial in a proceedings with case file NO: E/13/1994 by a Tribunal set up by the Military Government of Nigeria.
- 3.2.** That the applicants and others on death row are denied family visitation and are kept in total isolation while been so held and incarcerated by the defendant for the last 23 years. That as the consequence of such detention conditions 2<sup>nd</sup> applicant is now partially paralyzed.
- 3.3.** That the applicants are being denied unrestricted access to their lawyers. That effort on the part of counsel for the applicants to appeal the decision of the Military Tribunal has been frustrated due to impossibilities imposed upon the said counsels in obtaining the Certified True Copy of the Judgment of the said Tribunal from the military authority which is a demand of the Prerogative Board for the review of the said judgment.
- 3.4.** That the defendant has threatened to execute the applicants without allowing the applicants to exhaust the appeal process and that such threats constitute a violation of the applicants right to life, due process of law, access to justice and judicial independence, to fair hearing and to effective remedy.

**3.5.** The applicants averred further that the actions of the defendant is in violation of the resolution adopted both by the African Commission on Human and Peoples Right, and the United Nations General Assembly requiring countries to adopt Moratorium on execution of the death penalty.

**3.6.** The applicants alleged that the resolution referred to herein above further provides that member state of the African Union that maintained capital punishment should fully comply with their obligations under the African Charter on Human and People's Right, and guarantee to every person accused of crime for which capital punishment is applicable, fair trial standard. The applicants further contended that their trial before the Military Tribunal did not meet due process safeguard as required by the African Charter on human and People's Right and other relevant international standard having been trial by a Military Tribunal even though the offense for which they were tried could have been had by the regular judicial tribunal.

**3.7.** That unless the relieve sought by the applicants is granted, the defendant will continuously be in breach of its human rights obligations, and that the applicants may be secretly executed away from the public, and their families in violation of transparency requirements.

**3.8.** The applicants therefore pray this court for the following reliefs:

(a) A declaration that the trial of the applicants by a Military Tribunal constituted by the Military Government as against the regular tribunal who has jurisdiction to try the offense alleged against them constitutes a breach of his right to fair hearing and fair trial as guaranteed by the African Charter on Human and People's Right.

(b) A declaration that the consistent and continuous denial of fair trial right and the right to appeal of the applicants on death row and in prison under dehumanizing and harsh conditions- is in violation of the Federal Republic of Nigeria's constitution and Article 1, 2, 3, 4, 5, 7 and 26 of the African Charter on Human and People's Right.

(c) A declaration the public threat by the defendant to publicly execute the applicants and other persons on death row amount to deliberate and wilful disregard of the request by the African Commission on Human and Peoples'

Rights to the effect that African countries including the Federal Republic of Nigeria that still maintain the death sentence should comply fully with their obligation under the African Charter, And guarantee to every person accused of crime for which capital punishment is applicable, fair trial standards.

(d) An order of perpetual injunction restraining the defendant and/or agents from carrying out the public threat to execute the applicants and other persons on the death row of the defendant.

(e) An order for the respect of the applicants' right to free and unrestricted access to their lawyer.

(f) An order for the respect of applicants' right to be visited by their families.

(g) An order for immediate release of the applicants from detention forthwith.

(h) An order directing the defendant to pay a monetary compensation of 50,000,000 naira only to the 1<sup>st</sup> applicant for damages suffered as a result the long years he has been kept in prison under cruel, degrading and inhuman condition.

(i) An order directing the defendant to pay a monetary compensation of 150,000,000 naira only to the second applicant, who is now partially paralyzed, as a result of the long years he has been kept in prison under cruel, degrading and inhuman condition without access to medical care.

(j) An order directing the defendant to faithfully and fully implement its obligations under its own constitution and the African Charter as well as resolutions and moratorium on execution adopted recently by both the African Commission on Human and Peoples' Rights and the Third Committee of the UN General Assembly.

3.9. In their defense in opposition to the applicants' application, the defendant filed equally a fourteen count answer on the March 19, 2018. The defendant interposed a general denial of all the allegations and averments in the applicants' Application except where admitted in the Defense and hold the applicants to the strictest proof of some averments in the Application since according to the defendant, they are untrue and they lie within the personal knowledge of the applicants.

3.10. The defendant further contends that the applicants' Application failed to disclose any cause of action against the defendant for the following reasons:

- (a) That the plaintiffs were sentence to death by a competent Military in 1995
- (b) That the applicants' failure to appeal the decision of the Military Tribunal renders the Application to be an abuse of court process and a ploy to misguide this court by filing a fresh action on a matter that has already been concluded. The defendant strenuously argued that the right of appeal available to the applicants was to a higher court rather than the prerogative board to which they exhausted their efforts.
- (c) That the applicants failed to exhaust local remedies and hence the matter is not ripe to claim the attention of this court.
- (d) That the Applicants claim does not fall under fundamental human right. That the constitution of Federal Government protects qualify rather than unqualified right to life. That one of the qualification to this right is when life is taken in execution of a court order.
- (e) That issue of torture and inhuman treatment while in custody for the commission of a capital offense do not militate against the sentence imposed for the said commission. Such actions are violation that must be address by a separate action.
- (f) That the validity of the death sentence in Nigeria under the constitution of the Federal Republic cannot be questioned.

3.11. The defendant therefore prays for an order of dismissal of the Applicants' Application with cost.

3.12. The Applicants, on the April 19, 2018, filed a Reply to the defendant's Statement of Defense containing 3 counts in which a general denial of all the averments as are contained in the defendant's Statement of Defense is interposed.

3.13. That the applicants have a valid cause of action as appeared on the face of the Application in that the entire process of the applicants detention starting from the arrest, purported trial, conviction, sentencing and continued detention in degrading and in human condition is violative of every known tenets of fair hearing as recognised by the Constitution of the Federal Republic, and the African Charter, other international instruments on Human rights which the defendant is a signatory to and in fact ratified.

- 3.14. On the issue of exhaustion of local remedy, that the applicants' Application narrated the impossibility that led to the applicants' inability to appeal this matter at the local courts and that this court has held in numerous cases that Applicants are not bound to exhaust their right of appeal at the local Courts before approaching this court.
- 3.15. On the issue as to whether the applicants' claims as contained in the Application fall under fundamental right, the applicant averred that the right to be protected against torture, cruel, dehumanizing, degrading treatment is a fundamental and inalienable right of every human being as recognised by the Federal Republic's Constitutions, the African Charter and other international human rights instruments.
- 3.16. The applicants restated their prayers for relief as was enumerated in the Application.
- 3.17. On the May 30, 2018, ---days after oral hearing was had in this matter, an Affidavit Evidence in support of the applicants' case sworn to by Mr. Arthur Angel and containing 18 counts was filed with the court. Mr. Angel swore that he is a friend of the applicants and that he is familiar with the facts of the case.
- 3.18. That indeed the applicants are been held by the defendant at the Enugu Prison and that he has on several occasion had extensive meeting with the applicants at the Enugu Prison.
- 3.19. That the applicants are traumatised, depressed, and not mentally stable due to prolonged detention on death row, and that second applicant is paralyzed and seriously sick.
- 3.20. That the applicants were tried by a Military Tribunal without access to the opportunity to defend themselves during the hurriedly conducted trial and that he is aware that the applicants were not given the opportunity to appeal since right of appeal did not exist at the time of their conviction.
- 3.21. That effort to get copies of the judgment or records of the proceeding before the Military Tribunal so as to enable the applicants to approach national court for review proved futile.

- 3.22. That he is aware that during the course of the alleged robbery no death or injuries ensued.
- 3.23. That it is fact known to him that the cumulative effect of this court's failure to grant the relief sought by the applicant would lead to the untimely death of the applicants and that it will serve the course of justice for this court to grant the relief sought by the applicants.
- 3.24. That it is his understanding that this court possesses the competence to grant the relief sought by the applicants.

#### **4.0. PLEAS IN LAW OF THE PARTIES**

##### **PLEAS IN LAW BY THE APPLICANTS**

- 4.1. The applicants invoked as their legal reliance in support of their application Act Cap A9, Vol. 1 of the Federation of Nigeria 2004 (Ratification and enforcement of the African Charter on Human and Peoples' Rights), Article 4 of the Revised Treaty of the Economic Community of West African States which provides for the application of the terms of the African Charter to member states, and Article 1, 2 and 5 of the African Charter.

##### **PLEAS IN LAW BY THE DEFENDANT**

- 4.2. The defendant invoked Article 11 of the Rules of Court, Economic Community of West African States, Articles 6 & 7 of the African Charter, Sections 33(1) & 35 (1)(a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), The case Adekeya V. F.H.A.(2008) 11 N.W.L.R. Pt. 1099 at pgs 439 to 539, Alhaj Madi Mohammed Abubakar v. Bebeji Oil and Allied Products LTD ^ 2 others (2007) 18 N.W.L.R. part 1066 at p. 319, and Onuoha Kalu vs. The State (1998) 13 NWLR (PT 583) 531.

#### **5.0. ISSUES FOR CONSIDERATION**

From a careful examination and perusal of the pleadings of the parties, this court identifies the following issues as been determinative of this case:

1. Whether or not the Application as filed by the applicants stated a cause of action to attract the competence and consideration by this court?
2. Whether or not the applicants failed to exhaust local remedies for the redress of allege wrong complaint of and therefore this court is impotent to enquire into this matter?
3. Whether or not the injuries complaint of by the applicants constitutes a violation by the Federal Government of its obligations as is enshrine in the ECOWAS Protocol and other human right instruments that were ratified by the said Government?
4. Should it be the finding of this court that the Federal Government was in breach of its international obligations as refer to above, is this court competent, and is there evidence sufficient in law for this court, to grant the reliefs sought by the applicants?

## **6.0. DISCUSSION OF THE ISSUES**

These issues shall be enquired into in the order in which they are presented.

### **6.1. Whether or not the Application as filed by the applicants stated a cause of action sufficient to attract the competence and consideration of this court?**

- 6.1.1. It is the position of the defendant that the Application as filed by the applicant failed to disclose any action against the defendant. The defense, relying on the case Adekeya vs. F. H. A. (2008), argued that the failure of the applicants to annexed any documents relied upon in support of the Application is “evident that the law did not give unfettered rights for parties to be sued indiscriminately without a cause of action against parties they are suing”. The defendant furthered that “the plaintiffs did not disclosed the necessary facts to substantiate their plea capable of granting them cause to seek for the reliefs they are praying for before this Honourable Court.
- 6.1.2. The defendant further averred that the arrest and incarceration of the applicants was the outcome of a valid judgment from a competent tribunal from which the applicants are yet to appeal to the proper judicial forum. Therefore, according to the defendant, this action is nothing more than a ploy by the applicants to resurrect a matter that has already been concluded.
- 6.1.3. The defendant further alleged that the claims by the applicants do not fall within the ambit of fundamental human right. That while the Federal



Government guarantees the right to life as is enshrined in Section 33 (1) of the Constitution of the Federal Republic, however that such right is not unqualified. That execution as the consequence of a judgment by a court does not constitute a violation of that right to life since the Constitution of the Federal Republic provides for the same. (Objective legal fact)

6.1.4. The applicants, for their part, argued that indeed their Application contained sufficient averments to sustain a cause of action against the defendant. An analysis of the applicants reply shows that the major contention of the applicants which they consider as establishing a cause of action are the “dehumanizing and degrading treatments” allegedly meted to them during the period of their incarceration by the defendant, and the violation of their “right to fair hearing”

6.1.5. This court is in agreement with the holding in the case Adekeya vs. FHA (2008) 11 NWLR Pt. 1099 that “(A) cause of action is a fact or combination of facts which establishes or gives a right of action. It is the factual situation which gives a person a right to judicial relief. In other words, a cause of action is the operative fact (or facts) that gives rise to a right of action, which itself is a remedial right...A right of action is the right to enforce a cause of action. A cause of action accrues the moment a wrong is done to the Plaintiff by the defendant...” Therefore in making a determination as to whether the applicants herein have stated a cause of action to attract the attention of this court, the averments in the Application must be searched to determine whether a wrong is averred over which this court has the jurisdiction to address.

6.1.6. In summary, it is the position of the applicants that they were arrested, incarcerated, subjected to a military tribunal trial which was unfair and without a right of appeal, that all effort on their part to access the records of this trial for the purpose of bringing the matter up for review has proven futile as the records cannot be accounted for, that they have been kept on death row in dehumanizing and degrading conditions for the past 23 years without right of family visitation and that they have been denied unfettered access to their lawyer. Certainly these averments, if true, constitute sufficient cause of action to trigger the judicial mechanism of this court.

6.1.7. It is the position of the defendant that the failure of the applicants to annex a file containing the documents relied on in support of their application together with a schedule listing them as provided for by Article

32 (4) of the Rules of this court renders the Application devoid of a cause. The Court observed that there is no reference in the applicants' Initiating Application to instruments (documentary or physical) as evidence to be relied upon to establish their case. The purpose of annexing instruments to pleadings is for the purpose of notice. Where no such instruments are pleaded, the Court does not see how the right of action of the applicants can be defeated by not annexing such non-pleaded instruments to the pleading. This Court says that the soul of the law is reason. Where reason ceases, there too must the law ceased.

6.1.8. Or is it the position of the defendant that in the event that a party who believe that a human right violation has been committed against him cannot institute an action in the absence of documentary evidence, even though his case may be established by oral evidence? This Court held in the case *Bakary Sarre vs. The Republic of Mali* (unreported) Suit no. ECW/CCJ/APP/09/09, that the competence of the Court to adjudicate in a given case depends not only on its texts but also on the substance of the initiating application. The Court accords every attention to claims made by applicants, the pleas-in-law invoked, and in an instance where human rights violation is alleged, the Court equally consider how the parties present such allegations. The Court therefore looks to find out whether the human rights violation as observed constitutes the main subject matter of the application and whether the pleas-in-law and evidence produced essentially go to establish such violation.

6.1.9. Article 9 (4) of the Supplementary Protocol (A/SP.1/01/05) Amending the Protocol (A/P1/7/91) of the Community Court of Justice confers upon this court the "jurisdiction to determine cases of violation of human rights that occurs in member states". The self-same Supplementary Protocol also provides at Article 10 (c) that "(A)ccess to the Court is open 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".

6.1.10. The court in fulfilling its human rights competence relied upon Article 4 (g) of the Revised Treaty which provides for the declared and affirmed adherence by member states to the "recognition, promotion and

protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".

6.1.11. The initiating application of the applicants having fulfilled all of these conditions, this court cannot give credence to the defendant's application that this Court refuses jurisdiction over this matter on the ground that the applicants did not annexed to the Initiating Application documentary evidence that were not pleaded.

6.1.12. Relative to the defendant's averment that the arrest and incarceration of the applicants was the outcome of a valid judgment from a competent tribunal from which the applicants are yet to appeal to the proper judicial forum, this Court says that this is one of the most contentious issues presented by the applicants for resolution by this Court. The applicants alleged substantially that the trial before the Military Tribunal was unfair and that they were denied the right of appeal. Chapter 7 (1) of the African Charter provides as follows:

6.1.13. 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 right as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b. the right to be presumed innocent until proved guilty by a competent court or tribunal
- c. the right to defense, including the right to be defended by counsel of his choice
- d. the right to be tried within reasonable time by an impartial court or tribunal

Certainly giving due consideration to the averments as are contained in the Initiating Application of the applicant in light of the above quoted provision of the African Charter, this Court says that it has the competence to enquire there into.

6.1.14. Relative to the defendant's averment that the claims by the applicants do not fall within the ambit of fundamental human right since the Federal Constitution, while guaranteeing the right to life as is enshrine in Section 33 (1) of the Constitution of the Federal Republic, however

recognizes that execution as the consequence of a judgment by a court does not constitute a violation of that right to life, this Court says that the crux of the applicants case does not revolved around whether or not the imposition of the death penalty is a breach of the Federal Government's international human rights obligation. This court notes that the applicants, in count 9, and 10 only alleged threat of execution by the defendant without affording the applicants the right to fully exercise and exhaust their right to appeal, and resolutions by both the African Commission and the United Nation General Assembly requiring countries to adopt moratorium on execution of the death penalties. This can in no way be equated to an averment that the imposition of the death sentence is a violation of fundamental rights. While the applicants did not specify the resolution alluded to by them, it suffices to say here that resolutions are not binding instruments.

6.1.15. The Court therefore says that it sees no justification to refuse jurisdiction over this matter.

**6.2.0. Whether or not the applicants fail to exhaust local remedies for the redress of allege wrong complaint of and therefore this court is impotent to enquire into this matter?**

6.2.1. In count 3.06 of the Defense in opposition to the applicants' Initiating Application, the defendant alleged in passing that the applicants not having exhausted all available remedies, the said matter is not as yet ripe for the consideration of this Court.

6.2.2. This Court has, on numerous occasions; expatiate on the issue of non-exhaustion of local remedies. This court has consistently held that there is no requirement for the exhaustion of local remedy before acquiring access to this Court. {See Professor Etim Moses Essien v. The Republic of the Gambia and the University of the Gambia (2007) ECW/CCJ/APP/05/05 pgs. 107 – 108, Hadijatou Mani Koraou v. The Republic of Niger (2008) ECW/CCJ/APP/08/08}

6.2.3. More besides, the applicants are averring the impartiality of the military Tribunal and the denial of the rights to appeal. Assuming these averments are true, what local remedies are available for the applicants to take advantage of in the local arena? Under the circumstances of this case as

presented by the Initiating Application, the only remedy that avail itself to the applicants is the Community Court of Justice, ECOWAS.

**6.3.0. Whether or not it is evidence from the pleadings in this matter that the acts complaint of by the applicants constitutes a violation by the Federal Government of its obligations as is enshrine in the ECOWAS Protocol and other human right instruments that were ratified by the said Government?**

6.3.1. The applicants' complaint raises the following as constituting violations of their human rights by the Federal Government:

1. Inhuman and degrading treatment during their 23 years of detention on death row resulting into the paralysis of Second Applicant, and the secret threat to execute the applicants without affording them the time to exhaust their right to appeal;
2. Denial of family visitation and detention in isolation during their 23 years in detention;
3. Denial of unrestricted access to their lawyer;
4. Denial of fair trial before a military tribunal and the right to appeal.

6.3.2. On the issues of denial of family visits, been held in degrading and inhuman condition leading to partial paralysis of one of the applicants and denial of the applicants with unrestricted access to their lawyers, this Court says that if the same is established by the preponderance of the evidence, the same constitute a breach of the obligation of the Federal Government under the terms and conditions of the African Charter.

6.3.3. The African Charter provided at Chapter 4 "that the human being is inviolable. Every human being shall be entitled to the respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." Further to the above, the Charter further provides at Chapter 5 that "Every individual shall have the right to 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 punishment and treatment shall be prohibited".

- 6.3.4. Treatment is considered to be “degrading” within the meaning of Article 3 of European convention which is *pari materia* to the provisions of Article 5 of the ACHPR, when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance (*see M.S.S. v. Belgium and Greece* [GC], no. 30696 para ECHR 2011).
- 6.3.5. In order for treatment to be “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment.
- 6.3.6. It is trite that he who alleges must prove. The burden of proof in civil cases rests on the party that will lose if no evidence is led. Proof of facts alleged is either by production of documents, oral testimony or production of material for examination by the Court.
- 6.3.7. The Court has stressed that merely stating allegations without more does not discharge the burden placed on the Applicants to prove their case.
- 6.3.8. In **PETROSTAR (NIGERIA) LIMITED V. BLACKBERRY NIGERIA LIMITED & 1 OR CCJELR (2011)**, the court in its consideration reiterated the cardinal principle of law that “he who alleges must prove”. Therefore, where a party asserts a fact, he must produce evidence to substantiate the claim.
- 6.3.9. Article 32 (4) of the Rules of this Court enjoins litigants to attach to their pleadings documents and evidence relied on in proof of their case.
- 6.3.10. The 2<sup>nd</sup> Applicant failed to annex any document evidencing the stringent and humiliating treatment meted out on him. Being an allegation on health, it is only but right to secure an expert evidence to prove that the alleged disability was as a result of the dehumanizing prison conditions. There is also no evidence before this Court that the said disability did not predate the incarceration.
- 6.3.11. The burden of proof will only shift to the Respondents when the Applicants have discharged onus placed on him. In **E.D TSOKWA AND SONS COMPANY LIMITED V. UNION BANK OF NIGERIA**

**LIMITED (1996)** 12 SCNJ 445, it was held that it is only when the claimant has produced credible evidence that prima facie establishes his claim, that the onus will then shift on the person asserting the opposite to adduce evidence in rebuttal.

6.3.12.      **In FEMI FALANA & 1 OR, V. REPUBLIC OF BENIN & 2 ORS ECW/CCJ/JUD/ 02/12 (2012) UNREPORTED**, the Court relying on the decision in *ELSI'S* case in *R Lilich* New York (1992) stated on the burden of proof that, the Applicant's case must be objectively and realistically seen crossing a bright line of proof. Its case must be made by a preponderance of evidence and should be able to persuade the Court to tilt in its favor.

6.3.13.      A party having a burden of proof must not only bring evidence in support of his allegation but must also convince the Tribunal of their truth less they Be disregarded for want of sufficiency or proof.

6.3.14.      In the instant case, there is no such evidence for the Court to even equate its sufficiency or otherwise.

6.3.15.      In the light of the foregoing, the Court holds that the Applicant has not made out any case relative to the allegations of inhuman and dehumanizing treatment for the Respondent to answer. The 2<sup>nd</sup> Applicant has failed to prove any inhuman or dehumanizing treatment.

6.3.16.      The applicants contend that they were denied family visit and have lived in total isolation for the past 23 years which amounts to a dehumanizing treatment.

6.3.17.      Generally, every prison inmate is entitled to visit by his family members or legal representative as the case may be. This must however be in compliance with the governing rules. Any restriction in this regard will amount to an interference with the right to family life of the inmate.

6.3.18.      The African Commission on Human Rights, in **Law Office of Ghazi Suleiman v. Sudan, Communication. 222/98 and 229/99 (2003)** held that "Detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amounts to inhuman treatment both for the detainees and their families".

6.3.19. In paragraph 6 of document no. 4 deposed to by one Jude Arthur Angel, a friend to the Applicants, deponent stated in clear terms that he had on several occasions had extensive meetings with Applicants at their detention center in Enugu. This statement contradicts the Applicants' allegations that they were denied family visits.

6.3.20. The Court notes that a document made under oath depicts the true position of a matter. The Applicant failed to put forward any credible evidence in proof thereof, the Court therefore holds that the Applicants' claim in this regard has not been substantiated.

6.3.21. On the issue of public threats to execute the Applicants, the Court notes that this allegation has not been substantiated with any credible evidence and therefore goes to no issue. The Court therefore cannot give credence to unsubstantiated averments.

6.3.22. On the applicants' averments that the trial before the military tribunal was unfair, and that they were denied the right of appeal, the Court says that the African Charter is not silent on this issue. The Charter provides at Chapter 7 that *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; (d) The right to be tried within a reasonable time by an **impartial court or tribunal**.* For the applicants to succeed in an application for a violation of their right to fair trial, it is not sufficient to merely allege that they were trial by a special tribunal. It must be shown that the trial was violative of international standard. In the instant case, the applicants must show that the tribunal was not impartial. This partiality may be discerned from the text establishing the tribunal.

6.3.23. The Tribunal before which the applicants were tried was established pursuant to an Act known and styled as the Robbery and Firearms (Special Provisions) Act Cap. 398 LFN 1990. This Act provides in Section 8 as follows:

1. The Governor of each State shall constitute a Constitution tribunal or tribunals for the trial of offenses under this Act committed within his State.



2. A tribunal constituted under subsection (1) of this section shall consist of the following persons to be designated by the Governor, that is to say – (a) a serving or retired judge of a High Court or any court of like jurisdiction, whether or not of the State concerned, who shall be Chairman; (b) an officer of the Nigerian Army not below the rank of major or an officer in the Nigerian Navy or Nigerian Air Force not below the corresponding rank; and (c) an officer of the Nigerian Police Force not below the rank of chief superintendent of police: Provided that no member of the armed forces or of the Nigerian Police Force who has taken part in the search for, pursuit or apprehension of any person to be tried under this Act or who has taken part in the investigation of the offense alleged or suspected to have been committed by that person shall sit as a member of a tribunal constituted for the trial of that person for that offence.

6.3.24. The Act provides at Section 9 (2) that “(p)rosecutions for offences under this instituted by the Attorney-General of the State or where there is no Attorney-General, the Solicitor General of the State in respect of which the tribunal was constituted or by such officer in the Ministry of Justice of that State as the Attorney-General or the Solicitor General, as the case may be, authorise so to do...”. Further to the above, Sections 10 and 11 confers upon the Governor the authority to review the judgment of the tribunal without any right of appeal to the judiciary.

6.3.25. The Court certainly is of the opinion that considering the text creating the Special Tribunals in light of Section 7 of the African Charter, the said act is in violation of the rights of the applicants as protected by sub-section (a) and (d) of Section 7.

6.3.26. These identical issues were raised before the African Commission on Human and Peoples’ Right growing out of a trial by a military tribunal constituted under the same Act which resulted into the imposition of the death penalty. Because this Court is in full agreement with the analysis and conclusion of the Commission, the said determination is hereby quoted herein verbatim and incorporated as a part and parcel of this judgment. “60/91: Constitutional Rights Project (in respect of Wahab Akamu, G. Adegga and others) / Nigeria

6.3.27. The Facts

**“1.** Communication 60/91 was brought by the Constitutional Rights Project, a Nigerian NGO, on behalf of Wahab Akamu, Gbolahan Adegga and others sentenced to death under the Robbery and Firearms (Special provision) Decree No. 5 of 1984. This decree creates special tribunals, composed of one serving or retired judge, one member of the armed forces and one member of the police force. The decree does not provide for any judicial appeal of sentences. Sentences are subject to confirmation or disallowance by the Governor of a state.

**“2.** Wahab Akamu was convicted and sentenced to death on August 12th 1991, and Gbolahan Ageaga was convicted and sentenced on August 14th 1991. Both were sentenced by Robbery and Firearms Tribunal 1, Lagos.

**“3.** The complaint alleges that both were tortured to extract confessions while they were in custody.

Argument

**“4.** The communication argues that the prohibition on judicial review of the special tribunals and lack of judicial appeals for judgments of these tribunals violates the right to an appeal to competent national organs against acts violating fundamental rights, guaranteed by Article 7, paragraph 1(a) of the African Charter.

**“5.** The communication also argues that the practice of setting up special tribunals, composed of members of the armed forces and police in addition to judges, violates the right to be tried by an impartial tribunal guaranteed by Article 7, paragraph 1(d).

The Law: Admissibility

**“6.** The case was declared admissible at the 14th Session of the Commission on the following grounds:

**“7.** The case raises the question of whether the remedies available are of a nature that requires exhaustion.

**“8.** The Act complained of in communication No. 60/91 is The Robbery and Firearms (Special Provisions) Act, Chapter 398, in which Section 11, paragraph 4 provides: No appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such decision by the Governor.

**“9.** The Robbery and Firearms Act entitles the Governor to confirm or disallow the conviction of the Special Tribunal.

**“10.** This power is to be described as discretionary extraordinary remedy of a no judicial nature. The object of the remedy is to obtain a favour and not to vindicate

a right. It would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective.

“11. Therefore, the Commission is of the opinion that the remedy available is not of a nature that requires exhaustion according to Article 56, paragraph 5 of the African Charter.

Merits

“12. The Robbery and Firearms (Special Provisions) Act, Section 11, subsection 4 provides:

No appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such decision by the Governor.

“13. A “decision of a tribunal constituted under this Act or any confirmation or dismissal of such decision by the Governor” may certainly constitute an “act violating fundamental rights” as described in Article 7.1.a of the Charter. In this case, the fundamental rights in question are those to life and liberty provided for in Articles 4 and 6 of the African Charter. While punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of appeal to “competent national organs” in criminal cases bearing such penalties clearly violates Article 7.1.a of the African Charter, and increases the risk that severe violations may go unredressed.

“14. The Robbery and Firearms (Special Provision) Act, Section 8(1), describes the constitution of the tribunals, which shall consist of three persons; one Judge, one officer of the Army, Navy or Air Force and one officer of the Police Force. Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, the same branch that passed the Robbery and Firearms Decree, whose members do not necessarily possess any legal expertise. Article 7.1.d of the African Charters requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality. It thus violates Article 7.1.d.”

6.3.28. In light of the above, it is the finding of the Court that the trial of the applicants by the Special Military Tribunal as referred to hereinabove, and the denial of the right to appeal to a competent judicial body constitute a violation of Section 7 (1) (a) and (d) of the African Charter.

**7.0. Should it be the finding of this court that the Federal Government was in breach of its international obligations as refer to above, is this court competent, and is there evidence sufficient in law for this court, to grant the reliefs sought by the applicants?**

- 7.1.** This Court, by virtue of its mandate “to determine cases of violation of human rights that occur in any Member State” as provided for by Article 9 (4) of the Supplementary Protocol (A/SP.1/01/05) Amending the Protocol (A/P1/7/91) Relating to the Community Court of Justice, has the competence to grant reliefs to remedied breach and violation of a Member State of international human rights obligation. By virtue of its membership of the Economic Community of West African States, and in view of the fact that it ratify the African Charter, the defendant herein can be held accountable for breach of any provision of said African Charter if so found by this Court.
- 7.2.** It being the finding of this Court that the defendant is in breach of Article 7 (1) (a) and (d), this Court is competent to grant the reliefs appropriate to address the same.

## **8.0. DECISION**

In view of the foregoing, this Court hereby adjudge that:

1. The Initiating Application stated a cause of action.
2. This Court has the competence to hear this matter.
3. That having find the defendant in breach of Article 7(1)(a) and (d) of the African Charter, the defendant continuous holding and detention of the applicants is illegal and therefore the defendant is hereby order to immediately release or order release the applicants from all further detention and restriction
4. That due to lack of substantiating evidence, this Court did not find the defendant in breach of Article 6 of the African Charter.

## **9.0. COSTS**

This Court hereby adjudges that the defendant bear the cost of these proceedings as provided for by Article 24 of the Protocol (A/P1/7/91) on the Community Court of Justice.

And the following hereby append their signatures:

Hon. Justice Yussif KABA – Presiding

Hon. Justice Maria DO CEU Monteiro – Member

Hon. Judge Friday Chijioke Nwoke – Member

Assisted by Mr. Aboubakar Dijbo Diakite - Registrar

DONE THIS 29<sup>TH</sup> DAY OF JUNE, 2018 IN THE CITY OF ABUJA, FEDERAL  
REPUBLIC OF NIGERIA

STAMP OF COURT