

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



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

HELD IN ABUJA, NIGERIA

On June 28th, 2019

PROCEEDING No ECW/CCJ/APP/27/17

JUDGEMENT No ECW/CCJ/JUD/25/19

BETWEEN:

SUNDAY CHARLES UGWUABA - Applicant

AND

STATE OF SENEGAL

Defendant

COMPOSITION OF THE PANEL:

Honorable Judge Dupe **ATOKI** - President

Honorable Judge Keikura **BANGURA** - Member

Honorable Judge Januária Tavares Silva Moreira COSTA Member/Rapporteur

Assisted by:

Athannase **Atannon** - Deputy Register

1. REPRESENTATIONS OF THE PARTIES

a) For the Applicant

U L. ABONYI

b) For the Defendant

Maitre Papa Moussa Felix Sow

2. PROCEDURE

By application dated July 10th, 2017, and registered on October 27th, 2017, **SUNDAY CHARLES UGWUABA**, a Community citizen with Nigerian nationality, ordinarily resident in The Gambia, brought the present action before the ECOWAS Court of Justice against the **STATE OF SENEGAL**, for violation of the applicant's human rights to free movement of persons, goods and services, guaranteed by the combined effects of Articles 1, 2, 4 and 12 of the African Charter on Human and Peoples' Rights, the Article 3 (2) (d) (iii), Article 4 (g), Article 45 (2), and Article 46 of the ECOWAS Revised Treaty, Article 13 of the Universal Declaration of Human Rights, Article 2 (2) and Article 27 of the Protocol on Free Movement of Persons, Right of Residence and Establishment and the Mini Summit of Heads of State and Government on the Creation of a Borderless ECOWAS, Abuja, 2000. (document 1)

The Defendant State, SENEGAL, regularly cited, on October 21, 2017, came by an application dated November 22, 2017 and registered with the Registry of this Court on November 27, 2017, to present its defense. (document 2)

The applicant, duly notified of the presentation of the defense, on November 29, 2017, presented his reply by an application dated January 29, 2018, registered with the Registry of this Court on the same date. (document 3)

Furthermore, by an application dated 28 March 2018, the applicant made a request for an extension of the deadline to offer his response, having submitted it at the same time and also offered as evidence the oral testimony of the applicant and the visualization of a video clip that he attached. (document 4)

The defendant, after having received the duly translated documents offered by the applicant, came on 11 April 2019, to present the rejoinder as contained in the document (5).

The applicant, duly notified, replied as contained in the document (6).

The parties were heard on a court hearing on May 15, 2019, and the video clip offered by the applicant was reproduced and visualized.

3- ON THE FOUNDATIONS OF THE APPLICANT'S CLAIMS:

The applicant is a citizen with Nigerian nationality, ordinarily resident in The Gambia. He is an international businessman engaged in cross-border business within ECOWAS, with a particular interest in exporting fish from The Gambia to Nigeria across the borders of Senegal, Mali, Burkina Faso, Republic of Benin and Nigeria.

On 18 March 2016, he departed on an exportation of 156 boxes of smoked fish to Nigeria in 3 lorries, having obtained all the necessary authorizations from the competent authorities.

The trucks include:

- a. Iveco Truck with license plate JJJ42XQ, carrying 70 boxes of smoked bonga fish and each box contained 4000 pieces of fish.
- b. Mini Bus Mercedes Benz Sprinter with license plate KIA404XS, carrying 30 boxes of smoked bonga fish and each box contained 4000 pieces of the said fish.
- c. Mercedes Benz 814 truck with license plate MUS851XG, carrying 56 boxes of the same bonga fish and each box contained 4000 pieces.

When the applicant arrived at the BADIARA border post, he discovered that the defendant had closed its borders with The Gambia and refused the passage of Gambian citizens through its country.

The applicant was convinced that he being a Nigerian citizen and that the trucks carrying his products also have Nigerian registrations, approached the border police to identify himself and also to show them his passport, but to his surprise, the policemen refused to allow his access across borders.

That while making efforts to convince the Senegalese police of the perishable nature of his merchandise, he found that the defendant's police were allowing the passage of persons and goods from selected countries. A Mercedes branded truck with registration number RGB 4269 CF, Guine-Bissau was authorized to cross border by the defendant.

- The applicant waited at that frontier for days, and the days became weeks and months (63 days), believing that the border closure was temporary, until May 20, 2016, when he decided to turn around and return to The Gambia, having waited in vain. Under normal conditions, it takes 30 days to complete the business trip to Nigeria.

The applicant spent his money feeding his three drivers, workers, his helpers and also paid for his and their treatments for scorpion bites, had to find a way to mitigate the losses caused by the defendant by selling the fish in the Gambia.

On 20 May 2016, the applicant, in accordance with the Gambian law, delivered the fish to the Ministry of Health of The Gambia for recertification, but unfortunately they were declared unsuitable for human consumption because of excessive exposure to direct sunlight resulting from the refusal access to entry by the defendant.

That in order to mitigate his losses, the applicant immediately sold the fish to a Mr Ogonnaya Friday at Tanji Beach in The Gambia on 23 May 2016 at the price of D3000 (three thousand Dalasis per carton), totaling D468,000.00 (four hundred and sixty-eight thousand Dalasis) for the 156 boxes, which is equivalent to \$10,636.00 at the exchange rate of D44 to 1USD.

The cost of buying a fish box from his supplier was D19,400 and D3,026,400.00 (three million, twenty-six thousand, four hundred) only for 156 boxes.

That the cost of transportation, transit and feeding is as follows:

a. Each driver was entitled and was paid \$1500 per month and if the \$1500 be split into 30 days, it gives \$50 per day and if multiplied by 63 days, it gives a sum of \$3150 for each driver. The applicant had three trucks and therefore paid \$9450 for 3 drivers.

b. Each worker was entitled and paid \$800 per month and if divided the \$800 by 30 days, it is a value of \$27 per day and if multiplied by 63 days, it gives a sum of \$1680 for each helper. The applicant had 3 trucks and therefore paid \$5040 for 3 helpers.

c. The Iveco truck generated a profit of \$4,000 per month and if the \$4000 is split into 30 days, it gives a value of \$133 per day and if multiplied by 63 days, it gives a total of \$8400 for this truck.

d. The Mercedes truck generated a profit of \$ 4,000 per month and if the \$4000 is split into 30 days, it gives a value of \$133 per day and when multiplied by 63 days, it gives a total of \$8400 for this truck.

e. The Mercedes Sprinter truck generated a profit of \$2400 per month and if the \$ 2400 is split into 30 days, it gives a value of \$80 per day and if multiplied by 63 days, it gives a total of \$ 5,040 for this truck.

The applicant claims that the total cost of feeding, transportation, transit and the cost of renting trucks is \$36,330.

Each carton of smoked fish would be sold in Nigeria in March/April 2016, at ₦260,000.00, which would total ₦40,560,000.00 for the 156 consigned boxes.

The applicant claims that if the sum of ₦2,105,928.00 representing the Naira equivalent of \$10,636.00 raised with the resale (at the official exchange rate of ₦198 per 1USD) is deducted from the sum of ₦40,560,000.00, will give a balance of ₦38,454,072.00.

The applicant claims that the money he used for this transaction was a 25% interest loan granted to him by the SKYE BANK based in the Republic of The Gambia.

The applicant also claims that, following the aforementioned facts, he was not possible to repay the loan to the bank, since the goods perished.

That because of his inability to repay the loan, the bank has sued him in the court and he was sentenced to pay the loan, so his two buildings are being put up for sale in The Gambia to pay off the debt.

He also maintained that his company collapsed completely and that his family of six children have been subjected to psychological torture, since four of his children left school because of lack of school fees, and because of all this he suddenly became hypertensive and has been hospitalized constantly since this incident.

The applicant claims that he paid the Levis Uche & Co law firm the sum of ₦5,000,000 (five million naira) only to sue this process.

4- ON THE APPLICANT'S REQUESTS

The applicant makes the following claims before the Court:

(A) A DECLARATION that the refusal to the applicant's entry into the Republic of Senegal with his lorries loaded with perishable goods en route to Nigeria on 18 March 2016 by the defendant is illegal and violates the provisions of Articles 2 and 12 of the African Charter on Human and Peoples' Rights and Articles 4 (g), the Articles 3 and 27 of the ECOWAS Revised Treaty which guarantee the right to free movement of persons and goods within 90 days without a visa in the territory of the Member States.

(B) AN ORDER obliging the defendant to pay to the applicant the sum of thirty-eight million, four hundred and fifty-four thousand, seventy-two Naira (₦38,454,072.00) only, being this the normal sale price of said goods in Nigeria after deduction of value obtained by the sale of the perished goods.

(C) AN ORDER obliging the defendant to pay the applicant the sum of \$19,030, being this the additional cost of feeding and rental of the trucks for an additional period of 33 days.

OR

(D) AN ORDER obliging the defendant to pay the sum of D2,558,400.00 (two million, five hundred and fifty-eight thousand and four hundred dalasis), being this the cost of acquisition of the goods after deduction of the sum of D468,000 raised by the sale of the perished fish and a sum of \$36,330 (thirty-six thousand three hundred and thirty dollars), being this the cost of feeding and hiring the trucks for 63 days.

(E) AN ORDER obliging the defendant to pay a sum of ₦5,000,000 (five million Naira) only, the legal fees paid by the applicant for the trial of this case.

(F) AN ORDER granting the applicant a sum of \$100,000,000 (one hundred million US dollars) as general and exemplary compensations for psychological trauma, shock and loss of health due to the action of the defendant.

The defendant gathered documents.

5. ON THE FOUNDATIONS OF THE DEFENDANT

The Defendant State, that of Senegal, in its defense, claimed that the application should not be admissible since the applicant did not indicate his domicile at the Court of Justice and that the applicant's lawyers did not accept to receive notifications by fax or any other technical means of communication, thus failing to comply with the requirements in the Articles 33 (2) and (3) and 28 (3) of the Rules of Procedure of this Court.

That also in the petition notified on the defendant, the applicant did not attach the document "*Legitimation*" which the lawyer of the applicant must submit, as required by Article 28 *in fine* of the Regulation.

That it is such document that allows the Court to know the lawyer or agent responsible for representing the applicant and, on the other hand, to have the real guarantees as to the existence, identity and authenticity of the names, surnames and qualities of the persons;

That the Article 28 of the Rules of Procedure requires the lawyer to prove that he is entitled to practice before a court of a State Member or any other State party of the Treaty.

The Defendant concluded that failure to regularize these formalities means that the application is declared inadmissible in accordance with Article 33 (6) of the Rules of the Court.

AS TO THE FACTS, THE DEFENDANT FURTHER ALLEGED:

That due to a crisis in the border between the two countries, which began in February 2016, and resulted in the suspension of road traffic for several weeks, the situation was only normalized with the reopening of the border between Senegal and The Gambia on 24 May 2016.

That the defendant's lorries did not cross the Senegalese border was not due to the closure of the border, but due to the breaking load, which is a measure imposed on the Gambian and foreign carriers wishing to transit their goods through the Senegalese

territory, requiring that the products should be decanted in vehicles authorized to continue their journey;

That this regime of interstate transit of goods in the ECOWAS region is governed by Convention A/P4/5/82, establishing an interstate transit regime for goods in the ECOWAS region, as provided for in Article 4 thereof, that the Article 5 et seq. specify the formalities to be complied with in order to be admitted to transit in accordance with the interstate transit regime through the establishment of the TRIE declaration.

That at the material time, The Gambia had not complied with the requirements for the implementation of the Interstate Transit System (TRIE) signed in Cotonou on 29 May 1982;

That the applicant did not meet the requirements of the interstate transit of goods as provided for by the aforementioned Convention, therefore he can not claim any infringement of the right to free movement of persons and goods;

That, contrary to the applicant's assertion, it is not the police who is in charge of interstate traffic, but the Customs services;

That the Community origin of the products must be confirmed by a certificate of origin as specified in the memorandum of the Directorate-General for Customs of 16 January 2017; whereas the certificate of origin, whose specimen is attached, is compulsory for the export of products to an ECOWAS member country; without this certificate of origin, the product can not be exported.

That in the Senegal-Gambia report issued on 15 May 2016 it was reminded by the Senegalese party that "*road traffic between Senegal and The Gambia is governed by Senegalese national law (Customs Code) in the absence of the possibility of implementing the mechanism recommended by the ECOWAS Convention in this regard.*

That this lack of operation of interstate road transit of goods between the two countries is due to the absence of a national guarantor and of authorized lorries or containers, two of which are necessary for the effectiveness of this regime, in accordance with the provisions of Article 4 of the aforementioned convention.

That the State of Senegal has already signed the Convention on Interstate Transport of Merchandise in the ECOWAS area and should therefore be applied in a specific manner; that even if it refers to more general provisions, including the African Charter on Human Rights, in view of the provisions of article 12, the freedom of movement of persons and goods must respect the national legislation of the State, which was not the case of the applicant.

That the applicant, in support of his application, has attached 13 documents which were not communicated to him (the defendant), and that this constitutes a breach of the adversarial principle and equality of arms, wherefore the documents must be rejected.

6. DEFENDANT'S CONCLUSIONS

The defendant concluded that:

- a) the petition of the applicant should be declared inadmissible for non-compliance with the provisions of Article 33 of the Court's Rules of Procedure;
- b) should be rejected the documentary evidence submitted by the applicant as it was not communicated to the defendant;
- (c) the applicant's claims should be reject due to lack of grounds;
- (d) order the applicant to pay the costs.

The defendant gathered documents.

The applicant **replied**, claiming that on the first page of the petition is clearly stated his address, that he declared his address of service within the jurisdiction and in Abuja where the court has its seat, that he duly attached his certificate of order, which can be found in the Court registry, that the defendant has not shown by evidence that he refused the applicant's entry because he did not submit the transport of his goods in accordance with the law.

He conclude asking for the present action to be considered well-founded.

The documents presented by the applicant were duly translated and notified on the defendant, who came to present his **rejoinder** in which he argued that:

- the traffic on both sides of the border between Senegal and The Gambia was blocked due to a border crisis triggered by the Senegalese road transport unions protesting against a new tariff imposed by the Gambian Customs.

- According to Annex 12, the customs office at Bassa pointed out that *"(the vehicles) stayed about seven hours at the Badiarra border post. Then they decided to return to Serekunda in The Gambia"*.

- And for this reason the vehicles carrying smoked fish did not stay on the border, as alleged, from March 18th to May 20th, 2016, but they parked for only seven hours at the border post in Badiarra;

- The annex 9 mentions that the certificate of sanitary discharge was only valid for 14 days counting from 03/17/2016.

The defendant gathered documents.

The applicant replied to the rejoinder and concluded as in the application initiating proceedings.

7. THE QUESTIONS TO BE DECIDED

Having been verified the Court's competence, it should be decided first, on the one hand, whether the application initiating proceedings should be declared inadmissible due to an alleged failure to comply with the provisions of Article 33 (2) and (3) and Article 28 (3) of the Court's Rules of Procedure and rejected the documentary evidence submitted by the applicant, on the ground that they were allegedly not communicated to the defendant.

On the other hand, if those pleas are rejected, to decide whether the facts as claimed by the applicant constitute a breach by the defendant to the fundamental human rights claimed and whether the defendant should be ordered to pay the requested sum to the applicant.

8.ON THE ANALYSIS BY THE COURT.

On the jurisdiction of the Court:

The jurisdiction depends on the nature of the question brought to the Court by the applicant, based on the facts claimed by him/her.

In this case, the applicant's petition is based on claims of a series of acts, which, imputed to the defendant, were found to violate his human right to the free movement of persons and goods guaranteed by the African Charter on Human and Peoples' Rights and by the Universal Declaration of Human Rights.

Pursuant to Article 9 (4) of the Supplementary Protocol, which establishes that: "*The Court has jurisdiction to determine case of violation of human rights that occur in any Member State.*"; And of article 10 (d) of the same law where it is stated that: "*Can consult the court: ... Individuals on application for relief for violation of their human rights...* ", this Court has jurisdiction to hear cases of Human Rights violations occurring in its Member States.

That is a case-law of this Court that its competence can not be questioned when the claimed facts are related to Human Rights. Cf. the judgments ECW/CCJ/JUD/05/10 of 14th March pronounced on the case ECW/CCJ/APP/07/08 between Hissène Habré and the Republic of Senegal, ECW/CCJ/RUL/032/2010 of 8 November 2010, pronounced in the case ECW/CCJ/APP/05/09 case between Mamadou Tandja and the Republic of Niger; *No. ECW/CCJ/RUL/05/11* pronounced in the case ECW/CCJ/APP/03/09 between *Private Alimu AKeem*, against the Federal Republic of Nigeria).

The present action is based on the violation of legal instruments ratified by ECOWAS Member States, which binds them and imposes on them the duty to respect and protect the rights therein proclaimed.- Cf. Judgment No ECW/CCJ/APP/01/09 pronounced in the Proceeding ECW/CCJ/APP/01/09 on the case Amazou Henri against the Republic of Côte d'Ivoire.

The facts claimed in the application initiating proceedings were considered by the applicant as grounds of violation of his human rights guaranteed by the legal instruments of which the Defendant State is a party, namely the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights.

The Article 9 (4) of the Protocol relating to the Court, as amended by the Supplementary Protocol of 2005, provides that the Court has jurisdiction to hear cases of human rights violations occurring in the Member States of the Community.

Article 10 of the same Protocol states in turn that individuals may consult the Court in order to obtain compensation for human rights, provided that the request is not anonymous and that the same case is not pending before another competent international court.

Therefore, the requirements described above are fulfilled, because the request is not anonymous and there is no evidence that the same case is pending in another international court.

Therefore, considering the facts claimed by the applicant as violations of his human rights, this court is then competent to hear the case.

On the questions raised by the defendant:

a) The plea of inadmissibility of the application initiating proceedings

The defendant went on to allege that the application must not be admissible since it does not comply with the requirements of Article 33 (2) and (3) and Article 28 (3) of the Rules of Procedure of this Court.

The applicant replied claiming that his address was clearly stated on the petition page, and that he declared his place of service within the jurisdiction and in Abuja, where the court has its seat, that he duly attached his certificate of order, which is at the Court registry.

So, in this specific case, the Court does not accept the argument presented by the defendant.

See why,

After examining the application initiating proceedings (see page 9), it was found that it contains the address chosen by the applicant at the seat of this Court.

Moreover, the Article 33 (3) gives the lawyer a possibility, instead of choosing the address at the seat of the Court, to authorize that the notification be sent by fax or by any technical means of communication.

Since the applicant chose his domicile at the seat of this Court, he was not required to comply with paragraph 3 of the aforementioned article.

The Article 28 (3) of the same legal document provides that "*A lawyer assisting or representing a party shall deliver a certificate to the clerk of the court stating that he or she is entitled to practice before a court of a Member State or another State party to the Treaty.*"

In the present case, such requirement is fulfilled in view of the document presented by the representative of applicant and it can be found with the proceedings.

In the light of the foregoing, we consider that the application initiating proceedings is admissible.

b) On the rejection of the documentary evidence submitted by the applicant

The defendant asserted that the applicant, in order to demonstrate his pleas, offered 13 documents as evidence which were not communicated to him (defendant) and that this constituted a breach of the adversarial principle and equality of arms and therefore the documents must be rejected.

It is well known that the court must observe and enforce the adversarial principle throughout the entire process, and it is unlawful, unless it is manifestly unnecessary, to rule on matters of law or fact, even if it is of non-official knowledge, without the parties being able to comment on them.

As can be seen, the rule of the adversary is a general principle of law, according to which a court can not rule on matters of law or fact, even if it is of non-official knowledge, without being previously given to the parties, the effective possibility to discuss, challenge and value them.

The aim of this principle is to safeguard the procedural parts against surprise decisions and to give them an effective opportunity to actively influence the development and success of the process.

A breach of the adversarial principle results in a procedural nullity if it is capable of influencing decisively the decision of the case.

Pursuant to Article 33 of the Rules of Procedure, the application initiating proceedings contains the offered evidences, in this case, the mentioned documents.

Accordingly, we believe that, if the documentary evidence attached to the application initiating proceedings were not delivered to the defendant, that constitutes a mere irregularity, liable of being remedied, since those documents were lodged at the Registry of this Court, thus accessible to the defendant, that could have requested or consulted them.

Moreover, such an irregularity did not hinder the defense of the defendant, since the defendant did not plead in that regard, having lodged its defense within the legal deadline, challenging the facts claimed by the applicant.

In this sense, we understand that it is without ground the demand of the defendant that the court rejects the documents offered with the application initiating proceedings, as evidence, because in the act of the citation they were not sent to him, when he could have raised an incident of nullity of the citation, requiring the repetition of the act.

In fact, it is what he came to do at the court hearing held on March 5th, 2019, when he requested the translation of the aforementioned documents, which was done and permitted him to present the rejoinder, as found in the document (5) .

Therefore, this claim of the defendant is also dismissed.

ON THE APPLICANT'S DEMANDS:

c) On the claimed infringement of the right to free movement of persons, goods and services

The applicant claimed that due to the fact that the defendant prevented his three lorries carrying fish from entering the defendant's territory by closing its border, it violated

Articles 1, 2, 4 and 12 of the African Charter on Human and Peoples' Rights; Article 3 (2) (d) (iii), Article 4 (g), Article 45 (2), Article 46 of the ECOWAS Revised Treaty; article 13 of the Universal Declaration of Human Rights, 1948; (2) and Article 27 on Free Movement of Persons, Right of Residence and Establishment and the Mini Summit of Heads of State and Government on the creation of a Borderless ECOWAS, Abuja, 2000.

In contrast, the defendant argued that the applicant's lorries did not cross the Senegalese border because of the breaking load, since, at the material time, The Gambia had not complied with the requirements for implementing the Interstate Road Transit regime (TRIE), signed in Cotonou on 29 May 1982; that the applicant did not meet the requirements for interstate transit as provided in Articles 4 and 5 et seq. of the Convention A/P4/5/82, which establishes the regime for interstate transit of goods in the ECOWAS region, therefore the applicant can not claim any infringement of the right to free movement of persons and goods.

Analyzing,

One of the aspects taken into account in the aforementioned Convention was the need to introduce a transit system to facilitate the transport of goods between the territories of ECOWAS Member States.

Thus, the Article 1 (3) of the Convention defines state road transit as being "*a regime that allows the transportation of goods by road from one Customs Office in a Member State to another Customs Office in another Member State through one or more Member States free of duties, taxes and restrictions while in transit. Such goods shall be accompanied with a set of customs documents and shall not be off-loaded or transferred while in transit.*"

Articles 4, 5 et seq. lay down the formalities required for nationals of the Member States to benefit from the exemptions provided for therein.

However, in the event of non-compliance, the Article 29 (1) of the Convention provides that "*When an infringement is established in the course of and at the time of an Inter-State Road Transit Operation in a Member State, the duties, taxes and fines that may be incurred shall be collected by the Member State in conformity with the laws and regulations in force in each Member State.*"

It should be pointed out that the defendant did not specify the specific requirements laid down in the cited Articles 4 and 5 that the applicant failed to fulfill, but rather merely claimed, as a rule of thumb, that the applicant did not comply with such Articles.

And furthermore, the following question arises:

In the event of a breach of the requirements laid down in that Convention by the applicant, was it for the defendant to prevent the applicant from entering its territory by closing its border with The Gambia?

The answer is negative, since, as aforementioned, the Article 29 states that in the event of non-compliance, the duties, taxes and fines which may be incurred shall be collected by the Member State in accordance with the laws and regulations, in force in each State.

The defendant did not claim that the applicant did not comply with a duty or refused to pay any tax or fine that was determined to him by the defendant because of the alleged breach of the Convention.

The defendant was categorical in stating that the applicant did not meet the requirements under the framework for interstate transit of goods as provided in Articles 4 and 5 et seq. of the Convention A/P4/5/82.

It was incumbent on the defendant to specify which requirements under the framework of interstate transit of goods, as provided in Articles 4 and 5 et seq. of the Convention A/P4/5/82, that the applicant did not comply with, in order to be able to prove them.

Therefore, there are no doubt that based on the ground that those facts were hampering to the right claimed by the applicant, the defendant would have to plead and prove, because the burden of proof lays on him.

By the way, the Court wrote in the Judgment ECW/CCJ/JUD/01/10 (in CCJLR 2010, p. 12 par.35) in the case of Daouda Garba versus Republic of Benin: *"it is of general rule in law that in the course of a trial the party making the allegations must prove it. The constitution and demonstration of the evidence therefore belongs to the concerned parties. They must use all the legal means and provide evidence to support their claims. Such evidence must be convincing to establish a connection between them and the claimed facts..."*

And this the Defendant failed to do considering that, he did no claim any fact nor did he present any evidence.

The defendant also claimed that The Gambia had not complied with the requirements for the implementation of the Interstate Transit System (TRIE), signed in Cotonou on 29th May 1982. And that is why it is the West African Economic and Monetary Union customs code that applies, as well as the code of the Member States that are oppose to it.

This argument is not appropriate either, since, as the defendant admitted, the border post was in fact closed.

It remains to be ascertained if there is infringement of the right to free movement of persons, goods and services

The right to free movement is provided for in several international and regional instruments for the protection of human rights, namely, the Article 4 of the Universal Declaration of Human and Citizen Rights of 1789, the Article 13 of the Universal Declaration of Human Rights of 1948, the Article 12, 2 of the International Covenant on Civil and Political Rights of 1966 and the Article 12 of the African Charter on Human and Peoples' Rights of 1981.

The Article 13 of the Universal Declaration of Human Rights provides that: "*(1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country.*"

The Article 12 of the African Charter on Human and Peoples' Rights, establishes that: 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 2. Every individual shall have the right to leave any country including his own, and to return to his country. **This right may only be subject to restrictions provided for in the law, necessary for the protection of national security, law and order, public health or morality...** "(Underlined and Bold are ours)

In the same vein, the Article 12 of the International Covenant on Civil and Political Rights stipulates that: "(2) *Everyone shall be free to leave any country, including his own.* (3) **The above-mentioned rights shall not be subject to any restrictions except when they are provided in the law and are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.**" (Bold is ours)

Article 1 (h) of ECOWAS Supplementary Protocol A/SP1/12/01, on Democracy and Good Governance, determines that: "*The rights set out in the African Charter on Human and People's Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights. In the absence of a court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving the necessary powers to common or civil law judicial bodies.*"

In addition to the above provisions, it should be noted that one of the fundamental ideas of ECOWAS, of which the Defendant State is a member, is that of "a borderless ECOWAS", wherefore the management of immigration and borders is deeply rooted in the overall *raison d'être* of the Community.

The ECOWAS, anchored in the 1975 Treaty, with the aim of progressively strengthening cooperation between Member States through the free movement of goods, capital and people, and thus helping to consolidate the peace, stability and security of the region, adopted the Protocol on the Free Movement of Persons, Residence and Establishment (1979), which was later expanded by four supplementary protocols.

The aforementioned Protocol, the ECOWAS Revised Treaty of 1993 and the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security (1999), form the basis of the legal framework for the management of immigration and the borders within ECOWAS.

Thus, the ECOWAS Revised Treaty (1993) provides that "*abolition, among Member States, of customs duties levied on imports and exports, and the abolition, among*

Member States, of non-tariff barriers in order to establish a free trade area at the Community level;" (Article 3)

- Orders the States to *"maintain periodic and regular consultations between national border administration authorities"*; (Article 58)

- Grants that *"Citizens of the Community shall have the right of entry, residence and establishment and Member States undertake to recognise these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto"*; (Article 59)

- Calls on the Member States to *"undertake to adopt all appropriate measures to ensure that Community citizens enjoy fully the rights"* aforementioned. (Article 59)

- Requests that *"Member States undertake to adopt, at national level, all measures necessary for the effective implementation of the provisions"* aforementioned; (Article 59)

On the same ground, the Protocol A/P.1/5/79 on Free Movement of Persons, Residence and Establishment (1979):

- Establishes the right of citizens to enter, reside and establish in the territory of the Member States; (Article 2 (1))

- Establishes an approach and three phases over 15 years of implementation of (I) the right of entry and abolition of visas, (II) of residence (III), and of establishment; (Article 2)

- Establishes the conditions for the right of entry into the territory of the Member States as long as is in possession of a valid travel document and an international health certificate; (Article 3 (1))

- Reserves to Member States the right to refuse admission to their territory of Community citizens considered inadmissible immigrants under its national laws; (Article 4)

In the present proceedings, the defendant admitted that it did not allow the applicant and his lorries transporting dried fish to enter its territory by closing its frontier with the Gambia.

It came later, in the rejoinder, to justify that the traffic on both sides of the border between Senegal and The Gambia was blocked due to a border crisis triggered by the Senegalese road transport unions protesting against a new tariff imposed by the Gambian Customs.

As can be seen In accordance with the Articles 12 of the African Charter on Human and Peoples' Rights and of the International Covenant on Civil and Political Rights, the right to freedom of movement of persons, goods and services can only be subject to restrictions laid down by the law which are necessary to protect national security, public order, public health or morality, considering that the latter legislation adds also the restriction of the mentioned right as regards the protection of other rights and freedoms of third parties, which are compatible with the other rights recognized in the aforementioned Covenant.

Such restrictions were not claimed by the defendant, it pleaded only on the aforementioned pleas in law which the Court does not uphold to.

However, the applicant added to the proceedings:

- Four declarations (see annexes 2 to 5) issued on 15th March 2016 by the High Commission of Nigeria in Banjul, The Gambia, addressed to all customs and immigration agencies at the various border posts, to the Director-General of Customs in Dakar, Senegal, concerning the applicant's lorries, which state that the aforementioned entity *"... therefore calls for the assistance of all security agencies at the various border posts en route to Nigeria to ensure smooth passage..."*

- Three certificates of food safety and quality control (see Annexes 6 to 8) dated 17 March 2016 issued by The Gambian entities concerning products transported on the applicant's lorries, which state that *"The products are not, to the present state of knowledge, harmful to human health when used for the intended purpose."*

Therefore, the aforementioned documents show that the boxes containing smoked fish transported in the applicant's 3 lorries did not present any threat to the national security, public order, health or public morality.

Accordingly, this Court considers that the conduct of the defendant's agents, by preventing the applicant from entering its national territory, by not being subject to the exceptions provided for in Article 12 (2), since they were not even claimed by the defendant, then constitutes a violation of the right of the applicant to free movement of persons, goods and services guaranteed by Articles 13 of the Universal Declaration of Human Rights, 12 of the African Charter on Human and Peoples' Rights, Articles 3 and 59 of (ECOWAS Revised Treaty (1993) and Article 2 (1) of the Protocol A/P.1/5/79 on Free Movement of Persons, Residence and Establishment (1979).

The applicant intends, by the present action, to establish the civil liability of the Defendant State for the damages he claims as a result of the unlawful conduct of its agents.

It must therefore be ascertained whether the defendant State is to be responsible for the acts of its servants.

The defendant State, as we have seen, is bound not only to respect the rights and freedoms enshrined in the conventions to which it is a party, as well as to guarantee the free and full exercise of such rights (obligations of respect and obligations of guarantee).

That is, the State can not perform any act that may violate guaranteed human rights, but must still create all necessary means to prevent, investigate and even punish any violation, public or private, of fundamental human rights, showing the objective facet of such rights. (cf. Carvalho Ramos, *in Responsabilidade Internacional por violação de direitos humanos: seus elementos, a reparação devida e sanções possíveis: teoria e prática do direito internacional; renovar, 2004 pag. 41.*)

This has been the position of this Court in several Judgments, in which it has emphasized, in the area of human rights protection, the responsibility of Member States for non-compliance with obligations arising from international treaties or conventions signed and ratified by them. - See Judgment *ECW / CCCJ / Rul / 03/2010, delivered in the case Peter David versus Ambassador Ralph Uwechue, (in CCJLR 2010 pag. 224 para. 41 to 47,*

cited in the Judgment ECW/CCJ/RUL/07/2010 pronounced in SERAP versus President of the Federal Republic of Nigeria & others. (CCJLR 2010 to page 252, para.72) -.

In this case, it remains to be ascertained whether are fulfilled the assumptions, which determine the international responsibility of the Defendant State, namely the **unlawful act** (the violation of the applicant's human rights guaranteed by the conventions) - the **imputability** of the unlawful act to agents of the State that violates the international law, binding the State, the causal link between the unlawful act and the **damages** suffered by the applicant.

First, it must be observed that the general principle of proof imposes the burden of proof on the party making the claims. It is true that this rule is reversed when there is a legal presumption, exemption or release of the burden of proof, situations in which such burden happens to fall on the opposite party.

Thus, in an instance where the party to whom the burden of proof is to be imposed complies with it, such party shall enjoy the benefit of the presumption and, as such, it will be for the counterpart to counteract the evidence produced.

In the present case, there is no doubt that the burden of proof lies with the applicant, and it is for him to prove the facts which he has claimed as constituting the right which he is pleading for.

It is proved that, on the 18th of March 2016, in breach of the aforementioned Conventions, the agents of the defendant closed their borders with The Gambia and refused to allow the entry of the applicant's three trucks carrying fish to Nigeria, preventing him from crossing the border between The Gambia and Senegal, without any justifiable excuse for the violation of his right to free movement of persons, goods and services, guaranteed by the aforementioned conventions, making *such action to be internationally illicit* - therefore the first two presuppositions above mentioned are thus fulfilled - the ***unlawful act attributable to the defendant's agents***)

On the claimed damages:

The applicant claimed to have suffered pecuniary and moral damages, the compensation of which he petitioned.

In view of the documentary evidence provided, it resulted proved only that:

- On March 18, 2016, the applicant departed on a exportation of 156 boxes of smoked fish to Nigeria in 3 trucks.
- When the applicant arrived at the BADIARA border post he discovered that the defendant had closed its borders with The Gambia and refused the entry and passage of Gambian citizens through its country.
- The applicant's lorries remained for seven hours at the Bandiara border post;
- For the issuing of the three food safety and quality control certificates dated 17 March 2016 issued by the Gambian entities, the applicant paid the sums of D1.000.00, D750.00, D750.00 (see Annexes 6 to 8, respectively)
- On 20th May 2016, the applicant, in accordance with the Gambian law, delivered the fish to the Ministry of Health of The Gambia for recertification but was certified unsuitable for human consumption due to excessive exposure to direct sunlight. (See Annex 15)
- The applicant sold the fish to a Mr. Ogbonnaya Friday at Tanji Beach in The Gambia on 23rd May 2016 at a feed of D3000 (three thousand Dalasis per box) totaling D468,000.00 (four hundred and sixty-eight thousand Dalasis) for the 156 boxes, (See annex 23).
- The cost of buying a fish box from his supplier was D19,400 and D3,026,400.00 (three million, twenty-six thousand, four hundred) only for 156 boxes. (See Annex 18)
- The applicant paid fees to the lawyers, to initiate this action in the amount of 5,000,000 Naira (See Annex 19)

It was not proved:

- That the applicant waited at that frontier for days, and the days became weeks and months (63 days), believing that the border closure was temporary, until May 20, 2016, when he decided to turn around and return to The Gambia.
- That the applicant claims that the money he used for this transaction was a 25% interest loan granted to him by the SKYE BANK based in the Republic of The Gambia.

- That after the aforementioned facts, the applicant was not able to repay the loan to the bank, since the goods got perished.
- That because of his inability to repay the loan, the bank has sued him in the court and he was sentenced to pay the loan, so his two buildings are being put up for sale in The Gambia to pay off the debt.
- That his company has completely collapsed;
- That his family, comprised of six children, was subjected to psychological torture, as four of his children left school for lack of paying school fees,
- That the applicant has suddenly become hypertensive and has been hospitalized constantly since this incident.

Therefore, from the prove presented, it was concluded that, after the recertification result, which considered the merchandise unfit for human consumption, in 20th May 2016, the applicant decided to sell it to a Mr. Ogbonnaya Friday in Tanji Beach, The Gambia, on May 23, 2016 at a feed of D3000 (three thousand Dalasis per box) totaling D468,000.00 (four hundred and sixty-eight thousand Dalasis) for the 156 boxes, (See Annex 23); That, in this way, he suffered pecuniary damages (emergent damages) in the **sum of D2,558,400.00 (two million, five hundred fifty-eight thousand, four hundred dalasis)** as a result of the difference between the cost of acquisition of the merchandise and the sale price of the perished fish.

With regards to the non-material damage claimed, the applicant has not presented any evidence.

It remains to be examined whether there is a causal link between the damage and the unlawful act attributed to the defendant's agents, that is, if the conduct of the defendant's agents was capable of producing deterioration in the goods carried by the applicant, as he claims to be.

As it is proven by the factual basis, the applicant was carrying 156 boxes of smoked fish in three lorries to Nigeria on a 30 days journey:

However, having found the border closed, as he asserted, even though he did not present any evidence that proves his statement, he decided to wait there for it to open during 63 days, when he decided to turn around and return to The Gambia where the goods came to be re-certified as unfit for consumption.

In this case, it remains to be ascertained whether the closure of the border (unlawful act) was the appropriate cause for the production of the damage.

According to the legal theory of *proper causality*, in order for a fact to be the caused of a damage, it is not necessary that on its own, without the collaboration of others, it causes the damage, but it must be condition of the damage or one of the conditions of the damage, provided that the fact is objectively appropriate to the production of that damage (See Antunes Varela in "das Obrigações em Geral Vol. I. 2ª Ed. 754 e ss. Almeida e Costa in "Direito das Obrigações" 5ª ed., 634 e ss e Galvão Telles, in "Direito das Obrigações" 6ª ed. 408).

According to this theoretical construction it can not be abstracted from the factual process that, in particular, it led to the damage.

In this case, the applicant claimed that on 18 March 2016 the defendants' agents closed the border by not allowing him to pass with his three lorries loaded with smoked fish, and that he waited on that frontier for 63 days, believing that the closure was temporary, until, on 20 May, when he decided to turn around and return to The Gambia.

It can not be taken as proved the applicant's stay at the border for 63 days, since he did not present any evidence.

However, even if the applicant would have proved such fact, it could still be concluded that if he could have been diligent and adopted the behavior of an average man or of a "*bonus pater family*" (a good family father), the applicant could have avoided the damage, by having turned around and gone back to The Gambia on a timely manner, for he knew the perishable nature of the commodity he carried.

Therefore, it is not acceptable that the applicant remained at the frontier for 63 days as he claimed, exposing the goods he was carrying to the conditions he describes, thus contributing to its deterioration, and then impute the damage to the Defendant State.

The closure of the frontier by itself alone did not leave the applicant unable to conserve or preserve his merchandise, therefore it can not be concluded that such fact - closure of the frontier - was an appropriate cause to produce the pecuniary damage claimed by the applicant.

Thereby, in the absence of verification of this assumption (the causal link) of the civil liability, the applicant's claim related to the compensatory request is thus dismissed.

9. ON THE DECISION

Therefore, the Court decides:

To declare that the Defendant, the State **REPUBLIC OF SENEGAL** violated the human rights of the applicant, **SUNDAY CHARLES UGWUABA**, to free movement of persons, goods and services.

To Declare that the causal link between the damage claimed by the applicant and the closure of the border has not been established.

And as a result,

To Judge as unfounded the compensatory claims made by the applicant.

On the Legal expenses:

The costs shall be borne by the applicant, in accordance with Article 66 (2) of the Rules of Procedure of the Court of Justice.

This judgment was declared and pronounced in a public court hearing held in Abuja by the Court of Justice of the Community on 26th of June 2019.

By the Judges:

Honorable Judge Dupe **ATOKI** - President

Honorable Judge Keikura **BANGURA** - Member

Honorable Judge Januária Tavares Silva Moreira **COSTA** Member/Rapporteur

Athannase Atannon - Deputy Registrar