COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNATE,
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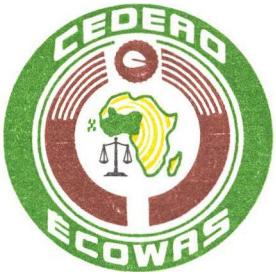

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IN THE COMMUNITY COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)
HOLDEN AT ABUJA, IN NIGERIA
SUIT NO: ECW/CCJ/APP/27/1

JUDGMENT NO: ECW/CCJ/JUD/01/20

BETWEEN:

1. **Ousainou Darboe**
2. **Kemmesseng Jammeh**
3. **Femi Peters**
4. **Lamin Dibba**
5. **Lamin Jatta**
6. **Yaya Bah**
7. **Baboucarr Camara**
8. **Fakebba Colley**
9. **Ismaila Ceesay**
10. **Mamodou Fatty**
11. **Dodou Ceesay**
12. **Samba Kinteh**
13. **Mamudu Manneh**
14. **Nfamara Kuyateh**
15. **Fanta Darboe-Jawara**
16. **Lamin Njie**
17. **Juguna Suso** - **APPLICANTS**
18. **Momodou L. K Sanneh**
19. **Yaya Jammeh**
20. **Masaneh Lalo Jawlan**
21. **Lamin Sonko**
22. **Modou Touray**
23. **Lansana Beyai**
24. **Lamin Marong**
25. **Alhagie Fatty**
26. **Nogoi Njie**
27. **Fatoumata Jawara**
28. **Fatou Camara**
29. **Kafu Bayo**
30. **Ebrima Jadama**
31. **Modou Ngum**
32. **United Democratic Party (UDP), The Gambia, (suing for itself and for the Estate of *Ebrima Solo Sandeng (deceased)***

AND

THE REPUBLIC OF THE GAMBIA - RESPONDENT

COMPOSTION OF THE COURT

Hon. Justice Edward Amoako Asante - Presiding

Hon. Justice Gberi-Be Ouattara - Member

Hon. Justice Keikura Bangura - Member

Assisted By:

Tony Anene-Maidoh – Chief Registrar

JUDGMENT

Parties

The Applicants are Citizens of the Republic of Gambia and Citizens of the Community who are ordinarily resident in the Republic of Gambia. The Respondent is the Republic of Gambia and a Member State of the ECOWAS Community.

Subject Matter of the Proceedings

The Applicant's claim is for the violation of the human rights pursuant to Articles 4, 5, 6, 7, 10, 11 & 13 of the African Charter on Human and People's Rights; violation of Articles 3, 4(1) and 25 (a) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa; violation of Article 1 (j) of the ECOWAS Protocol on Democracy and Good Governance.

Summary of Facts

The Applicants, 1st to 31st, aver that they are members of the 32nd Applicant who were arrested during peaceful protests on the 14th April, 2016 and

were detained and severely tortured by the Respondent. That one of the detainees, Ebrima Solo Sandeng, died from torture inflicted by the Respondent, which the latter confirmed in a sworn deposition (Annexure B2) that the deceased died whilst in detention. The Applicants aver that the protests were disrupted by the police and were not allowed to disperse. That the police used more force than was necessary and randomly arrested persons in the vicinity of the protests.

The Applicants contend that the provisions of the Public Order Act of the Respondent are inconsistent with the Provisions of the African Charter on Human and Peoples Rights (hereinafter ACHPR or African Charter) and other relevant Human Rights Instruments.

The Applicants aver further that some of the persons arrested were taken to the maximum security prison without remand warrant, whilst some were detained at the National Intelligence Agency Headquarters in Banjul. The detainees claimed that they were questioned and tortured and that the Respondent had asked whether they had knowledge of the 1st Applicant.

The Applicants claim that during detention seven detainees were hospitalized due to injuries sustained after various forms of torture and ill-treatment. That Ebrima Solo Sandeng died from said torture and ill-treatment and his remains were never handed over to his family.

The 32nd Applicant undertook a peaceful march on the 16th April, 2016 from the place of the 1st Applicant, demanding for the release of Ebrima Solo Sandeng. That during the protests the protesters locked hands in solidarity but were intercepted by Police Intervention Unit (hereinafter PIU) officers in riot gear who attacked them with batons, teargas and the butts of their gun. That they were thrown in trucks where the beating continued and they were detained at the PIU Headquarters until the 17th April, 2016 when they were transported to the maximum security prison without a remand warrant. That they were tortured and put in solitary confinement.

The Applicants aver that an application for Habeas Corpus was filed on behalf of the deceased on the 26th May, 2016. That the State filed two affidavits on the 13th and 22nd June, 2016 respectively confirming that the

deceased had died in the process of arrest and detention and the primary cause of death was shock and the secondary cause was respiratory failure. The Applicants submitted Annexure B2 and B3 which is a Death Certificate that puts the time of death at 15th April, 2016 at 4:20 a.m. but that his remains were not handed to his family neither were they informed.

The Applicants further aver that they were all in bad physical conditions during detention and several of them had injuries on various parts of their bodies and some were limping or had difficulty moving. That they were sentenced to three (3) years in prison on the 20th July, 2016 in a trial that was devoid of fair hearing. That the 1st Applicant was denied his right to make a statement on his sentencing before he was sentenced.

The Applicants specifically contend that the Public Order Act (of the Respondent), by its Section 5, is an unjustifiable as its provisions restrict Rights under Article 7 of the ACHPR.

RELIEFS SOUGHT BY THE APPLICANTS

1. A DECLARATION that Section 5 of the Public Order Act of the Republic of the Gambia Chapter 22-01 is in violation of Article 11 of the African Charter on Human and People's Rights.
2. A DECLARATION that the arrest, detention, charge, purported trial and imprisonment of the Applicants for offences under the Public Order Act were in violation of Articles 4-7 and 11 of the ACHPR.
3. A DECLARATION that the arrests and detention of the Applicants on the 14th April, 2016 and 16th April, 2016 were arbitrary, unlawful and in violation of Article 11 of the ACHPR.
4. A DECLARATION that the torture and/or cruel, inhuman and degrading treatment of the Applicants by the Respondent and its agents violated Articles 4 and 5 of the ACHPR.
5. A DECLARATION that the purported trial of the Applicants without giving them the opportunity to be defended by Counsel of their choice violated Articles 6 and 7 of the ACHPR.
6. A DECLARATION that torture and/or cruel, inhuman and degrading treatment and abuse of the 27th and 28th Applicants, violated Articles

3, 4(1) and 25 (A) OF THE Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa.

7. A DECLARATION that the torture to death, and/or arbitrary and extra judicial killing of Ebrima Solo Sandeng (deceased) in circumstances admitted by the Respondent amounted to violation of Article 4 of African Charter on Human and People's Right.
8. A DECLARATION that the arrest, detention, trial and imprisonment of the Applicants have the consequences of denying the 32nd Applicant, as an opposition political party, from effectively participating in the general elections slated for later 2016 and denying the Applicants their right to participate in the elections as a result of their political opinion or affiliation, therefore violates Article 2 and 13 of the African Charter on Human and People's Rights.
9. A DECLARATION that the Respondent has failed to recognize, promote and protect the rights of the Applicants and to take measures to give effect to their rights as provided under Article 4, 5, 6, 7 and 11 of the African Charter on Human and People's Rights.
10. A DECLARATION that the Respondent has failed to recognize and promote principles of democracy and good governance as envisaged by the ECOWAS Protocol on Democracy and Good Governance.
11. AN ORDER directing the Respondent to set up an independent panel of inquiry to look into events of the 14th and 16th April 2016, and also determine the persons responsible for the torture and ill-treatment of the Applicants and to provide credible measures taken to discipline, dismiss and prosecute the police officers involved.
12. AN ORDER nullifying the purported charge, trial and imprisonment of the Applicants on the basis of the Public Order Act and immediate release of the Applicants from prison.
13. AN AWARD of damages in the sum of 10 million Dalasi to each of the 1st to 31st Applicants for injuries sustained by the Applicants as a result of their torture and physical abuse by agents of the Respondent and their arrest, and unlawful detention.
14. AN AWARD of compensation in the sum of 30 million Dalasi to the Estate of Ebrima Solo Sandeng (deceased) through the 32ND

Applicant for unlawful deprivation of life, and associated loss to the relatives and family members.

15. AN ORDER directing the Respondent to release the body of Ebrima Solo Sandeng (deceased) to his family and to the 32nd Applicant for proper burial in accordance with highly respected African values and culture.
16. AN ORDER restraining the Respondent from harassing, arresting, detaining charging trying or otherwise intimidating any member of the 32nd Applicant in respect of this matter or any other matter, and to allow the members of the 32nd Applicant exercise their rights to participate, vote and elect their representatives and express political opinion as enshrined in Article 2 and 13 the African Charter on Human and People's Rights.
17. Any other order the Honorable Court considers necessary and which the justice of this case, including any order to ensure that the implementation of the judgement and orders made in this case are monitored.

The Respondent's defense

The Respondent denies paragraph 1 of the Applicants' claim and states that they were arrested pursuant to law after undertaking an unlawful public procession. That the 1st to 31st Applicants were not tortured but that the arrest and prosecution followed due process. That the procession was in defiance of an order of police and posed real and imminent danger to public peace.

The Respondent denies further, paragraph 2 of the Applicants' claim and submits that the deceased, Ebrima Solo Sandeng, died from shock and respiratory failure.

The Respondent contends that the Public Order Act is not contrary to Article 11 of the African Charter on Human and People's Rights. That the Applicants were arrested and detained because they violated the Public Order Act Cap 22 vol. 4 of the Gambia 2009.

The Respondent avers that the Applicants were duly arraigned in court but that the High Court ordered for their remand in custody pending trial. That they were allowed access to family, Counsel and medical care. That they were allowed Counsel of their choice until Counsel withdrew his representation and the Applicants continued their defense.

The Respondents aver that the Applicants were not subjected to torture or inhumane and degrading treatment but that the investigation was pursuant to the unlawful processions of 14th and 16th April 2016 and its attendant disorder.

The Respondent maintains that the treatment of the Applicants did not amount to torture and ill treatment, that 18th detainee and Ebrima Solo Sandeng were never subjected to torture particularly subjected to torture.

The Respondent states that the Applicants were not beaten or brutalized but that reasonable force was used to disperse the crowd.

The Respondent admits paragraph 16 of the Applicants claim and affirms the sentence of three years in prison but states that the Applicants were accorded fair hearing during the trial. The Respondent states that the Applicants have filed an Appeal in the Court of Appeal against their conviction.

The Respondent contends that the application of the Applicants lacks merit and is therefore not eligible for the reliefs sought. That the Court should dismiss the application for lack of merit.

The Applicants' Response to the Respondents' Statement of Defense

The Applicants' maintained the facts averred in the initiating application. The Applicants specifically contend that they were denied Counsel, family and medical care and refer to the proceedings of THE STATE V. OUSAINOU DARBOE & ORS (2016) CRIMINAL CASE NO: HC/179/16/CR/059/AO.

The Applicants aver that the Counsel representing them (in the domestic case) was compelled to withdraw representation cited many instances leading to this including the fact that there was an atmosphere of

intimidation in the way proceedings were conducted. The Applicants contend that the Court (domestic) ordered that they represent themselves when Counsel withdrew without giving the Applicants the opportunity to obtain new Counsel.

The Applicants contend that they were prosecuted and convicted because they associated with the 1st and 32nd Applicants.

The Applicants aver that they were remanded in prison before they were arraigned in court. The Applicants maintain that the records of proceedings will indicate apparent physical injuries on the 26th to 31st Applicants, that they were arraigned on the 4th May, 2016 which was two weeks after the arrest, allowing injuries to heal.

The Applicants submit that facts not challenged are deemed admitted; the Respondent's admission as contained in their statement of defense proves the Applicants' reliefs sought.

The Respondent responded to the Applicants reply and maintained their defense.

Applicants' Reply

The Applicants filed their reply to the Respondent's defense on the 28th September, 2016. They maintained that the 21st to 31st Applicants were arrested on the 14th of April, 2016 alongside the late Ebrima Solo Sadeng. That the 1st Applicant then received information that the persons arrested were subjected to torture by the security officials of the Respondent and that Ebrima Solo Sadeng had died as a result injuries sustained from the torture. That the 26th-28th Applicants were seriously injured and on the brink of death.

That it was on this premise the 1st Applicant and others decided to walk towards the head-quarters of the Police intervention unit to demand the release of the deceased and other detainees but were indiscriminately attacked by the agents of the Respondent. That the attack was characterized by excessive force, tear gas, batons and gun butts which made it disorderly, as a result of which the 1st- 19th Applicants were injured. The Applicants added that the said injuries were apparent when the

Applicants appeared before the Court in the Gambia and the record of proceedings of the 20th of April 2016 would indicate that the Court was informed of the injuries which was not denied by the Respondent. That the force used by the agents of the Respondent was disproportionate in the circumstance.

The Applicant's further narrated that sometime on the 14th June, 2016 some 14 out of the 25 persons arrested on 14th April, 2016 were released when it became apparent that they were not members of the United Democratic Party (UDP). That the 1st -19th Applicants who were transferred to the Central Prison in Mile 2 from the Police intervention unit on the 17th April, were remanded without a remand warrant or Court order up until the 20th April when they were brought to Court. That six (6) out of the detainees were held in solitary confinement at the prison. The Applicants referred to the record of proceedings of the national court to confirm this position.

The Applicants' reiterated that they were denied access to Counsel, family members and medical treatment. That even the Court to which they were charged ordered that they be granted access to Counsel and medical treatment but the Respondent failed to comply with the said order. The Applicants' added that they had to attend Court with the same clothing they had since they were arrested and that on the 21st April, the Court had to make a second order urging compliance with its first order.

The Applicants states that their Counsel was compelled to withdraw its representation because the Court consistently refused all applications made on their behalf and that their case was transferred to another Court two hundred (200) kilometers away from the scene of the alleged offence which lacked jurisdiction to entertain the matter. The Applicants assert that they addressed a letter of complaint to the Chief Justice dated 24th May, 2016 in protest but to no avail. That the conduct of proceedings and atmosphere was characterized by intimidation especially with the presence of dozens of armed security personnel with weapons in and around the Court room. That even the Counsel was not permitted to consult with the Applicants in private and when the attention of the Court was drawn to intervene, it found nothing wrong with the actions of the security officers.

That without reference to the Applicants, the Court ordered that trial be continued and Applicants defend themselves without giving them the opportunity to engage another Counsel of their choice.

The Respondent's Reply

In its rejoinder, the Respondent denies subjecting the Applicants to any form of torture or ill treatment and denied that Ebrima Solo Sandeng died as a result of injuries sustained from torture.

The Respondent stated that on the issue of the Applicants' Counsel's withdrawal that the High Court of Gambia can sit at any designated place in the Gambia. That the security personnel in the Court premises were only deployed to maintain order in the face of the unruly conduct of the Applicants' supporters and to ensure a hitch free proceeding. They added that the Counsel had unfettered access to the Applicants throughout the course of trial both at the prison and in the Court room.

The Respondent avers that the arrest and prosecution of the Applicants had no political consideration and profiling but was necessitated by their participation in an unlawful procession and further stated that the death of Ebrima is not a justifiable grounds for the Applicants to have embarked on an unlawful procession.

The Respondent maintained that the investigation resulted into the death of Ebrima Solo and denied the allegation of undue delay in bringing the Applicants to Court after being arrested. They submitted that the Applicants were arraigned within seventy-two (72) hours of arrest and that the Applicants have not established a prima facie violation of Article 11 of the African Charter.

In conclusion, the Respondent submits that in seeking an order to nullify the purported charge, trial and imprisonment of the Applicants on the basis of the Public Order Act and subsequently direct an immediate release of the Applicants from prison, will amount to seeking to impose the powers of the Court to review the decision of the High Court of Gambia for which this Court lacks the competence to do.

ISSUES FOR DETERMINATION

- WHETHER THE COURT HAS THE COMPETENCE TO HEAR AND DETERMINE THE CLAIM BROUGHT BY THE APPLICANTS.

- IF THE ANSWER IS IN THE AFFIRMATIVE, THE COURT MUST DETERMINE WHETHER THE APPLICANTS HAVE ESTABLISHED A VIOLATION OF THEIR RIGHTS AS CLAIMED.

- WHETHER OR NOT THE PROVISIONS OF SECTION 5 OF THE PUBLIC ORDER ACT OF THE GAMBIA CONTRAVENES THE PROVISIONS OF ARTICLE 11 OF THE AFRICAN CHARTER.

- WHETHER THIS COURT HAS COMPETENCE TO DECLARE THE JUDGEMENTS OF NATIONAL COURT NULL AND VOID.

- WHETHER THE 32ND APPLICANT HAS CAPACITY TO INITIATE THIS APPLICATION ON BEHALF OF EBRIMA SOLO SANDENG (DECEASED).

ISSUE 1: WHETHER THE COURT HAS THE COMPETENCE TO HEAR AND DETERMINE THE CLAIM BROUGHT BY THE APPLICANTS.

Competence is a matter of statutory provision. The Court by itself cannot assume jurisdiction to adjudicate on any matter except by clear mandate conferred on it by statutory provisions. Jurisdiction therefore is the mandate and power conferred on the Court to adjudicate on any matter that is brought before it. In this instance, the jurisdiction of this Court is provided for by Article 9 of the Supplementary Protocol (A/SP.1/01/05 Amending Protocol (A/P1/7/91)) and the Court recognizes that the basis of the Applicants claim is specifically anchored to the Provisions of Article 9 (4) of the said Supplementary Protocol Amending the said Protocol of the Court to wit:

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

Article 10 (d) specifically grants access to the Court to individuals wo are seeking relief for violation of their Human Rights and it further provided the conditions precedent :

"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."

The Court has held severally that a mere allegation of a violation of human rights in the territory of a Member State is sufficient, prima facie, to justify its jurisdiction. In the case of MOUSSA LEO KEITA V. THE REPUBLIC OF MALI (2007) ECW/CCJ/JUD/03/07, the Court held that it has a competence to adjudicate matters involving the violation of human rights within its Member State. Therefore the threshold is simply that the application should contain an allegation of a violation for it to be deemed admissible: See SERAP V. FEDERAL REPUBLIC OF NIGERIA & 4 ORS (2014) ECW/CCJ/JUD/16/14.

The Applicants have contended that the Respondent's act of arrest, detention and prosecution whilst exercising their fundamental human rights, especially their right to peaceful assembly, fair trial and the right to life is in violation of their right. Further, that the alleged torture, inhuman and degrading treatment meted out on them whilst in custody of the Respondent is an affront to their dignity. Furthermore, the Applicants also challenge the alleged death of one of them (Ebrima Solo Sadeng) in custody of the Respondents as a violation of his right to life.

Subject to the above averments, the Applicants relied on the provisions of Articles 4, 5, 6, 7, 10, 11 & 13 of the African Charter on Human and People's Rights, Articles 3, 4(1) And 25 (a) of The Protocol to The African Charter On Human and People's Rights on the Rights of Women in Africa and Article 1 (j) of the ECOWAS Protocol on Democracy and Good Governance. In relying on the said provisions, the Applicants are in tandem with the ratio in the case of KAREEM MEISSA WADE V. REPUBLIC OF SENEGAL (2019) ECW/CCJ/JUD/13/19, at pg. 259 Para. 95 (3), where the Court held that: ***"simply invoking human rights violation in a case suffices to establish the jurisdiction of the Court over that case."*** See

also BAKARE SARRE V MALI (2011) ECW/CCJ/JUD/03/11 and Dr. GEORGE S. BOLEY V. THE REPUBLIC OF LIBERIA & 3 ORS. (2019) ECW/CCJ/JUD/24/19.

In line with the above jurisprudence of the Court vis-à-vis the facts of the present application, the Court holds itself competent to hear and determine the matter.

ISSUE 2: IF THE ANSWER IS IN THE AFFIRMATIVE, THE COURT MUST DETERMINE WHETHER THE APPLICANTS HAVE ESTABLISHED A VIOLATION OF THEIR RIGHTS AS CLAIMED.

The Applicants in their application have contended that the Respondent's act of arrest, detention and prosecution whilst exercising their fundamental human rights, especially their right to peaceful assembly, fair trial and the right to life is in violation of their right. Further, that the alleged torture, inhuman and degrading treatment meted out on them whilst in custody of the Respondent is an affront to their dignity. Furthermore, the Applicants also challenge the alleged death of one of them (Ebrima Solo Sadeng) in custody of the Respondent as a violation of his right to life. Subject to the above averments, the Applicants relied on the provisions of Articles 4, 5, 6, 7, 10, 11 & 13 of the African Charter on Human and People's Rights, Articles 3, 4(1) And 25 (a) of The Protocol to The African Charter On Human and People's Rights on the Rights of Women in Africa and Article 1 (j) of the ECOWAS Protocol on Democracy and Good Governance.

To determine the series of Human Right violations alleged by the Applicants, the Court will now outline the series of Human Right violations alleged, examine and assess the facts and arguments as canvassed by the Applicants in the pursuit of proving their case before it. The same will be done according to the thematic issues raised in the Application hereunder.

i. <u>ARREST AND DETENTION</u>

The Applicants aver that in the exercise of their right to assembly, they embarked on a peaceful protest on the 14th and 16th of April 2016 respectively. In the course of the protest, they were arrested and detained

by agents of the Respondent on grounds that they failed to produce a license permitting them to hold the said protest amongst others.

The Respondent, on the other hand, contended that the interference with the Applicants' rights to liberty was executed within the context of the provisions of Article 6 of the African Charter. That the Applicants were arrested and detained for embarking on an unlawful and violent procession which disrupted public peace and constituted an imminent threat. That they behaved in an unruly manner and failed to comply with a dispersal order, throwing missiles at the Police and thereby causing the law enforcement agency to resort to force within the confines of the law. The Applicants maintained that the protest was peaceful as they were unarmed, walking together with locked arms and chanting "*release Ebrima Solo Sadeng dead or alive".* They further contend that their detention was prolonged and in contravention of the Gambian Constitution which provides a maximum period of seventy-two (72) hours before being charged to Court. They argued specifically that the detention of the 26th-31st Applicants lasted more than two weeks.

In rebutting the claim of prolonged detention, the Respondent relied on the provisions of Section 32 of the Interpretation Act of the Gambia to justify the extra days. The Applicants however challenged the applicability of the said provisions of the Constitution. It must be noted that right to liberty and assembly are rights to which the state as a signatory is under obligation to protect though not absolute and the exercise of which is regulated by law. This means simply that such rights can be derogated from within the frame work of the law. It is therefore important to examine the provisions of Article 6 of the African Charter on Human and People's Rights provides:

> *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."*

The Court notes that the Gambian Criminal Procedure Code was drafted having in mind the desire to provide absolute protection for the sovereignty

of the State. The Respondent's defense is that the provisions of the Criminal Procedure Code, Article 5 of the Public Order Act, as well as Section 19(1) of the Constitution of the Gambia are in tandem with the provision of Article 6 of the African Charter on Human and People's Rights (ACHPR). They also maintained that the detention was in compliance with a valid order of Court following the due process of the law. Section 15 of the Criminal Procedure Code Cap 11 Vol 3 Laws of The Gambia, Revised Edition 2009, permits a police officer without a warrant to arrest any person whom he suspects on reasonable grounds of having committed a cognizable offence, any person who commits a breach of peace in his presence and any person who obstructs a police officer in the execution of his duty. They further relied on Section 73 of the Criminal Code Cap 10 Vol. 3 Revised Laws of The Gambia 2009 which provides:

> ***"If on the expiration of a reasonable time after the proclamation is made, or after the making of the proclamation has been prevented by force, twelve or more persons continue riotously assembled together, a person authorized to make proclamation, or a police officer, or any other person acting in aid of the person or police officer, may do all things necessary for dispersing the persons so continuing assembled, or for apprehending them or any of them, and, if a person makes resistance, may use all such force as is reasonably necessary for overcoming the resistance, and shall not be liable in any criminal or civil proceeding for having , by the use of such force, caused harm or death to any person".***

Consequently, the Respondent submits that the interference with or deprivation of liberty of the Applicants in pursuance of and in accordance with the legal principles in the Gambia, are well within the permissible exceptions enshrined in Article 6 of the African Charter and therefore does not constitute violations of the applicant's rights to liberty within the meaning of the said Article.

The Court is mindful of the fact that an arrest and detention premised on lawful grounds cannot be seen as a violation of the guaranteed right to liberty. See BARTHELEMY DIAS V. REPUBLIC OF SENEGAL (2012) ECW/CCJ/JUG/05/12 and ALHAJI HAMANI TIDJANI V. FEDERAL REPUBLIC OF NIGERIA AND 4 ORS. (2007) ECW/CCJ/JUD/04/07.

In determining the legality of the alleged arrest and detention the Court will consider whether or not the alleged unlawful and violent procession resulted in the disruption of public peace as the Respondent would want this Honorable Court to believe. Whether the Respondent has shown any credible evidence documentary or oral before the Court to establish the Applicants unruly behavior and subsequent failure to comply with dispersal orders which has resulted to breach of Public Oder, threat to Public safety as the Respondent averred in his defense.

It is trite law that the burden of proof rests on the person making the allegation to ascertain the truth of his assertion. Such a person can succeed or fail on the strength of his evidence. In the case of FEMI FALANA & ANOR V. REPUBLIC OF BENIN & 2 ORS (2012) ECW/CCJ/JUD/02/12, this Court held that *"as always, that the onus of proof is on a party who asserts a fact and who will fail if that fact fails to attain that standard of proof that will persuade the court to believe the statement of the claim*". Also, in SIKIRU ALADE V. FEDERAL REPUBLIC OF NIGERIA (2012) ECW/CCJ/JUD/10/12 the Court found that every material allegation of claim must be justified with credible evidence and the defense should also sufficiently satisfy every defense and put forward what will rebut the claim or take the risk of putting nothing at all if the claim by their estimation is weak and unproven. In the instance case, it is the expectation of the Court that the Respondent would have tendered hospital report of treatment of agents of the Respondent as a result of injuries sustained from the missiles alleged to have been thrown by the Applicants and even pictures of destructions alleged to have been done by the unruly behavior of the Applicants.

The Court notes that Article 11 of the African Charter provides that:

"*Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the Safety, heath, ethics and rights and freedom of others"*.

Section 5 (5) of the Public Order Act of the Laws of the Gambia on the other hand provides that going on any procession without a license or one in which a license has been issued and the terms of the said license is violated constitutes a **"*cognizable offence"*** for which an arrest can be made without a warrant.

The Respondent has made a blanket denial to Applicants allegation therefore, it is imperative on the part of the Applicants to prove their allegation by way of credible evidence that the act of the Respondent amounted to a violation of their Rights to peaceful possession. However, the Applicants failed to tender evidence to establish proof that the protest was with the approval of the Inspector General of Police of the Gambian Police Force and did not lead evidence either by means of oral or documentary in form of pictures or video to establish that indeed the acts of the Applicants was peaceful. The Applicants therefore failed to show that their act was lawful and peaceful.

In light of the above and in the absence of such evidence to rationalize the alleged acts of the Respondent, the Court finds that though the protest was a peaceful protest it was nevertheless without license and therefore illegal. That the arrest that followed was not arbitrary because it was done pursuant to the Gambian Law. However, the detention that followed was nonetheless arbitrary as the period of detention went beyond the limit permitted by the law of the Gambia before the Applicants were brought to Court.

ii. TORTURE, INHUMAN AND DEGRADING TREATMENT.

The Applicants alleged that they were subjected to torture, inhuman and degrading treatment by agents of the Respondent from the time of arrest to the period in detention. The Respondent however denied subjecting them to any form of torture, inhuman or degrading treatment. The Respondents

relied on the definition of the United Nations Convention against torture to wit:

> ***"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain arising from, inherent in or incidental to lawful sanctions".***

The Respondent went on to state that for an act to constitute a violation of Article 5 of the African Charter, the following three elements must be proved beyond reasonable doubt:

a. *The infliction of severe pain or suffering;*
b. *By or with the consent or acquiesce of the state authorities;*
c. *For a specific purpose, such as giving information, punishment or intimidation.*

They submitted that none of the above elements have been proven by the Applicants.

The Applicants argued that the physical injuries suffered by the 1st to 19th Applicants were apparent when they were brought before the Court on the 20th April, 2016. That the record of proceedings will show that the Court was informed of the injuries of which the Respondent did not deny at that time. See proceedings of 20th and 21st April, 2016.

The Court notes that Article 5 of the African Charter provides:

> ***"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man***

particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

The depositions made on oath by the Applicants contain consistent allegations of acts of torture, inhuman and degrading treatment meted on them by the officers of the PIU unit, to wit agents of the Respondent.

The 1st Applicant deposed that he was slapped by an officer. He alongside the 4th and 5th Applicants were assaulted which resulted in profuse bleeding. That they were made to seat on the bare floor for forty-five (45) minutes and were not given medical attention. However, the Inspector General of Police (IGP) came and told them that they would be taken to the clinic. The 1st Applicant further averred that he sustained a wound on his head which was so deep that it was sutured. He also alleged that they were kept in solitary confinement.

The 3rd Applicant alleged being assaulted by the PIU officers who hit him with their batons and kicked him with their boots on his left hip where he once had a fracture. That he was forcefully thrown into the truck. He however affirmed that those who were injured were given medical attention the next day. He also stated that they were taken to mile 2 prison where photographs of them were taken. While some were escorted to solitary confinement without access to a lawyer. That the cell he was taken to was two (2) meters wide with a small door, with no matrass and full of cockroaches, rats, and mosquitoes. That he stayed there for three (3) days after which he was moved to a different cell.

The 4th Applicant affirmed that he was hit on the back twice by a PIU officer and on turning to see who it was, alas, he was hit on his face (forehead) and his chest. That he had eight (8) stitches on the wound on his forehead. That they were taken to the PIU camp where they were detained before being transferred to Mile 2 prison.

The 15th Applicant who was a passerby at the time of the protest was also arrested, dragged and slapped by the PIU officers. She alleged that they kept on beating her from the time she was arrested to the time they arrived the PIU camp. That on reaching the camp, the officers pushed her off the

truck with so much force that she landed on her feet hence her inability to walk properly. That they were taken to Mile 2 prison on Sunday the 17th of April.

The 17th Applicant on the other hand averred that he was arrested but not beaten. He was only asked who he will vote for during the election.

The 31st Applicant alleged that the officers put a black mask round his face and tied his hands and legs with ropes which was used to drag him on the floor into a dark room. That he was beaten mercilessly as a result of which he was wounded on his arms and thighs. That the NIA brought a doctor who gave them certain medicines and rubbed Chinese balm on their wounds. That they wore their clothes for nine (9) days until they began to smell. He further averred that the NIA officers brought kaftan, a pair of jeans and shirt for him to wear and told him that the kaftan is to be worn on the day they were appearing in Court. That the condition in Mile 2 prison was very bad and they were given small amounts of sub-standard food. That they were in detention from the 27th April to 4th May, 2016 when they were finally taken to Court for the first time.

The 26th Applicant was also beaten by the PIU officers, carried into the truck and handcuffed. They tied a rope around her legs, pulled it tight as a result of which she fell off, bent and broke her little left finger which was swollen and was left without medical attention. She averred that the officers tore her clothes and left her naked except for a short wrapper she wore underneath her cloth. That she was taken to another room where she was told that she will cry until her mouth tears up and no one will hear her. That she was given another round of merciless beating with hose pipes and batons for about an hour leaving her whole body bloody and damaged while the officers continued to pour water on her. That they slapped her on both ears simultaneously and kept asking her questions as to why she is with the opposition party. That they later called a medical doctor to check on her and other detainees.

The 27th Applicant, who is the youth wing President of the party, was on her way back from school when she was chased, caught up and thrown into the truck with the officers stamping on her with their feet. When she

demanded to know why she was arrested, one of the officers slapped her. That they used her head tie to cover her head, face and mouth and also asked questions about her political affiliation. That they took her to a dark room, undressed her and beat her seriously until she collapsed. That they called about 10 fat men to rape her but she insisted she has not known any man before except her husband and it will be better for them to kill her. When they heard this, they stopped. She further averred that she was asked to make a statement under duress. That they poured water on her and threw her on the floor without clothes. She had to be assisted on a wheel chair to use the bathroom by two women. That she collapsed and was taken to the clinic in NIA. She started urinating blood and was at the clinic for about thirteen (13) days. She was also bleeding all over. That afterwards, the officers brought very good medicines to heal their wounds before they were taken to Court. Subsequently, they were taken to Mile 2 prison with poor food, no access to medicine and family visit. That the Doctors in NIA said they should bath with hot water because of the injury, however, they had no access to hot water in Mile 2 prison.

The 28th Applicant alleged that she was put in a truck, handcuffed and taken to Mile 2 prison. That one of the officers kicked her on the back and used her veil to cover her face. That she was asked to lie down on a table, open her mouth and stick out her tongue. She further alleged that the officers used vulgar languages on her while being beaten and slapped. She was left with a swollen face and her ears burst to the extent that she lost consciousness. That they later kept on pouring water on her until she regained her consciousness. That she lost consciousness a second time and sustained injuries all over her body. That the beatings were severe and that she was urinating blood, after which she was carried on a wheel chair to the NIA clinic.

The 30th Applicant, asserted that he was on his way from a business transaction when he was arrested, handcuffed and put in a truck. That the handcuff injured him on the wrist. That the officers took his statement and put it in writing but was not given the opportunity to read the statement before being asked to sign. His face was covered with a black cloth and he was taken to another room where he was beaten up, placed on a table and

poured water on him. That the beating was severe and he was in much pain.

The 5th Applicant who is the vice chairman of the UDP party was attacked by the officers with batons and guns and he sustained injuries on the head. That he was kept in solitary confinement and released only once a day to bath. He also stated that the food given to him in detention was extremely terrible.

The Respondent in response negated all the allegations above and reiterated that the Applicants were not treated inhumanly without more. By its very nature, documents made under oath are reflective of the true position in a matter. It is well-settled that averments in supporting affidavits are evidence upon which the Court may, in appropriate case act.

In the case of MAGNUSSON V. KOIKI (1993) 9 NWLR (PT. 317) 287 SC, the Supreme Court observed that affidavit evidence upon which applications or motions are largely decided are not the same thing as pleadings in a civil suit, which are written statements (and not evidence generally) of facts relied upon by a party to establish his case or answer to his opponent's case.

In the instant case, in their deposition on oath, Applicants presented a prima facie substantiation of an interference with their rights and arguable basis for violation. Where evidence is produced that suggests the victim suffered ill-treatment while in the custody of State authorities, the burden may shift to the State to produce evidence to show that the State was not responsible as was held in the case of MR. NIAN DIALLO V (2019) ECW/CCJ/JUD/14/19

In this instance, proof is what allows one to establish the value of truth or falsity, regarding a statement or a fact that is judicially relevant. To this end, it is submitted that mere averments in pleadings does not amount to proof. In case of OBIOMA C. O. OGUKWE V REPUBLIC OF GHANA (2016) ECW/CCJ/JUD/20/16 Para.8 @ page16 this Court held that:

"Generally, the burden of proof rests on he who alleges. Where however that person makes a prima facie case, he carries the benefit of presumption and the obligation to prove then shifts to the other party who has the burden of presenting evidence to refute that presumption".

Under the principle of proof, where the Applicants make depositions on torture, inhuman and degrading treatment, the Respondent needs to go beyond mere denial to adduce evidence to show that the Applicants were treated with respect and dignity. No single person was brought before the Court to testify in this regard neither was there any form of documentary evidence to persuade the Court to reason with the Respondent as to the falsity of the Applicants claims. In the absence of convincing evidence, the Court is again inclined to believe that the allegations of the Applicants in this regard were true. Article 5 of the African Charter promotes respect for dignity and expressly prohibits all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.

In the case of GABRIEL INYANG V. REPUBLIC OF NIGERIA (2018) ECW/CCJ/JUD/20/18 the Court relying on the decision in M.S.S. v. Belgium and Greece [GC], no. 30696 para ECHR 2011 stated thus:

"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

The court went further to state that 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."

The Court in the case of FEDERATION OF AFRICAN JOURNALISTS V. REPUBLIC OF THE GAMBIA (2018) ECW/CCJ/JUD/04/18 relied on the

decision in Loayza Tamayo V. Peru judgment of September 17, 1997. Series C No. 33, para 57, where the Inter-American Court held that: ***"the violation of the right to physical and psychological integrity of persons is a category of violation that has several gradation and embraces treatment ranging from torture to other types of humiliating or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation. The European Court of Human right has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical moral resistance".***

The act of slapping, kicking, masking, blind folding, being stripped naked, handcuffing, unconsciousness/fainting, confined in a dark room and inadequate feeding come with their physical and psychological effects. A slap on its own amounts to humiliation with a considerable impact on the person receiving it in terms of his identity, sight, speech and hearing as the face is the center of his senses. This is capable of arousing in the victim a feeling of arbitrary treatment, injustice and powerlessness. In the case of BOUYID V. BELGIUM (2015) Application no. 23380/09 ECHR**,** the European Court of Human Rights found that persons under the control of the police or a similar authority, are in a situation of vulnerability as the authorities who are under a duty to protect them flout this duty by inflicting the humiliation of a slap. The Court also found that the fact that the slap may have been administered thoughtlessly by an officer who was exasperated by the victim's disrespectful or provocative conduct was irrelevant as the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned.

The Court considers the acts of the Respondent as alleged diminished the dignity of the Applicants and was therefore a violation of Article 5 of the Charter. As to the conditions in the prison cells where the Applicants

claimed to have been kept, the Respondent also failed to lead evidence to rebut these claims. We submit that silence without more is deemed admission. The European Court of Human Rights in the case of TIREAN V. ROMANIA (2014) Application no. 47603/10 ECHR where the applicant complained about the conditions of his detention while serving a four-year prison sentence, the applicant further alleged he was beaten up by police officers during the criminal investigation against him and that the medical care during his pre-trial detention was inadequate. The Court concluded that the physical conditions of the applicant's detention caused him suffering that exceeded the unavoidable level of suffering inherent in detention and that attained the threshold of degrading treatment prescribed by Article 3 of the Convention. A serious lack of space in a prison cell weighs heavily as a factor to be taken into account for the purpose of establishing whether the detention conditions described are "degrading" from the point of view of Article 3.

Also, in the case of the European Court of Human Rights KARABET AND OTHERS V. UKRAINE (2013) Applications nos. 38906/07 and 52025/07 in an allegation of ill treatment amongst others, where the applicants were brutally beaten by masked security officers and by prison guards to the point of fainting in the case of some. They had been tightly handcuffed, ordered to strip naked and adopt humiliating poses; and were transported in an overcrowded van. Further, they were deprived of access to water or food and exposed to a low temperature without adequate clothing; and, no adequate medical assistance was provided to them. The Court found that the authorities' brutal action had been grossly disproportionate given that, there had been no transgressions by the Applicants. The Court also found that the Applicants had been subjected to treatment which could only be described as torture. The Court accordingly found a violation of Article 3.

In the instant case, the Respondent denied all the allegations made by the Applicants in their depositions. There was however no specific response to the alleged acts of torture and humiliating treatment while in custody of the agent of the Respondent. In custody situations it is incumbent on the State to provide a plausible explanation for injuries. The Respondents failed to annex any evidence to proof that the Applicants were not subjected to any

form of torture inhuman or degrading treatment. No pictures to convince the Court that the Applicants came in and remained in good condition while in detention. The Applicants however provided a series of corroborative depositions on oath which was arguably the best they could provide considering their incarceration.

Therefore the principle of presumption of innocence until proved guilty was as a matter of obligation supposed to have been observed and applied to the inmates by the Respondent to the extent that bail was supposed to have been granted especially when the Court observed that the offence alleged to have been committed was a felony but a Public Order offence. There is no evidence before this Court rebutting these allegations of the Applicants who claimed to have been kept in terrible prison conditions.

In light of the foregoing, the Court holds that the treatment given to the Applicants while in custody is in violation of the Applicants rights guaranteed under Article 5 of the African Charter.

iii. ACCESS TO FAMILY

The Applicants submitted inter alia that they were not allowed family visits while in detention. In challenging the Applicants assertion in this wise, the Respondent claimed to have annexed the daily occurrence book emanating from the prison which shows records of prison visitation to the Applicants by counsel and family members.

However, having critically scrutinized all the documents and annexures before the Court, we find no document of such nature emanating from the Respondent. As a matter of fact, the burden of proof lies on the person alleging the existence of facts. (See FEMI FALANA supra). However, where the adverse party expressly states that there was no such denial of visits, then it behooves on him to lead evidence to discredit the claims of the Applicants. More so, it is incumbent on the Respondent to annex such evidence having expressly referred to same in his pleadings. The Court notes that the denial of family visits while in detention will have a disproportionate effect on detainees and the aim of reintegration and rehabilitation.

The Court therefore finds that in the absence of such record in proof of the existing visitation record, that the Applicants families' and Counsel were not allowed access to visit their love ones whilst families which directly affects the Applicant right to the dignity of their family.

iv. RIGHT TO FAIR TRIAL

The Applicants alleged that throughout the entire trial at the national court there was an environment of intimidation characterized by fear and denial of their right to fair hearing and the right to make a statement before sentencing, the Respondent maintained that the rights to a fair hearing was adequately complied with all through the proceedings at the national Court. Right to fair hearing includes amongst others the Right to:

a. Right to be presumed innocent until proven guilty by a neutral Court of competent Jurisdiction.
b. To be heard before a free and fair Court of Competent Jurisdiction
c. To be defended including the Right have counsel of Choice
d. Right to access the courts devoid of any intimidation
e. Right to Appeal
f. Right to Equality before the Law
g. Unfettered accessed to counsel.

The provision of Article 7 (c) of the ACHPR provided as follows:

> ***Every individual shall have the right to have his cause heard. This comprises:***
> ***"The right to defense, including the right to be defended by counsel of his choice"***

In more clear terms, Article 14 (3) (d) International Convention on Civil and Political Rights provides as follows:

> ***In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:***

"To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

The Constitution of the Respondent also guarantees the right to be defended by Counsel. Section 24 (3) of the Gambian Constitution provides that:

"*Every person who is charged with a criminal offence-*

(a) shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal representative of his or her own choice;"

The Applicants maintained that the Counsel representing them were compelled to withdraw their representation because the Court refused every application made on their behalf. That the presence of armed security personnel in and around the Court room during proceedings prevented their Counsel from consulting with them privately. That after Counsel withdrew their representation, the Court ordered that the Applicant defend themselves without giving them opportunity to engage another Counsel of their choice. Conversely, the Respondent argued that the Applicants were accorded the full guarantees of a fair trial and represented by Counsel of their choice until when counsel opted out and they elected to represent themselves. That the whole process was in conformity with the provisions of Article 7 of the Charter.

The Court having analyzed the annexures to the Applicants' initiating application, it is clear that the trial Court categorically asked the Applicants in clear terms if they were ready to enter their defense or if they wish to wait for their Counsel but they failed to answer. (See para 29 Exhibit B 10, Judgment of the High Court of the Gambia Suit No. HC/179/16/CR/060/AO). Prior to this, the Applicants were called upon to

prepare and enter their defense on the adjourned date and the 1st Applicant responded saying:

> ***"I will say that our rights have been infringed by this court so I will not participate in a trial where our rights have not been protected. (…) I will therefore not participate in the proceedings".***

Similarly, when the Applicants were asked the number of days they required to file their written address, the 1st Applicant responded thus:

> ***"I have said that I don't wish to participate in this proceedings so I will not file any address. When I am convicted as I know I will, I will have something to say why sentence should not be passed on me".***

Furthermore, all other Applicants who were unrepresented by Counsel were informed of their rights and options in entering their defenses in accordance with the Criminal Procedure Code of the Gambia. This was communicated to them in their different languages but they remained silent and offered no word or gesture. By implication, it can be inferred that the Applicants waived their right to defense and to be represented by Counsel of their choice.

In HARUN GÜRBÜZ v. TURKEY (2019) (Application no.68556/10) the European Court of Human Rights in analyzing the provisions of Article 6 of the Convention which is in tandem with Article 7 of the African Charter and Article 14 of the ICCPR reiterated:

> ***"Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. That also applies to the right to legal assistance. However, if it is to be effective for Convention purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. Such a waiver need not be explicit, but it must be voluntary and***

constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. Moreover, the waiver must not run counter to any important public interest.

It must be pointed out that the grant of applications before a Court is at the discretion of the Court, albeit judicially and judiciously. The fact that a party is unsuccessful in any application should not be misconstrued as a violation of the party's right to fair hearing. In JUSTICE PAUL UTTER DERY & 2 ORS v. THE REPUBLIC OF GHANA ECW/CCJ/JUD/17/19, as it relates to fair hearing, the Court found that failure to secure a favorable judgment is not tantamount to a denial of the right to fair hearing. The Court however notes the statement by the 1st Applicant indicating his unwillingness to participate in his own trial and that such statements constitutes a waiver of right thus the maim that no wrong will emerge out of an act for which consent has been given in other words ***"volenti non fit injuria."*** It is important to note here that the mere presence of armed guards in the course of a trial at the National Court which the Respondent did not deny cannot not the mean absence of Equality before the Law and cannot be interpreted to amount to a violation of the Right to fair trial and on this note the court observed that there is no proof before it from the Applicant to support the allegation that the entire trial process at the National Court was marred with intimidation and deprivations of access to counsel of choice. The Court therefore finds that the Respondent did not violate the Applicants Right to fair hearing and fair trial. In the circumstances as in the instance case the Court hold that the Applicants Rights to fair hearing was not violated by the Respondent and the court so hold.

ISSUE 3: WHETHER OR NOT THE PROVISIONS OF SECTION 5 OF THE PUBLIC ORDER ACT OF THE GAMBIA CONTRAVENES THE PROVISIONS OF ARTICLE 11 OF THE AFRICAN CHARTER.

The Applicants avers that a fundamental issue to the effect that Section 5 of the Public Order Act of the Gambia violates Article 11 of the African Charter on Human and Peoples Rights. They argued that the provisions of the said Article 5 are too stringent and amount to turning "***the fundamental human right of assembly, peaceful protests, processions and***

demonstrations into a privilege to be conferred at the discretion of the authorities." The Applicant further claims that the Public Order Act violates the Gambian Constitutional provisions on fundamental freedoms and is therefore void.

The Respondent on the other hand contends that the said acts in no way violates the provisions of Article 11 of the African Charter as the said Article 11 is not absolute but subject to certain limitations. Article 11 of the African Charter provides:

> ***"Every Individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedom of others".***

Section 25 (1) (d) of the Gambian Constitution puts it thus:

> "***Every person shall have the right to freedom to assemble and demonstrate peaceably and without firearms".***

Furthermore, Section 25(4) of the same Constitution provides-

> ***"The freedoms referred to in subsections (1) and (2) shall be exercised subject to the law of The Gambia in so far as the law imposes reasonable restrictions on the exercise of the rights and freedoms thereby conferred, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of the Gambia, national security, public order, decency, or morality, or in relation to contempt of court".***

Section 5 of the ***Public Order Act*** which is being contested provides:

> ***(1) The Inspector-General of Police in the city of Banjul or the Kanifing Municipality or; in any of the regions, the Governor or other person authorized by the president may direct the conduct of all public processions and prescribe the route by which and the times at which any procession may pass.***

(2) A person who is desirous of forming any public procession shall first make application for a license to the Inspector-General of Police or the Governor of the region, or other person authorized by the President, as the case may be, and if the Inspector-General of Police or the Governor of the region or other person authorized by the President is satisfied that the procession is not likely to cause a breach of the peace , he or she shall issue a license specifying the name of the license and defining the conditions on which the procession is permitted to take place.

(3) A condition restricting the display of flags, banners, or emblems section shall not be imposed under subsection (2) of this section except such as are reasonably necessary to prevent risk of a breach of the peace.

(4) A magistrate or police officer not below the rank of Sub-inspector may stop any public procession for which a license has not been issued or which violates any of the conditions of a license issued under subsection (2) of this section, and may order it to disperse.

(5) A public procession which-

(b) Takes place without a license under subsection (2) of this section, or

(c) Neglects to obey any order given under subsection (4) of this section, is deemed to be an unlawful assembly, and all persons taking part in the procession, and in the case of a public procession for which no license has been issued, all persons taking part in the convening, collecting or directing of the procession commit a cognizable offence and on summary conviction before a Magistrate, are liable to imprisonment for a term of three years

The Public Order Act Cap 4 laws of the Gambia, is an extant legislation of the Gambia, duly enacted by the National Assembly of The Gambia. The provisions contained therein are clear and unambiguous.

Section 5 of the Public Order Act specifically calls for a license to be issued by the Executive or law enforcement authority of The Gambia before processions can be held. Similarly, Article 11 of the African Charter provides for that the exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedom of others.

While it is submitted that the restrictions contained in Section 5 of the Public Order Act should not be seen as a tool in the hands of the Executive and law enforcement agencies to impinge on the guaranteed rights of persons under Article 11 of the Charter making it impracticable for individuals to enjoy their Human Rights, the positive obligation of ensuring national security, safety, peace and order should not be disregarded.

The Respondent further argued that the Applicants have not established a violation of Article 11 and that in any event it does not reside in this court to embark on an examination of laws of Member States but rather to protect the rights of citizens when violated.

In the case of FEDERATION OF AFRICAN JOURNALISTS V. REPUBLIC OF THE GAMBIA, (2108) ECW/CCJ/JUD/04/18, the Court having reiterated its human rights competence found that it has the powers to go into the root of the violation i.e. those laws which the Applicants are contesting to establish whether or not they are contrary to the provisions of international human right laws on freedom of expression.

The Respondent further argued that the tenor of the Public Order Act is regulatory of the right to assembly rather than prohibitive and the provisions are reasonably necessary to achieve legitimate aims to ensure public safety and public order. Assemblies of a public character raise a number of practical issues that ought to justify at least a minimum amount of consultation with the authorities regarding time, location, traffic management and other factors. These issues may include safety, security and inconvenience or even economic loss to those affected by the peaceful assembly. Hence, certain forms of regulation, such as the requirement to

give prior notice or obtain an authorization or permit for an assembly, do not constitute an interference with the right to freedom of peaceful assembly. However it must be noted that the manner of exercising a Right under any given statute may lead to such action being negative and will therefore undermine the objective intended to be served. The action of the agents of the Respondent could assessed against this background in line with the provisions of Article 11 (2) of the ACHPR. From the provisions of Section 5 of the Public Order Act above, it can be inferred that the whole essence of imposing the need for a license is to ensure law and order, as well as a violent free processions in the overall interest of the populace.

In the case of ÉVA MOLNÁR V. HUNGARY (2009) APP. NO. 10346/05 FINAL, EUR. CT. H.R. the European Court of Human Rights' position was that prior notification served not only the aim of reconciling, on the one hand, the right to peaceful assembly and, on the other hand, the rights and lawful interests (including the freedom of movement) of others, but also the prevention of disorder or crime. In order to balance these conflicting interests, the institution of preliminary administrative procedures is common practice in Member States when a public demonstration is to be organized, and that such requirements do not, as such, run counter to the principles embodied in Article 11 of the Convention, as long as they do not represent a hidden obstacle to the freedom of peaceful assembly protected by the Convention. Further, in case of LINDA GOMEZ & 5 ORS V. REPUBLIC OF THE GAMBIA (2012) ECW/CCJ/APP/18/12 at pg. 27, the CCJ stated that it lacks the jurisdiction to annul domestic legislations of ECOWAS Member States.

In light of the action of the agents of the Respondents in the instant case, the Court holds that the provisions of section 5 of the Public Order Acts of the Republic of the Gambia did not violate the provisions Article 11 of the African Charter and further holds that the Public Order Act section 5 of the Laws of The Gambia and is in tandem with permissible restrictions in ensuring law and order. However, the requirement of having to obtain the approval of the Inspector General of Police of the Gambian Police Force will undermine the exercise of such right and therefore needs a review.

ISSUE 4: WHETHER THIS COURT HAS COMPETENCE TO DECLARE THE JUDGEMENTS OF NATIONAL COURT NULL AND VOID.

Finally, the Applicants urged this Court to declare the decision of the national Court of the Gambia null and void. This Court has in its flourishing jurisprudence held that it lacks the jurisdiction to sit on appeal over decisions of National Courts. In BAKARY SARRE & 28 ORS V. THE REPUBLIC OF MALI (2011), ECW/CCJ/JUD/03/11 the Court in determining the application filed by the Applicants held that: ***"The said application substantially seeks to obtain from the Court a reversal of judgment delivered by the Supreme Court of Mali and seeks to project the Court of Justice of ECOWAS as a Court of cassation over the Supreme Court of Mali. Viewed from that angle, the Court declared that it had no jurisdiction to adjudicate on the matter."*** Also in OCEAN KING V. REPUBLIC OF SENEGAL (2011)ECW/CCJ/JUD/07/11 Para 66 @ page 161.The Court reiterated its position to the effect that it does not compose itself as an appellate court over decisions of National courts. See also SIKIRU ALADE V. FEDERAL REP. OF NIGERIA (2012) ECW/CCJ/JUD/10/12; MUSA LEO KEITA V. MALI (2007) ECW/CCJ/JUD/03/07 @ pg. 72 para 26; DR. JERRY UGOKWE V. FRN & 1 OR, (2005) ECW/CCJ/JUD/03/05.

The Court therefore aligns itself to its precedents and holds that it lacks the powers to declare the decision of the national Court of the Respondent null and void.

ISSUE 5: WHETHER THE 32ND APPLICANT HAS CAPACITY TO INITIATE THIS APPLICATION ON BEHALF OF EBRIMA SOLO SANDENG (DECEASED)

Article 10 (d) of the Supplementary Protocol (A/SP.1/01/05 Amending Protocol (A/P1/7/91) specifically grants access to the Court to individuals who are seeking relief for violation of their Human Rights and it further provided the conditions precedent :

"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."

Article 10 (d) requires that Applicants seeking relief for violation of their rights must establish the status of a victim who must have suffered a personal loss capable of being ascertained. The import of Article 10 (d) is that only persons who qualifies as victims of Human Rights violations can access the Court to seek relief for violation of their Human Rights. This Court has held in series of decisions that to qualify for relief in respect of Human Right violation the Applicant must establish his capacity as a victim. In the case of CENTER FOR DEMOCRACY AND DEVELOPMENT V. MAMADOU TANJA & REPUBLIC OF NIGER (2011) ECW/CCJ/JUD/05/11 @ 27, the Court has this to say:

> ***''Cases shall be brought before the court by natural or legal person endowed, within the framework of their national laws, with the required Legal capacity, and who, in addition, shall justify their condition of being Victim…the Court recalls that when an application on human rights. Violation is brought before it, it is so done necessarily by a person who is a victim of the said violation against one or several Member States.''***

Also in the case of MUSA SAIDYKHAN V. REPUBLIC OF THE GAMBIA (2012) ECW/CCJ/JUD/08/12 @ page 43, this Court held that:

> ***"Principally the object of an award in human rights violation is to vindicate the injured feelings of the victim and to restore his rights and human dignity.''***

It can be concluded from the above decisions that only persons who can justify their claims of being directly affected have the standing to seek reliefs for violations of human rights from the Court.

The question to determine now is whether the Applicants in the instant case are victims within the meaning of Article 10(d) of the Protocol and this leads the Court to determine who is a victim of Human Rights violation. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violation of International Human Rights and Humanitarian Law, was defined in GA Res 60/147,pmbl, Sec IX, UN Doc A/RES/60/147(March 21, 2006), defines:

> **" A victim is anyone who suffers individual or collective harm (or pain) such as physical or mental injury, emotional suffering, economic loss or generally any impairment of Human Rights as a result of acts or omissions that constitutes gross violation of Human Rights or serious violations of Humanitarian Law norms"**

As noted above, it is without doubt that the 32nd Applicant is not victim within the meaning of the definition of who is a victim for the purpose of Article 10(d). However, the Court notes that it endorses on the face of the Application that it is coming before this Court in a representative capacity. The 32nd Applicant having endorsed its claim in a representative capacity, it behooves on it to establish by a credible documentary evidence by way of a Letters of Administration or an Authority to show that it has the capacity to represent the estate of Ebrima Solo Sandeng as the deceased Personal Representative. In the absence of this evidence the action fails. To date there is no evidence before this Court to show that the 32nd Applicant in this suit has the capacity required by law to represent the Estate of Ebrima Solo Sandeng (deceased) as his Personal Representative for it to institute this action. On this note, the action of 32nd Applicant fails See the case of the Trustees Jamaa' a Foundation & 3Ors vs. The Federal Republic of Nigeria& ors. ECW/CCJ/APP/26 /13.

Decision

For the reasons stated above, the Community Court of Justice, sitting in public after hearing the parties, and their submissions duly considered in the light of the provisions of the African Charter on Human and People's Rights, as well as the Supplementary Protocol of the Court and the Court's Rules of Procedure, hereby declares as follows:

1. That the 32nd Applicant lacks the locus standi to represent the Estate of Ebrima Solo Sandeng in this action, he having been denied locus standi.
2. That section 5 of the Public Order Act does not violate Article 11 of the African Charter as claimed.
3. That prayers 7, 14 and 15 of the Applicants on grounds of locus standi are hereby dismissed.
4. That the arrest and detention of the 1st, 3rd, 4th, 5th, 15th, 17th, 26th, 27th, 28th, 30th and 31st Applicants was lawful and did not violate Articles 5, 6 and 11 of the African Charter. However, the detention that followed was arbitrary as the period of detention went beyond the limit permitted by the law of the Gambia before the Applicants were brought to Court.
5. Declares that the acts of torture, inhuman and degrading treatment meted out on the 1st, 3rd, 4th, 5th, 15th, 26th , 27th, 28th ,30th and 31st Applicants violates Article 5 of the African Charter.
6. That the claim for violation of the right to fair hearing of the applicants fails and is hereby dismissed.
7. That prayer 8 is denied.

Orders and awards

In consequence of which the Court orders the Respondent as follows;
In consequence of which the Court orders the Respondent as follows;

1. To pay the sum of One Hundred Thousand United States Dollars (100,000 USD) equally to the 1st, 3rd, 4th, 5th, 15th, 17th, 26th, 27th, 28th, 30th for the hardships ad violations of their Human Rights caused to them by agents of the Respondents.
2. That the Respondent sets up an independent panel of inquiry to look into the events of the 14th and 16th of April 2016, and also determine the persons responsible for the arrest, detention, torture and other forms of ill- treatment of the Applicants be made to give account of their actions by Putting in place effective measures to discipline and prosecute the police officers involved.
3. That the Parties bear their own costs.

THIS DECISION IS MADE, ADJUDGED AND PRONOUNCED PUBLICLY BY THIS COURT, COMMUNITY COURT OF JUSTICE, ECOWAS; SITTING AT ABUJA, NIGERIA ON THE DAY 20th January, 2020.

Hon. Justice Edward Amoako ASANTE, Presiding

Hon. Justice Gberie-Be OUATTARA, Member

Hon. Justice Keikura BANGURA, Rapporteur

Mr Tony Anene MAIDOH, Chief Registrar