



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

In the Matter of

**DEDJO KOMLA SENA v. THE REPUBLIC OF TOGO**  
*Application No: ECW/CCJ/APP/03/17; Judgment No. ECW/CCJ/JUD/26/21*

***JUDGMENT***

ABUJA

9 JULY 2021

THE COMMUNITY COURT OF JUSTICE OF THE  
ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)  
HOLDEN AT ABUJA, NIGERIA

*Application No: ECW/CCJ/APP/03/17; Judgment No. ECW/CCJ/JUD/26/21*

**BETWEEN:**

DEDJO KOMLA SENA - APPLICANT  
AND  
THE REPUBLIC OF TOGO - RESPONDENT

**COMPOSITION OF THE COURT:**

Hon. Justice Edward Amoako ASANTE - Presiding/ Judge Rapporteur  
Hon. Justice Gberi-Be OUATTARA - Member  
Hon. Justice Januaria T. Silva Morcira COSTA - Member

**ASSISTED BY:**

Dr. Athanase ATANNON - Deputy Chief Registrar

***REPRESENTATION OF PARTIES:***

Ferdinand Ekuevi AMAZOHOUN  
Claude Kalou AMEGAN Counsel for Applicant  
Baroh Kossi APOW Counsel for Respondent



## ***I. JUDGMENT***

1. This is the judgment of the Court read virtually in open court pursuant to Article 8(1) of the Practice Directions on Electronic Case Management and Virtual Court Sessions, 2020.

## ***II. DESCRIPTION OF THE PARTIES***

2. The Applicant is a Togolese citizen and a former soldier in the national army of Togo, (The Togolese Armed Forces '*Forces Armées Togolaises*', FAT) who is assisted by LE COLLECTIF DES ASSOCIATIONS CONTRE L'IMPUNITÉ (THE COALITION OF ASSOCIATIONS AGAINST IMPUNITY), a registered Non-Governmental Organisation (NGO) under the laws of the Respondent with the mandate of fighting against impunity.
3. The Respondent is the Republic of Togo, a Member State of the Economic Community of West African States, ECOWAS.

## ***III. INTRODUCTION***

### ***Subject matter of the proceedings***

4. The Applicant filed this action against the Respondent claiming that as a soldier in the Togolese National Army, he was cruelly and inhumanly treated and further tortured by the agents of the Respondent before he was eventually wrongly dismissed from the army. He also alleges violation of his right to work, investigation and defence and claims reparation for the violations.

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### **III. PROCEDURE BEFORE THE COURT**

5. The Originating Application dated 8 December 2016 was filed at the registry of the Court on 11 January 2017 and served on 16 January 2017 on the Respondent.
6. The Application was filed and served together with a separate Application for Expedited Procedure.
7. The Respondent filed its Response to the Applicant's application on 7 February 2017 and same was served on the Applicant on 9 February 2017.
8. The Applicant filed a Reply to the Response of the Respondent on 27 February 2017 and same was served the following day 28 February 2017.
9. A Rejoinder was filed by the Respondent on 3 April 2017 and served on the Applicant on the same day.
10. On the 16 April 2017, the Respondent again filed a Written Address which was served on the same day.
11. In a Virtual Court Session held on 10 March 2021 where all parties were represented by Counsel. Case was heard on the merits, in which both counsel made their submissions accordingly and the case was adjourned for judgment.

### **IV. APPLICANT'S CASE**

#### **a. Summary of facts**

12. The Applicant avers that he was recruited as a soldier in 1990 by the Togolese Armed Forces and posted to the Commando Regiment of the Presidential Guard (RCGP) under the command of Lieutenant-Colonel Atcha TTIKPINA.
13. The Applicant alleges that on 26<sup>th</sup> June 1998, while he was on his way to work at his duty post, he was ran over by a green colour vehicle he described



as "Patrol Brand" at the "Chateau" Junction on Boulevard Eyadema, near the University of Lomé. As a result he fell into the nearby bush and was wounded on his hip. He went to the hospital the following day for treatment.

14. The Applicant avers that the following week after he was ran over by a vehicle, he was on night duty on the 5<sup>th</sup> to 6<sup>th</sup> July 1998. On the on 6<sup>th</sup> July 1998, around 9 o'clock in the morning, his wife came to his duty post to inform him of a fire incident that occurred in their house the previous night. He was compelled to seek permission from immediate superior, one Corporal Tchoko Biyao Tchamba to go home.
15. The Applicant alleges further that when he arrived home at the scene of the incident, he learned from informants, including his wife and brothers who were at the scene at the time of the incident that the perpetrators were soldiers who doused his house with petrol and set it on fire.
16. According to the Applicant, on July 6, 1998 while returning to his duty post on a motorbike, at a spot near "*Cite Oua*", he was again ran over by another vehicle he described as Mitsubishi Patrol, ash in colour. He managed to get up and started running towards the north of Lome at Agoe neighbourhood but on the orders of the driver, one Corporal BONFOH, the three other occupants of the vehicle, came down and pursued him until they caught up with him at the "CHU Campus" Roundabout where they caught and thrown him into the vehicle.
17. The Applicant continued that, in the vehicle he was handcuffed, crouched down and violently beaten, with his head in a bonnet while being interrogated with questions like "*where are you coming from?*" "*Who did you vote for?*" "*You will die if you do not tell the truth*".



18. It is the case of the Applicant that arriving at a destination unknown to him, he was taken out of the vehicle, further beaten with an iron bar, and abandoned on the spot when he had lost consciousness. When he regained partial consciousness, he realised that both his lower limbs had been burnt at calf level.
19. The Applicant further avers that in the state of partial consciousness, he realized that he was not far from the Lomé Stadium, "*Stade de Kégué*" that was still under construction. He therefore went to his fellow soldiers, at their duty post near GFA Fuel Station, not too far away from GFA Insurance Company, and they took him to his duty post, in Lomé, then to the Military Medical Treatment Pavilion, for treatment.
20. The Applicant alleges that after spending 45 days at the Military Medical Treatment Pavilion, he was brought back to the infirmary of the "*Camp RIT*" (Inter-Arms Regiment) and after a week at the infirmary, he was advised to get a Non-Commissioned Officer (NCO) to defend him and upon contact with the said NCO, the latter informed him that his Commandant accuses him of being a supporter of the opposition party.
21. The Applicant avers that while he was still on the hospital bed, the Secretary of their unit brought a document under the directives of Brigadier General Titikpina Atch for him to sign. His request to read the document before signing was met with refusal on the claim by the Secretary that it was an order from TITIKPINA on him to sign immediately.
22. Having been accused of being an opposition to the regime, the Applicant states that he was taken by panic and fear for his life, so he immediately signed the document under duress without appraisal of its contents.
23. On the 18<sup>th</sup> September 1998, after he had signed the document brought to him by Brigadier General Titikpina Atch without knowing its contents, the



Applicant avers that an Internal - Memorandum was served on him implicating him that he had consented to being declared unfit for service, on the grounds that he abandoned his duty post (*Exhibit no. 1*) and from that moment he was discharged from the army rendering him unemployed ever since.

24. The Applicant alleges that he recently obtained a medical report on his health, following a medical check-up, and he was diagnosed with numerous non-tactile scars, hypoacusis and pain in the nostrils and in the ears due to the beatings he suffered at the instance of the soldiers of the Presidential Guards (*Medical Report attached as Exhibit 2*)

**b. Pleas in Law**

25. The Applicant relies on the following laws:
- a. Articles 4, 5 and 7 of the African Charter on Human and Peoples Rights (African Charter);
  - b. Articles 7 of the International Covenant on Civil and Political Rights (ICCPR), Articles 5, 10 and 23(1) of the Universal Declaration of Human Rights, 1948, (UDHR)
  - c. Article 29 of the Law on the General Status of Military Personnel of the Togolese National Army of 17<sup>th</sup> July 1963;
  - d. Articles 11 and 21(1) & (2) of the Togolese Constitution of 14<sup>th</sup> October 1992;
  - e. Article 6.1 of the International Covenant on Economic, Social and Cultural Rights;
  - f. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments of 10<sup>th</sup> December 1984.

**c. Reliefs Sought by the Applicant**

26. For the reasons above, the Applicant is praying the Court to:



- a. **DECLARE** that the actions of the military officers constitute acts of torture and other cruel, inhuman or degrading treatment in violation of Article 21, paragraphs 1 and 2 of the Togolese Constitution, the provisions of Articles 4 and 5 of the African Charter on Human and Peoples' Rights, Article 5 of the Universal Declaration of Human Rights, Articles 7 of the International Covenant on Civil and Political Rights, the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment;
- b. **DECLARE** that the actions of agents of the Republic of Togo constitute a violation of Applicant's right to work, in violation of the provisions of Article 29 of the Law on the General Statute of Military Personnel of the Togolese National Army of 17<sup>th</sup> July 1963, Article 11 of the Togolese Constitution, Article 6 paragraph 1 of the International Declaration of Human Rights (UDHR);
- c. **DECLARE** that the Applicant's right to defence is violated by State officials, insofar as the provisions of Article 7 paragraph 1.b and c of the African Charter on Human and Peoples' Rights, Article 10 of the Universal Declaration of Human Rights have been manifestly and blatantly violated.
- d. **ORDER** the Republic of Togo to carry out an investigation to arrest the perpetrators of the incriminated actions, pursuant to the provisions of Article 12 of the UN Convention against torture of 10<sup>th</sup> December 1984 and by taking into account their seriousness, as provided for under Article 4 of the same Convention;
- e. **ORDER** the Togolese Republic to make reparation for the prejudice suffered, taking into account the relevant provisions of the Convention against Torture, in particular in its article 14, as well as the fundamental

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*principles and directives concerning the right to a remedy and reparation for victims of flagrant violations of international human rights law and serious violations of international humanitarian law adopted by the United Nations General Assembly on 16<sup>th</sup> December 2005, in its Resolution 60/147, in particular in the forms of restitution, compensation, rehabilitation, satisfaction and guarantees of non re – occurrence:*

- f. ORDER the Republic of Togo to pay Applicant a sum of One Hundred Million (100,000,000) FCFA as damages, pursuant to the provisions of Article 14 of the Convention against torture and other inhuman or degrading treatment or punishment of 10<sup>th</sup> December 1984, Article 9/5 of the International Covenant on Civil and Political Rights of 16<sup>th</sup> December 1966 and Principle 35 of the Body of Principles for the Protection of all Persons subject to any form of detention or imprisonment of 19<sup>th</sup> December 1988.*

## **V. RESPONDENT'S CASE**

### **a. Summary of facts**

27. In *limine litis*, and before any argument as to merit, the Respondent in its Response to the action of the Applicant raises an objection as to the propriety of the Application on grounds that the COLLECTIF DES ASSOCIATIONS CONTRE L'IMPUNITÉ AU TOGO (CACIT) (the Group of Associations against Impunity in Togo) (CACIT) is incompetent to represent the Applicant.
28. According to the Respondent, when the COLLECTIF DES ASSOCIATIONS CONTRE L'IMPUNITÉ AU TOGO (CACIT), a pseudo representative initiated the instant proceeding on behalf of the Applicant, who is a former soldier in the Armed Forces of the Republic of Togo, it did

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so without producing a mandate or power of attorney, under which it can act validly for, and on behalf of the Applicant.

29. The Respondent further argues in its defence that, a careful analysis of Article 29 of the Rules of the Court reveals that any person playing the role of Agent must produce an official authorization issued by his principal, a copy of which must be served on the Chief Registrar of the Court, pursuant to Article 12 of the Protocol on the Court (A/PI/7/91).
30. The Respondent submitted that on the account of the provisions cited in the immediate preceding paragraph, the application of the Applicant should be declared null and void for lack of quality or mandate by the Group of Associations against Impunity in Togo (CACIT) who initiated the action on behalf of the Applicant.
31. On the merits, the Respondent relutes all the allegations and claims of the Applicant and submits that State agents did not subject the Applicant to any act of torture. The Respondent further contends that the Applicant did not provide the slightest proof of his allegations or establish that he was subjected to acts of torture allegedly inflicted on him by agents of the Respondent.
32. The Respondent argues that the medical certificate submitted by the Applicant for the purposes of the case cannot constitute formal proof, as it merely repeats and records the Applicant's account.
33. On the violation of the right to work, the Respondent argues that the Applicant was sanctioned for abandoning his post, in accordance with the texts in force; and that in any event, if he felt unfairly treated, he was free to exercise the informal or contentious remedies that the law makes available to any interested person.



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34. The Respondent further argued that, it is not within the purview of the Court to assess the legality of decisions taken by national administrative authorities.
35. Regarding the alleged violation of the right of defence of the Applicant, the Respondent submits that the Applicant makes only vague assertions without any demonstration, with supporting evidence, of what he claims.

***b. Pleas in Law***

36. By way of pleas in law, the Respondent solely pleaded:
- i. Copy of Decision No. 98 – 470 by the Ministry of Defence of Togo on the Reformation of Mr. Dejo Sena Komlan (Relieving him of his Military Functions);
  - ii. Law 63 – 7 of 17<sup>th</sup> July 1963 on the General Status of Military Personnel of the Armed Forces of the Republic Of Togo.
  - iii. The following laws and Orders as amended:  
Law 64 – 26 of 31<sup>st</sup> October 1964;  
Law 66 – 15 of 8<sup>th</sup> December 1966;  
Order 72 – 16 of 4<sup>th</sup> September 1972, and,  
Order 28 of 11<sup>th</sup> August 1975.

***c. Reliefs sought***

37. The Respondent urges the Court to:
- i. ***DECLARE*** that none of the claims raised by Applicant is well-founded;
  - ii. ***REJECT*** all the claims of the Applicant;

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iii. **ORDER** the Applicant to bear all costs of proceedings.

#### **VI. REPLY BY THE APPLICANT**

38. The Applicant replies to the Respondent's objection by reiterating the utmost importance of prohibition of torture which is considered as a norm of *Jus cogens* and no slight derogation or an alleged defect in an application, in this case the production of document justifying the mandate given, can, in anyway, be argued to exempt the defendant from fulfilling its international obligations in human rights violation litigation.
39. The Applicant further replies to the Respondent's objection that Mr. Dedjo Komla Séna requested legal assistance from the **CACIT**, by mail dated 13<sup>th</sup> March 2013 (*copy Exhibited*) and on that same day, he gave mandate to the said NGO, to represent him and defend his interest before the national, regional and international human rights protection judicial institutions (*also Exhibited*).
40. The Applicant therefore urges the Court for an outright dismissal of the preliminary objection raised by the Respondent in respect of the admissibility of the initiating Application and admit same for hearing.

#### **VII. REJOINDER BY THE RESPONDENT**

41. In a Rejoinder, the Respondent impugned the two exhibits produced by the Applicant to demonstrate that Mr. Dedjo duly authorized the CACIT to initiate the instant suit on his behalf by pointing out the difference in the signatures on the two documents and why one was handwritten and the other printed. The Respondent concluded that the two documents were forged by the CACIT and must be rejected.

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## VIII. JURISDICTION

42. The Human rights jurisdiction of this Court is clearly stated in Article 9(4) of the 2005 Protocol on the Court as amended which states as follows:

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

43. Also, In *BAKARE SARRE v. MALI* (2011) CCJELR pg. 57, the Court stressed that:

*"Once human rights violations which involves international or community obligations of a member state is alleged, it will exercise its jurisdiction over the case."*

Similarly, In *KAREEM MEISSA WADE v. REPUBLIC OF SENEGAL* (2013) CCJELR 231 this Court held that:

*"Nevertheless, that simply invoking human rights violation in a case suffices to establish the jurisdiction of the Court over that case."*

44. On the basis of the above, the subject matter of the suit which is on violation of rights of the Applicant to work, torture and other rights provided for within the African Charter on Human and People's Rights falls within the jurisdiction of the Court and the Court so holds that it is vested with the power to entertain this suit.

## X. ADMISSIBILITY

45. On admissibility, the Respondent has raised objection to the propriety of the application on account of lack of proper authorization of COLLECTIF DES ASSOCIATIONS CONTRE IMPUNITÉ AU TOGO (CACIT) to initiate the instant suit for and on behalf of the Applicant, Mr. Dedjo Komla Sena. Again, the Respondent contends that the Applicant failed to exhaust the appeal

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processes available to him as a soldier under the Law on the General Status of Military Personnel of the Armed Forces of the Republic Of Togo.

**a. Respondent's Submissions in Support of the Preliminary Objection**

46. The first leg of the Respondent's Preliminary Objection is premised on ground that the COLLECTIF DES ASSOCIATIONS CONTRE IMPUNITÉ AU TOGO (CACIT), a pseudo representative initiated the instant proceeding on behalf of the Applicant without producing a mandate or power of attorney. The Respondent cited Article 29 of the Rules of the Court and argued that any person playing the role of Agent must produce an official authorization issued by his principal, a copy of which must be served on the Chief Registrar of the Court, pursuant to Article 12 of the Protocol on the Court (A/P1/7/91).

**b. Applicant's Submissions in Opposition to the Preliminary Objection**

47. The Applicant replies to the Respondent's objection that he requested legal assistance from the CACIT, by mail dated 13<sup>th</sup> March 2013 (*copy Exhibited*) and on that same day, he gave mandate to the said NGO, to represent him and defend his interest before the national, regional and international human rights protection judicial institutions (*also Exhibited*).

48. Applicant further contends that torture is a serious violation that fall within the category of *jus cogens* norms and mere technicalities in an application should not be used to oust the jurisdiction of the court where there is a clear case of torture.


**c. Analysis by the Court**

49. It is provided for under Article 13 of Protocol A/P1/7/91 (as amended) on the Court that:




*“Each party to a dispute shall be represented before the Court by one or more agents it designates for that purpose. These officials may, if necessary, request the assistance of one or more lawyers or advisers to whom the laws and regulations of the Member States grant the right to plead before their courts”.*

50. From the Originating Application and the submissions of the parties, it is not in doubt that the applicant Dedjo Komla Sena is represented by the (CACIT) and assisted by two lawyers registered at the Bar of Lomé (Togo). This Court has held that *“Where a petition is submitted on behalf of a victim, it must be with their consent, unless submitting it without their consent can be justified”*. See *NOSA EHANIRE OSAGHAE & 3 ORS v. REPUBLIC OF NIGERIA ECW/CCJ/JUD/03/17 @ page 18*.
51. Again in the case of *BAKARY SARRE & 28 ORS v. REPUBLIC OF MALI (2011) CCJELR 57*, the Court held that: *“Bringing an action before a Court of law is a vested power, and it is up to the holder of that prerogative, either to execute it himself, or to entrust that power to a third party within the limits permitted by the national laws”*.
52. In pursuant to the above authorities of the Court, the Applicant stated that Mr. Dedjo Komla Sena requested legal assistance from the CACIT, by mail dated 13<sup>th</sup> March 2013 (*copy Exhibited*) and on that same day, he gave mandate to the said NGO, to represent him and defend his interest before the national, regional and international human rights protection judicial institutions (*also Exhibited*).
53. The Court notes that the Respondent is imputing fraud in the way and manner the authorization was executed but failed to prove any fraudulent conduct attributable to either the Applicant or his agent that attains the evidential threshold of rendering the authorization null and void.



54. It is the considered view of the Court that restrictive rules about representation may be generally inimical to a healthy system of growth of this Court in achieving respect for human rights, if an Applicant with a good cause is turned away merely because he is not sufficiently represented, that could mean that some government agency may left free to violate their rights with impunity. Such a situation would be extremely unhealthy and contrary to the purpose of the establishment of the Court.
55. Agents are unlikely to spend their time and money unless they have some real interest of the Applicant at stake and in some cases where they wish to sue merely out of public spirit, to discourage them and thwart their good intentions would be most frustrating and completely demoralizing. Indeed, if the agents were on the frolic of their own, how were they able to get the details of the Applicant's case together with some vital document pertaining thereto.
56. Having produced in evidence the authorization issued by the Applicant to the agent, the unproven allegation of fraud by the Respondent failed to neutralise the quality of representation being exercised by the agent and therefore, the Court holds that the agent is competent to represent the Applicant in the instant suit. Consequently, the Respondent's objection under this head fails and same is dismissed.
57. Another argument canvassed by the Respondent in challenging the admissibility of the case by the Court is that the Applicant did not make use of the appeal avenues available through the extant laws of the Togolese Armed Forces when he was dismissed. The Court notes that it is another way of interpreting the usual concept of exhaustion of local remedy before an Applicant can access the Court, which the Court has emphatically refused to accept based on its constitutive texts.

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58. The Court has held that: "*Article 10(d) of the Supplementary Protocol on the Court of Justice expressly grants jurisdiction to this Court with regards to human rights violations except that the application should not be anonymous, and the same matter should not be before another International Court. This is a provision of the Statute which cannot be ousted by implication. Therefore, in order for this Court to decline jurisdiction on account of failure by the Plaintiff to exhaust local remedies it will require an express amendment of Article 10(d) of the Supplementary Protocol on the Court of Justice which gave this Court jurisdiction in human rights causes without the need to exhaust local remedies. In short, this Court's jurisdiction cannot be taken away by implication; the Statute has to expressly take away the jurisdiction that it has specifically conferred upon it*". See *MUSA SAIDYKHAN v. REPUBLIC OF THE GAMBIA (2010) CCJELR 156*.

59. In line with its above-cited jurisprudence, the Court rejects the submission and argument of the Respondent that the failure of the Applicant to utilise the appeal processes under the laws of the Togolese Armed Forces, bars him from instituting the present suit before this Court and the Court so holds. To this end, the Respondent's objection under this head also fails and same dismissed.

#### XI. MERIT

60. On merit, the claim of the Applicant hinges on violation of the following rights which shall be determined in *seriatim*:

- i. Allegation of torture contrary to Article 5 of the African Charter, Article 5 of the UDHR and Article 7 of the ICCPR;
- ii. Allegation of violation of right to work contrary to Article 15 of the African Charter, Article 23 of UDHR and Article 6(1) of International Covenant on Economic, Social and Cultural Rights;



iii. Allegation of right to fair hearing contrary to Article 7 of the African Charter and Article 10 of UDHR.

a. *Allegation of torture (Article 5 of the African Charter)*

*Submissions by the Applicant*

61. On allegation of torture, the Applicant stated that on July 6, 1998 while returning to his duty post on a motorbike, he was ran over by a Mitsubishi Patrol, ash in colour. He was prevented from running away on the orders of the driver, one Corporal BONFOH, when the three other occupants of the vehicle, came down and pursued him until they caught and thrown him into the vehicle. He was then handcuffed, crouched down and violently beaten, with his head in a bonnet while being interrogated with questions like "where are you coming from?" "Who did you vote for? You will die if you do not tell the truth.
62. At an unknown destination, he was taken out of the vehicle, further beaten with an iron bar, and abandoned on the spot when he had lost consciousness. When he regained partial consciousness, he realised that both his lower limbs had been burnt at calf level. He later spent forty-five (45) days at the Military Medical Treatment Pavilion before to the infirmary.
63. The Applicant cited and relied on the provisions of Articles 5 of the African Charter, Article 5 of the UDHR, Article 7 of the ICCPR and the relevant provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). In support of his claims, he produced a medical certificate stating that his body had numerous non-retractable scars and that he suffered from hearing loss and nasal pain.

*Submissions by the Respondent*

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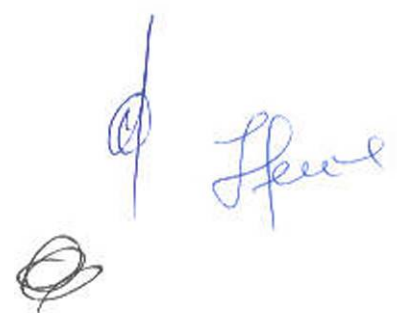
64. The Respondent refutes all the claim of violation of torture by the Applicant as mere allegations and contends that there is no evidence that the acts of torture as claimed by the Applicant were inflicted by State agents. Again, the Respondent impugns the medical report produced for the purposes of the present proceedings as inconclusive and serves no evidential value since it merely repeats the account of the facts given by the applicant.

*Analysis by the Court*

65. Torture as defined by Article 1 of the Convention Against Torture (CAT) states:

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

66. From the above definition of torture, to succeed in a claim for torture, it is incumbent on the Applicant to establish that the acts complained of are capable of inflicting severe pains or suffering, or injury to the body or to the mental or physical health. Again the acts must have been committed by a public officer with the intent of either obtaining confession or punishing the victim.

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67. The Court notes that the Applicant's account of the incidents he encountered when he was ran over by his assailants on two occasions have not been controverted by the Respondent. The Applicant stated that in the second incident, he was on a motorbike going to his duty station when he was ran over by a vehicle occupied by four military personnel among whom he was able to identified the driver as one Corporal Bonfoh.
68. Upon the orders of the said Corporal Bonfoh, the Applicant was arrested and thrown into the vehicle in a handcuff where he was violently beaten with iron bars and his legs set on fire leading to loss of consciousness and was left in that state for some time before he regained consciousness and sought medical attention for forty-five days.
69. Indisputably, the ordeal of the Applicant, which have not been controverted by the Respondent, in the considered opinion of the Court, were capable of inflicting severe pain or suffering, as required by the definition of the crime of torture, and thus can be said to be established by the account of the Applicant.
70. It was held in the case of *MIAN DIALLO v. FEDERAL REPUBLIC OF NIGERIA & ANOR JUDGMENT NO ECW/CCJ/JUD/14/19 PAGE 14* that the Applicant in a torture case bears the burden of proof:

*"The initial burden of proof thus rests on the Applicant who is to establish through evidence, all the requisite elements to succeed in his case. If that burden is met, the burden of proof then shifts to the Respondent who now has to lead evidence in rebuttal of the Applicants' assertions by preponderance of evidence."*

71. The Court continued in the MIAN DALLO case (supra) what is expected of an Applicant to discharge the burden of proof on him when it stated that:

*"In the discharge of this burden the Applicant is required to prove every material fact as alleged by him. Given the seriousness of the allegation of torture, the Court will expect the Applicant to prove the allegation of torture by way of independent medical evidence to establish torture as alleged or through independent credible witnesses whose pieces of evidence are capable of corroborating each other."*

72. In the discharge of the onus on him that he was indeed tortured, the Applicant produced a Medical Report (Exhibit 2) signed by Prof. Dossch Ekoué David, a surgeon at the Sylvanus Olympio Hospital in Lomé in wherein he was diagnosed with numerous non-tactile scars, hypoacusis and pain in the nostrils and in the ears traceable to the alleged cruel and inhuman treatment he suffered. The Applicant also exhibited photographs with traces of visible scars of torture, particularly on the part of his legs allegedly set on fire.
73. In the case of *MR. AMETEPE KOFFI v. THE REPUBLIC OF TOGO-ECW/CCJ/JUD/07/16 para. 37-42*, the Court concluded on the finding of torture that *"The Applicant tendered, as proof healed marks of the wounds that he sustained, due to acts of torture that were meted out on his person; The Defendant State failed to produce contrary proof to the claims made by Plaintiff/Applicant; on the strength of these facts, there is need to conclude that Plaintiff/Applicant was victim of acts of torture, which were inflicted upon his person by the security forces of the Republic of Togo"*.
74. In the instant case, the point of disagreement between the parties, however, stems from the contention of the Respondent that the Applicant has not been able to establish that the acts complained of were actually the deeds and products of the agents of the Respondent.

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75. The Court notes that the Respondent insists that the evidence of torture provided by the Applicant is insufficient to implicate its agents to create any liability on its part. In so doing, the Respondent overlooks its obligations under the relevant provisions of the international human rights instruments invoked by the Applicant. Once it has been proven that the victim was subjected to acts of torture, which the Court considers to be sufficiently established before it, it is up to the State to prove the contrary.
76. The Court reiterated the need for the Respondent to go beyond mere denial when it held that "*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 the Applicants were treated with respect and dignity*". *OUSAINOE DARBOE & 31 ORS v. THE REPUBLIC OF GAMBIA ECW/CCJ/JUD/01/20 @ pg. 23.*
77. In *ASSIMA KOKOU INNOCENT & 6 ORS v. REPUBLIC OF TOGO* Judgment N°ECW/CCJ/APP/08/11 (2013) *Unreported*, the Court considered the vulnerability of a victim of torture and shifted the burden of proof to the Respondent in the following words:

*"...before it concludes on the issue of occurrence of human rights' violation, the concrete proof of the facts upon which the applicants base their claims must be established with a high degree of certainty, or at least, there must be a high possibility of the claims appearing to be true, upon scrutiny. In this regard, mere allegations do not suffice to elicit the conviction of the court. Nevertheless, as regards the allegations of torture levelled against the authorities responsible for investigation and the prison administration, the court considers whether real opportunities existed for the applicants to obtain proofs of*

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*evidence. Finding themselves in a vulnerable situation, it can reasonably be presumed that real difficulties existed for the Applicants to gather evidence on the appalling act they were subjected to, such that burden of proof shall be shifted to the Republic of Togo, to prove that there were no acts of torture or acts similar to torture."*

78. Commenting on the obligation of a state where crime is alleged, this Court has emphasized that *"A State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out serious investigation of violations committed within its jurisdiction to identify those responsible, impose appropriate punishment and ensure the victim's adequate compensation. This obligation requires that states maintain mechanisms and procedures through which investigations can be initiated"*. See *HEMBADOON CHIA & 7 ORS v. FEDERAL REPUBLIC OF NIGERIA & ANOR ECW/CCJ/JUD/21/18 @ pg 30 Unreported*.
79. The Court observes that the Applicant has indicated that his assailants were men in uniform and he has been able to identify one of them by name (Corporal Bonfoh) as the driver in charge of the one of the vehicles that ran over him. Again, his house was allegedly set on fire by military personnel with eye witnesses. It was the duty of the Respondent to have carried out serious investigations of these acts committed within its territory to identify those responsible with the view to imposing appropriate sanctions and ensure adequate compensation of the Applicant.
80. The Court also notes that the military personnel, in the process of torturing the Applicant were interrogating him with the view to obtaining

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information with regards to his political affiliation i.e. "where are you coming from?" "Who did you vote for? You will die if you do not tell the truth".

81. The conduct of the military personnel, being members of an organ of the Respondent, are capable of creating liability for the State by their actions or omissions as held in the case of *TIDJANE KONTE & ANOR v. REPUBLIC OF GHANA ECW/CCJ/JUD/11/14 @ page 16* that "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activities".
82. On the premise of the above analysis, the Court is unable to accept the argument of the Respondent that the Applicant has failed to establish that acts of torture meted out to him were carried out by the agents of State. This position of the Court is fortified on the authority of *THE REGISTERED TRUSTEES OF JAMA'A FOUNDATION & 5 ORS v. FEDERAL REPUBLIC OF NIGERIA & 1 ECW/CCJ/JUD/04/20 @pg. 33* which states that: "Where a State is aware of the occurrence of acts amounting to a violation of human rights in its territory and fails to carry out effective investigation into the violation as to identify those responsible and hold them accountable, such State will be in violation of its obligation under international law".
83. In the light of the foregoing analysis, the Applicant having proved that he was subjected to severe pain and suffering by the agents of the Respondent with the intention to solicit information about his political affiliation and

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to punish him, and the Respondent having failed to prove the contrary, the Court holds that the Applicant was a victim of torture at the instance of the Agents of the Respondent.

84. Consequently, the Respondent is found in violation of the Applicant's right to torture enshrined in Article 5 of the African Charter (which is *in pari materia* Article 5 and 7 of the UDHR and ICCPR respectively).

*b. Allegation of violation of right to work contrary to Article 15 of the African Charter & 23 of*

*Submissions by the Applicant*

85. The Applicant claimed that his right to work was violated because he was forced to sign documents to the effect that he has consented to declaration of being unfit for military service which led to Decision No. 98-470/ MIN.DEF.NAT of 9<sup>th</sup> September 1998 dismissing him from the Togolese Armed Forces without being given the opportunity to defend himself.
86. He argues that the State violated the provisions of the Law on the General Status of Military Personnel of the National Army of Togo of 17 July 1963, as well as the relevant provisions of the Constitution of Togo, the African Charter, the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights.

*Submissions by the Respondent*

87. The Respondent maintained that there was no violation of the Applicant's right to work on the account that there was disciplinary measures instituted against him for abandonment of duty post that led to an administrative Decision No. 98-470/ MIN.DEF.NAT of 19<sup>th</sup> September 1998 relieving him of his military functions. He had the right to other remedies if he



considered that he was treated unfairly and that the decision infringed upon his rights.

88. Article 23(1) of the Universal Declaration of Human Rights provides:

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

Article 15 of the African Charter provides:

*"Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work."*

89. Article 29 of the Law on the General Status of the Military Personnel of the Togolese National Army provides:

*"Declaring an officer unfit for service, as a disciplinary measure is made by decision of the President of the Republic, and upon a report submitted by the Minister of Defence, following the opinion reached by a Military Council of Inquiry, for the following reasons:*

*Habitual Misconduct;*

*Serious dereliction and indiscipline, while in service; and*

*Dishonourable conduct.*


90. The Court had the opportunity to consider the parameters of the right to work in the case of *DR. ROSE MBATOMON AKO v. WEST AFRICAN MONETARY AGENCY & 5 ORS (2013) CCJELR 1 @ pg. 13 para. 32* as follows:

*"It is a trite law that a party who alleges a wrongful termination of his contract of employment is bound to show or prove that he indeed had an employment with the Defendant. He must plead or show by giving credible evidence that he had an employment that was*

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*terminated by the Defendant. Once this burden is discharged by the Plaintiff in keeping with the principle of law that he who asserts must prove, the Plaintiff is further required by law both in his pleadings and by credible evidence to show how the defendant wrongfully terminated his appointment. At the complete discharge of this burden by the Plaintiff the burden shifts to the Defendant to disprove the assertion".*

91. Clearly, the Court notes from the provision of the texts and the dictum provided above that the Respondent State, like any other signatory to the African Charter, inter alia, has an obligation under Article 15 towards every single employee of hers whether a civilian or a member of the forces not to sever and unfairly deprive the employee of his or her job.
92. Flowing from the above, it suffices to state that every claim for right to work must sufficiently establish, first and foremost the existence of contract of employment between the parties; secondly, proof of its termination at the behest of the employer; and finally that the termination was wrongfully done.
93. Applying the principle outlined above to the instant suit, it is not in doubt that the Applicant was a soldier in the Respondent's Armed Forces. It is equally not in dispute that he was declared unfit and dismissed from the service through the alleged disciplinary measures that led to the administrative Decision No. 98-470/ MIN.DFF.NAT of 19<sup>th</sup> September 1998 by the Military Command. What then is left for the Court to consider in order to determine whether the right to work of the Applicant has been violated is the propriety or otherwise of his dismissal.
94. The Respondent has produced ample evidence to establish that at all material times following his torture by the military personnel of the Respondent, he was under treatment in a known medical facility where he was served with

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document to sign under duress. This means he was not unfit for service and did not abandoned his duty post for no reason, and granted without admitting that he did abdicate his duties unlawfully, the laws governing his employment mandate the Military Command to involve him in any disciplinary measures taken against him.

95. However, contrary to the procedural requirements of Article 29 of the Law on the General Status of Military Personnel of the National Army of Togo, of 17 July 1963, the Respondent has woefully failed to adduce evidence that there was a Military Council Inquiry held into the alleged dereliction of duty or misconduct the Applicant. let alone involving him to defend himself in accordance with the known cardinal principles of natural justice.
96. Again, it is expressly stated under the same Article 29 of the Military Law (supra) that the decision to dismiss a soldier must be the prerogative of the President of the Republic of Togo and upon a report submitted by the Minister of Defence, following the opinion reached by a Military Council of Inquiry. This places an inevitable burden on the Respondent to convince this Court by production of the report upon which the fitness and dismissal of the Applicant was based but the Respondent failed to discharge the onus on it.
97. The implication of the Article 29 of Law on the General Status of Military Personnel of the National Army of Togo, of 17 July 1963 is that any soldier of the Togolese Armed Forces declared unfit and subsequently dismissed without adhering the substantive and procedural requirements therein contained renders the dismissal unlawful. In that case the culminating effect is that the victim has been unfairly deprived of his or her employment and denied the protection of his employment.

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98. The totality of the forgone analysis lends itself to an irresistible conclusion by the Court that the Applicant's employment was unlawfully terminated and finds the Respondent in violation of Article 15 of the African Charter and Article 23 of the Universal Declaration of Human Rights respecting right to work.
99. Before concluding on this head, the Court will briefly address the Respondent's contention that the Court has no competence to examine its domestic laws when it averred that *"Whereas it is very important to note here, that it is not the responsibility of the Honourable Court to find violations of a national text, in particular Article 29 of Law No. 63-7 of 17<sup>th</sup> July 1963, but rather the violation of international legal instruments for human rights protection, duly ratified by ECOWAS States"*
100. This Court has settled in a plethora of cases when its human right jurisdiction affords it a narrow way of examining the laws of the Member States with the view to discharging its mandate. To this end, in the case of *FEDERATION OF AFRICAN JOURNALISTS & 4 ORS v. REPUBLIC OF THE GAMBIA ECW/CCJ/JUD/04/18 @ pg.32* the Court held that:

*"Having reiterated the Courts' competence on human rights cases, it therefore implies that this court in exercising its jurisdiction, 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".*

101. Based on the above, the Court holds that though it has no competence to examine the laws of Member States *in abstracto*, in the discharge of its human rights mandate, it has powers to go into the root of the violation by examining the impugned laws with the view to establishing whether indeed a violation has occurred.

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c. *Allegation of right to fair hearing contrary to Article 7 of the African Charter and Article 10 of UDHR.*

102. The Applicant contends under this head that through the actions of its military agents, who declared him unfit for service, and dismissed him from the army, the Respondent violated the provisions of Article 7 (1) (b) and (c) of the African Charter and Article 10 of the UDHR.

103. Article 7(1) (b) provides:

*“Every individual shall have the right to have his cause heard. This right comprises:*

*b) The right to be presumed innocent until proved guilty by a competent court, or tribunal;*

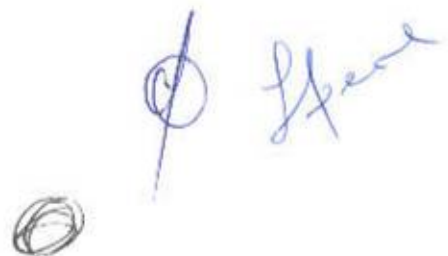
*c) The right to defence, including the right to be defended by Counsel of his choice”*

Article 10:

*“Everyone is entitled in full equality, in full equality, to a fair and public hearing, by an independent and impartial Tribunal, in the determination of his rights and obligations and of any criminal charge against him”.*

104. The Respondent on her part asserts that the Applicant’s claims for violation of his right to fair hearing remains mere allegations without proving, legally and objectively, in what ways the violation occurred.

105. The Court did pronounce on what amount to fair hearing in the case of *MOHAMMED EL TAYYIB BAH v. THE REPUBLIC OF SIERRA LEONE ECW/CCJ/JUD/11/15@* pg. 11 when it held that *“The principle of fair hearing as encapsulated in Article 7 of the African Charter on Human and Peoples Rights is based on the rule that an individual should not be penalized by decisions affecting his rights or legitimate expectations*



*without being given prior notice of the case, a fair opportunity to answer and/or opportunity to present their own case. The fact that a decision affects rights or interest of a person is sufficient to subject the decision to the procedures required by natural justice".*

106. The case of the Applicant is that he was declared unfit for military service and dismissed when he had had no opportunity to defend himself. In absentia, his case was heard and ultimate punishment of dismissal meted out to him which has affected his life. The Court observes that it has on several occasions discounted the habit of judicial authorities making decision affecting the rights of individuals without being given opportunity to defend themselves which flagrantly offends the protection afforded them under Article 7 of the African Charter.
107. It is reiterated by the Court that *"The right to defence forms an integral part of fair trial, and just like the right to presumption of innocence, the right to defence is especially a fundamental requirement of every judicial procedure in the course of all its phases. Viewed from that angle, it may be considered that the right to defence does not only imply that the two parties must be heard, but also that the person sued before the court must freely choose the person to defend him, unless there is an obligation upon him to choose his counsel from an officially established list of lawyers". See MR. KPATCHA GNASSINGBE & ORS v. REPUBLIC OF TOGO ECW/CCJ/JUD/06/13 Pg. 15.*
108. For the reasons canvassed thus far under this head, the Court is not hesitant to hold that the right of the Applicant to fair hearing, particularly right to defence was violated by the Respondent when he was declared unfit for military service and subsequently dismissed when he had no opportunity to defend himself.



## ***XII. REPARATIONS***

109. The Applicant sought various reliefs captured under paragraph 26 of this judgment. The Court notes that out of the six (6) reliefs sought by the Applicant, the Court has already dealt with three of them i.e. 26(a), (b) & (c) which are declaratory in nature.
110. The remaining reliefs basically borders on orders for investigation to arrest the perpetrators of acts complained of by the Applicant and reparations for the harm he suffered in the form of forms of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
111. In international law, the obligation to afford reparation arises as a consequence of the breach of a primary obligation causing injury. The right to reparation under international law obliges States to ensure that victims are able to obtain such reparation in law and in practice. In 2002, the African Commission adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (Robben Island Guidelines'). The Robben Island Guidelines outline under three main headings the State obligations to prohibit and prevent torture, and, in part III, to provide reparation to victims of torture and ill-treatment.
112. The Respondent has been found in violation of the Applicant's right to torture, fair hearing and right to work. The Court is mindful of awarding him compensation for the prejudice suffered since other forms of reparation, particularly restitution may not be appropriate in the circumstances of this case.
113. To this end, the Applicant prayed for a *"sum of One Hundred Million (100,000,000) FCFA as damages in reparation for the prejudice suffered*

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*as a result of the torture and other inhuman or degrading treatment or punishment”.*

114. The Court has held that *“General damages are usually awarded amongst others for, pain and suffering, future problems and crippling effect of an injury, loss of ability to perform various acts, shortening of lifespan, mental anguish, loss of companionship, loss of reputation, loss of anticipated business and many more. It is always awarded at the discretion of the Court having regard to the peculiar circumstances”.* See *LA SOCIETE BEDIR SARL v. REPUBLIC OF NIGER ECW/CCJ/JUD/11/20 @ pg. 32.*
115. It is obvious that the ordeal of torture and other cruel and inhuman treatment suffered by the Applicant did occasion serious and permanent moral and physical effects on him which cannot be adequately compensated by any quantum of monetary award. However, a colossal sum of One Hundred Million (100,000,000) FCFA as damages prayed for by the Applicant in the circumstances of this case is slightly outrageous.
116. That notwithstanding, the Court will assess an all- inclusive amount as compensation for torture, cruel and inhuman treatment and the violation of his right to work and fair-hearing. Consequently, having taken into account all the circumstances of this case, the Court awards to the Applicant a total sum of Forty Million (40,000,000) FCFA in compensation against the Respondent for all the prejudices suffered.
117. The Court further orders that the Applicant be allowed by the Military Command to access their medical facility for all his health challenges free of charge for life.
118. On the issue of investigation, it is a time tested principle that *“International law places a duty on State to investigate alleged infractions of rights of its citizens especially where formal complaints are made. Apart from any*

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*other acts or omission alleged on the part of the State or its officials, failure to investigate such allegations itself constitutes a breach under international law". See DOROTHY CHIOMA NJEMANZE & 3 ORS v. FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/08/17 @ page 42-43.*

119. The Court, in the instant case is not oblivious to the fact that the incident in question took place in 1998. However, since criminal justice administration knows not effluxion of time, conducting effective investigations into the acts complained of by the Applicant will serve the same purpose it would have achieved in 1998. Consequently, the Respondent is ordered pursuant to its international obligations, to carry out comprehensive investigations with the view to arresting the perpetrators of the cruel and inhuman acts meted out to the Applicant and prosecute them.

### ***XIII. COSTS***

120. The Applicant did not ask for costs whereas the Respondent prayed the Court "to order the Applicant to bear all costs in accordance with Article 46 of the Rules of Procedure of the Community Court of Justice, ECOWAS.

121. Article 66 (1) of the Rules of Court provides, "*A decision as to costs shall be given in the final judgment or in the order, which closes the proceedings.*"

122. In addition, Article 66(2) of the Rules of Court provide, "*The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.*"

123. In light of the provisions of the Rules, since the Applicant did not pray for costs, the Court orders that the parties bear their respective

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## ***XII. OPERATIVE CLAUSE***

For the reasons stated above the Court sitting in public after hearing both parties:

### **On jurisdiction**

- i. Declares that it has competence to adjudicate on the Application;

### **On admissibility**

- ii. Dismisses the Preliminary Objection of the Respondent and declares that the Application is admissible;

### **On merits**

- iii. **Declares** that the treatment of the Applicant by the agents of the Respondent amounted to torture and violation of his rights under Article 5 of the African Charter by the Respondent;
- iv. **Declares** that the Applicant's right to work under Article 15 of the African Charter and 23 of ICCPR was violated by the Respondent;
- v. **Declares** that the Applicant's right to fair hearing particularly right to defence under Article 7 of the African Charter was violated by the Respondent;
- vi. **Dismisses** all the claims by the Respondent;
- vii. **Orders** the Respondent to pay the lump sum of Forty Million FCFA (40,000,000) to the Applicant as compensation for moral prejudice suffered as a result of the violation of his rights under Articles 5, 7 and 15 of the African Charter.

### **On Costs:**

- viii. **Orders** the parties to bear their respective costs.

### **As to compliance and reporting**



- ix. **Orders** the Respondent to submit to the Court within three (3) months of the date of the notification of this Judgment, a report on the measures taken to implement the orders set-forth herein.

Hon. Justice Edward Amoako **ASANTE**

Hon. Justice Gberi-Bc **OUATTARA**

Hon. Justice Januaria T. Silva Moreira **COSTA**

ASSISTED BY:

Dr. Athanase **ATANNON**

Done in Abuja, this 9<sup>th</sup> Day of July, 2021 in English and translated into French and Portuguese.

