COMMUNITY COURT OF JUSTICE,
ECOWAS
COUR DE JUSTICE DE LA COMMUNAUTE,
CEDEAO
TRIBUNAL DE JUSTICA DA COMMUNIDADE,
CEDEAO

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

In the Matter of

KODJO ALAIN VICTOR CLAUDE V REPUBLIC OF COTE D'IVOIRE

Application No: ECW/CCJ/APP/01/21 Judgment NO. ECW/CCJ/JUD/ 09/21

JUDGMENT

ABUJA

26 APRIL 2021

KODJO ALAIN VICTOR CLAUDE - APPLICANT

V.

REPUBLIC OF COTE D'IVOIRE - RESPONDENT

COMPOSITION OF THE COURT:

Hon. Justice Gberi-Be OUATTARA - Presiding
Hon. Justice Dupe ATOKI - Member/Judge Rapporteur
Hon. Justice Januaria T. Silva Moreira COSTA - Member

ASSISTED BY:

Mr. Tony ANENE- MAIDOH - Chief Registrar

REPRESENTATION OF PARTIES:

SCPA ORE- DIALLO - Counsel for Applicant

Cabinet d'Avocat ESSIS - Counsel for the Respondent

I. JUDGMENT:

1. This is the judgment of the Court delivered 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, Mr Kodjo Alain Victor Claude who is an Ivorian and a Community citizen (hereinafter referred to as the "Applicant"), is currently in pretrial detention at the Abidjan Prison and Correctional Centre pursuant to a detention order of 28 June 2018.

3. The Application is brought against the Republic of Cote d'Ivoire, a Member State of the ECOWAS and signatory to the ECOWAS Treaty (hereinafter referred to as the "Respondent").

III. INTRODUCTION

4. The subject matter of the Application arises from the Applicant's allegation that the Respondent violated his right to liberty and security of persons and his right to be presumed innocent until proven guilty, contrary to Articles 6 and 7(1) (b) of the African Charter on Human and Peoples' Rights and Article 9(1) of the International Covenant on Civil and Political Rights.

IV. PROCEDURE BEFORE THE COURT

5. The Applicant filed the Initiating Application accompanied by an Application for expedited procedure on 21 January 2021 and these processes were served on the Respondent on 28 January 2021.

6. The Court heard the Parties on 9 March 2021 and thereafter granted the Applicant's Application for expedited procedure. The Court further directed the Respondent to file its defense to the Application before 18 March 2021, which was the next date of adjournment.

7. The Respondent filed its defense to the Application on 11 March 2021 and this was served on the Applicant.

8. On 18 March 2021, after hearing the Parties' oral submission to the substantive Application, the Court adjourned the case to 23 April 2021 for judgment.

V. APPLICANT'S CASE

a) Summary of facts

9. The Applicant, a financial analyst and director of a company was charged with being complicit in fraudulent activities and on 29 June 2018 the trial judge of the Court of First Instance issued a pretrial detention order against him in accordance with the provisions of Article 166(1) of the Criminal Code Procedure of Cote d'Ivoire, which provides for pretrial detention for a six

months' duration. He was then placed in detention at the Abidjan Prison and Correctional Centre.

10. At the expiration of the six months' duration, the detention order was then extended twice by six months each in accordance with Article 166(2) and (3) of the Criminal Code Procedure (CCP), which provides,

> "*In correctional matters, preventive detention cannot exceed six months.*
>
> *However, the trial judge may decide to extend pre-trial detention for a period which may not exceed six months by means of a reasoned order issued after an adversarial debate during which the public prosecutor and the accused or his lawyer are heard.*
>
> *Exceptionally, when the investigations of the trial judge must be continued and the preventive detention of the accused remains justified in the light of the conditions of Article 163, the Trial Chamber, seised by motion of the trial judge, may extend the preventive detention for a period not exceeding six months. The trial judge can only apply to the Trial Chamber once.*
>
> *The application of the trial judge must include the reasons justifying the continuation of the investigation. It is not necessary for the application to indicate the nature of the investigations envisaged where such an indication might hinder their completion.*
>
> *At the end of the aforementioned deadlines, the accused is in unjustified detention and must be released automatically*".

11. Based on the abovementioned provision of the CCP, the Applicant was detained for a total of eighteen months, which is the legal limit for such

detention. Thereafter, the Investigating Chamber of the Court of Appeal took over the appeal of the case, and in view of the fact that the Applicant's detention had continued beyond the statutory period, the Judge ordered the Office of the Public Prosecutor's Office to release the Applicant with immediate effect.

12. However, the Office of the Public Prosecutor disregarded the release order and continues to detain the Applicant on the ground that the time limit for appeal and ongoing appeal suspends the order of the Court in accordance with Article 605 of the CCP. The Applicant states that the Office of the Public Prosecutor failed to carry out its legal obligation to execute without delay any decision handed down by the Trial Chamber regarding pretrial detention and bail.

13. He states that the Respondent has kept him in detention for over the legal limit of eighteen (18) months and he remains in detention till date. He submits that his detention is illegal and a violation of his right to liberty and security and his right to be presumed innocent until proven guilty in a criminal matter.

b) Pleas in law

14. The Applicant relied on the following laws:

i. Article 6 of the African Charter on Human and Peoples' Rights (African Charter);
ii. Article 7 (1) (b) of the African Charter;

iii. Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR);

iv. Article 166 (1-3) of the Criminal Code Procedure of Cote d'Ivoire.

c) Reliefs sought

15. The Applicant's prayers are as follows:

A declaration

i. that the Respondent violated his right to liberty and security;

ii. that the Respondent violated his right to be presumed innocent;

An Order

iii. that the Respondent puts an end to these violations by effecting his immediate release;

iv. that the Respondent pay him the sum of one billion (1,000,000,000) FCFA as compensation for the damages he suffered;

v. that the Respondent comply with the Court's judgment within thirty (30) days from the date of notification of the judgment and submit a report stating the measures taken to comply with same at the end of the 30-day period.

VI. RESPONDENT'S CASE

a) Summary of facts

16. The Respondent in its response denies that the right to liberty of the Applicant was violated on the ground that the detention was done in accordance with laid down laws of the Respondent. That while the Applicant relied on the provision of Article 166 of the Criminal Procedure Code, the Office of the

Prosecutor relied on the provision of Article 605 of the Criminal Procedure Code, which provides,

> *"During the period of appeal at the Court of Cassation, and if there was appeal before the pronouncement by the Court of Cassation, the enforcement of the judgment which forms the subject matter of the appeal shall be suspended, except for convictions or sentences in civil matters."*

17. The Respondent contends that the subject matter of the appeal is the order for release of the Applicant from detention. As a result of this, the appeal shall suspend the Order of the Investigating Chamber of the Court of Appeal, until it is heard.

18. The Respondent argues that the detention of the Applicant is justified under the international human rights treaties that the Respondent has ratified. Furthermore, the UN Council for Human Rights in its definition of arbitrary detention stated that the following must be present; 1) the absence of legal grounds, 2) the deprivation of liberty is as a result of a trial or a sentence relating to the exercise of civil and political rights, 3) the serious disregard for international norms, in respect to the right to fair hearing.

19. The Respondent concludes that since none of these criteria applies to the case of the Applicant, the Application lacks substance and should be dismissed.

b) Pleas in law

20. The Respondent relies on Article 605 of the Criminal Code Procedure of the Republic of Cote d'Ivoire.

c) Reliefs sought

21. The Respondent's prayers are as follows:

A declaration:

i. that the deprivation of liberty of Mr. Kodjo Alain Victor Claude is legal and in accordance with Article 605 of the Criminal Procedure Code;

ii. that the detention is justified;

iii. that the detention is not characterized under the conditions of arbitrary detention as defined by the United Nations Human Rights Council;

An Order

iv. striking out the Application of the Applicant

v. dismissing the sum of one billion (1,000,000,000) FCFA, claimed by the Applicant as compensation same not been justified

VII. JURISDICTION

22. The Court holds that it has jurisdiction to adjudicate on this Application in accordance with Article 9(4) of the Supplementary Protocol A/SP.1/01/05 Amending the Protocol (A/P1/7/91) Relating to the Court (Supplementary Protocol), which provides, *"The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."*

VIII. ADMISSIBILITY

23. The Court holds that the Application is admissible in accordance with Article 10 (d) (i) and (ii) of the Supplementary Protocol, which provides, *"Access to the Court is open to... individuals on application for relief for the violation of their human rights; the submission of the application for which shall: i) not be anonymous; nor ii) be made whist the same matter has been instituted before another International Court for adjudication."*

IX. APPLICATION FOR EXPEDITED PROCEDURE

24. The Applicant filed an Application for expedited procedure of the Application before the Court in accordance with Article 59 of the Rules of Court, on the ground of his failing health due to the poor living conditions of the prisons where he has been detained since 29 June 2018. The Respondent made no submission in response to the application for expedited procedure

25. During its hearing on 9 March 2021, the Court granted the Applicant's request for an expedited hearing of the Application.

X. MERITS

26. The Applicant's claim hinges on the violation of the following rights:

i. The right to liberty and security of persons- Article 6 of the African Charter and Article 9(1) of the ICCPR;

ii. The right to be presumed innocent in a criminal matter – Article 7(1) (b) of the African Charter.

27. The Court will proceed to address the heads of the alleged violations separately.

a) Alleged violation of the right to liberty and security of persons

28. It is the submission of the Applicant that the Public Prosecutor disregarded the order of the Investigating Chamber of the Court of Appeal for his immediate release and continues to detain him over the eighteen (18) months limit under the Criminal Procedure Code. The legal limit for preventive detention in correctional matters is a total of eighteen (18) months. However, he has been held in detention since 29 June 2018 till date, which is more than 18 months.

29. He contends that the detention is unjustified and that under no circumstance should the time limit for appeal, suspend the requirement of the law under Article 166 of the Criminal Code Procedure. That the grounds for his continuous detention based on the suspensive effect of an appeal before the Court of Cassation, under Article 605 of the Criminal Code Procedure, is incompatible with international treaties ratified by the Respondent.

30. He submits that his continuous detention despite the expiry of the legal period of detention and the order for his release on 29 January 2020, is arbitrary, illegal and a violation of his right to liberty and security of persons.

31. The Respondent State on the other hand argues that the continuous detention of the Applicant is justified under Article 605 of the Criminal Code Procedure, which provides that an appeal before the Court of Cassation shall suspend the execution of an Order of the Court which is the subject matter of the appeal. They contend that the detention of the Applicant is compatible with the provisions of the ICCPR and other relevant international human rights instruments ratified by the Respondent.

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Analysis of the Court

32. The Applicant in the instant case allege that his detention beyond the prescribed 18 months is illegal and arbitrary same being a violation of his right to liberty and security of persons. The Respondent's defence is that the continuous detention was not arbitrary as it was in accordance with Art 605 of Criminal Code Procedure (CCP) thus is in accordance with the law.

33. The applicable provision of the law relating to the right to liberty cited by the parties include, Article 6 of the African Charter, which 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."*

34. Article 9 (1) of the ICCPR which provides,

> *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived*

of his liberty except on such grounds and in accordance with such procedure as are established by law."

35. From the above articles, it is clear that the first rule of the thumb is that the right to liberty of any individual is guaranteed. However it can be interfered with if it is in accordance with the law as this protection is not absolute.

36. In its simplest definition, *right to liberty is the right to be free, that is, freedom from restraint and the ability to do as one pleases as long as it is lawful and does not affect the right of others. See Kolawole Olaniyan: Corruption and Human Rights in Africa page 213.* However the simplicity of this definition collapses in the face of the all the international instruments on the right to liberty which condemns any "arbitrary" detention.

37. The dynamics of the word "Arbitrary" in relation to the right to liberty is so composite that a detention which is not in compliance with the law therefore unlawful, may not necessarily be arbitrary. On the other hand, a detention in compliance with the law thus lawful may nevertheless be arbitrary if it falls short of the fundamentals for the protection of the right to liberty. This complexity in defining arbitrary detention will be further elaborated later but suffice at this point to say that a common understanding amongst the various international human rights institutions is to the effect that a lawful detention may very well be arbitrary since a higher international standard is imposed on the content of domestic law as it subjects that "law" to compliance with the fundamentals of human right protection.

38. Below are jurisprudence from some international human right institutions on their understanding of arbitrariness in respect to the right to liberty.

39. "*The established international human rights jurisprudence sets three criteria to determine whether or not a particular deprivation of liberty is arbitrary, namely, the lawfulness of the deprivation; the existence of clear and reasonable grounds; and the availability of procedural safeguards against arbitrariness. These are cumulative conditions and non-compliance with one makes the deprivation of liberty arbitrary.*" ONYACHI AND NJOKA V TANZANIA (MERITS) (2017) 2 AFRICAN COURT LAW REPORT 65 PAGE 93, PARAGRAPH 131.

40. "*The Commission observes that not all actions that constrain an individual's physical freedom can amount to a deprivation of liberty in terms of Article 6 of the Charter. However, a deprivation of liberty that falls outside the strict confines of the law, or for reasons that are not acceptable or simply arbitrary, will amount to a violation of Article 6 of the Charter.*"
AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS COMMUNICATION 379/09 MONIM ELGAK, OSMAN HUMMEIDA AND AMIR SULIMAN (REPRESENTED BY FIDH AND OMCT) V SUDAN, MARCH 10 2015.

41. "*The right to liberty of person is not absolute. An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality*" HUMAN RIGHTS COMMITTEE – GENERAL COMMENT ON ARTICLE 9 ICCPR.

42. The European Court of Human Rights found a violation of the right to liberty where the applicant continued to be detained over the maximum period of detention set by law at six months. His detention after that date ceased to be lawful as a matter of domestic law. MUKHITDINOV v. RUSSIA ECHR APPLICATION NO. 20999/14 JUDGMENT OF 21 MAY 2015.

43. Similarly, an applicant who had been held in detention for more than three years after his acquittal by the Supreme Court of Georgia was held to have been arbitrarily detained and the Georgian State ordered had to secure his release at the earliest possible date. TENGIZ ASSANIDZE V. GEORGIA ECHR APPLICATION NO. 71503/01 JUDGMENT OF 8 APRIL 2004.

44. Deprivation of liberty is regarded as "arbitrary" in the following cases:

a. When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence, or despite an amnesty law applicable to the detainee, or a person detained as a prisoner of war is kept in detention after the cessation of effective hostilities);

b. When the deprivation of liberty results from the exercise of the rights or freedoms 4 guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights;

c. When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the State concerned, is of such gravity as to give the deprivation of liberty an arbitrary character;

d. When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy; or, (e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights. See *BASIC PRINCIPLES AND GUIDELINES ON REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE COURT.*

45. "*... an arbitrary detention is any form of curtailment of individual liberty that occurs without a legitimate or reasonable ground, and is in violation of the conditions set out under the law. One or all of these indices shall be said to be missing, if the detention, which is, at the beginning, not arbitrary, but is too prolonged. It thus leads to an abusive detention*". BODJONA AKOUSSOULELOU PASCAL V. THE REPUBLIC OF TOGO JUDGMENT ECW/CCJ/JUD/06/15 PAGE 12

46. *Arbitrary detention is a detention not in conformity with the national or international law and which occurs without a legitimate or reasonable ground.* BENSON OLUA OKOMBA V REPUBLIC OF BENIN ECW/CCJ/JUD/05/17 PAGE 16.

47. The sum total of above jurisprudence is to the effect that arbitrariness is tied to compliances with the law which as earlier stated is subjected to international standards. In the instant case, in examining the allegations of the Applicant that his detention is unlawful, arbitrary and thus a violation of his right to liberty and security, the Court intends to analyse the two laws invoked, that is, Articles 166 and 605 of the CCP.

48. Ahead of this examination, the Court hastens to state that as a rule, it does not have the jurisdiction to examine the laws of Member States, nor jurisdiction to act as an appellate Court in regards to decisions of Member States. However, where human rights violations are raised in the laws or judgment of a court of a Member State, it will exercise jurisdiction over same. This stand has been expressed by the Court in several cases, one of which states as follows;

> *"The Court further reiterates that it is not an appellate court and will only admit cases from national courts where human rights violations were alleged in the course of the proceedings."*

See HIS LORDSHIP JUSTICE PAUL UUTER DERRY & 2 ORS v. THE REPUBLIC OF GHANA JUDGMENT NO ECW/CCJ/JUD/17/19, PAGE. 28. BAKARY SARRE & 28 ORS V. REPUBLIC OF MALI ECW/CCJ/JUD/03/11 PAGE 13.

49. Since the subject-matter of this case hinges on the application of a national law, which is alleged to violate a human right on one hand and same was

raised to justify the alleged violation on the other, the Court is therefore seized with the jurisdiction to make a determination of the alleged violation premised on the said laws.

50. Having clarified the jurisdiction to examine the laws of the Respondent, we shall now proceed as earlier stated to review the facts presented by both parties viz a viz the said laws to determine the alleged violation or otherwise.

i) Article 166 of the Criminal Code Procedure:

51. The summary of the Applicant's case is that he was detained from 29 June 2018 to 29 January 2020 a period of 19 months contrary to Article 166 of the CCP that limits detention pending investigation to 18 months. Thus the detention is unlawful. For purposes of recollection the said Article 166 is reproduced hereunder:

> *"In correctional matters, preventive detention cannot exceed six months. However, the trial judge may decide to extend pre-trial detention for a period which may not exceed six months by means of a reasoned order issued after an adversarial debate during which the public prosecutor and the accused or his lawyer are heard.*
>
> *Exceptionally, when the investigations of the trial judge must be continued and the preventive detention of the accused remains justified in the light of the conditions of Article 163, the Trial Chamber, seised by motion of the trial judge, may extend the preventive detention for a period not exceeding six months. The trial judge can only apply to the Trial Chamber once.*
>
> *The application of the trial judge must include the reasons justifying the continuation of the investigation. It is not necessary for the*

application to indicate the nature of the investigations envisaged where such an indication might hinder their completion.

At the end of the aforementioned deadlines, the accused is in unjustified detention and must be released automatically".

52. The maximum period of detention lawfully permitted under the abovementioned law is 18 months. The Applicant was detained on 29 June 2018, having spent nineteen months in detention, on 29 January 2020 the Investigating Chamber of the Court of Appeal realizing this irregularity, declared as unjustified the continuous detention of the Applicant and ordered the Office of the Public Prosecutor to effect his immediate release. This order was however disregarded.

53. On the examination of the facts and Article 166, the Court finds that the detention of the Applicant beyond 18 months being in contravention of this Article is unlawful same not been in accordance with the law. This position has been reiterated in many decisions of the Court including in the case of PTE ALIMU AKEEM V. REPUBLIC OF NIGERIA ECW/CCJ/JUD/01/14 PAGE 11, where the Court held that *"Since the Applicant has served his sentence beyond the number of years imposed on him, and the authority charged with confirming or reversing the sentence of the Court martial has not delivered its judgment, the said detention is arbitrary and violates Article 6 of the African Charter on Human and Peoples' Rights."* See BENSON OLUA OKOMBA V REPUBLIC OF BENIN ECW/CCJ/JUD/05/17, PAGE 16. See also HADIJATOU MANI KORAOU V. REPUBLIC OF NIGER CCJELR (2008)

54. Indeed the last sentence of Article 166 that sets out the time limit of 18 months for detention says it all when it provided that "*At the end of the aforementioned deadlines, the accused is in unjustified detention and must be released automatically*" Based on the above, the Court finds that an unlawful detention is well accommodated within the provisions of right to liberty so long as it was carried out outsides the confines of the law.

55. The legal effect of an unlawful action is to render same void and in the instant case will result in liability against the offending party, which is the Respondent.

56. The Court therefore holds that the continuous detention of the Applicant by the Respondent in contravention of Article 166 of the CCP is unlawful and a violation of the right to liberty of the Applicant same being contrary to Article 6 of the African Charter and Article 9(1) of the ICCPR.

57. Though this holding is sufficient to terminate this Application and result in the award of appropriate damages, However, in view of the fact that Respondent sought to justify the continuous detention by virtue of another law, the Court will nevertheless proceed to examine the said law to determine the justification or otherwise of the continuous detention of the Applicant.

ii) Article 605 of the Criminal Procedure Code:

58. It is the case of the Applicant that his continuous detention is unjustified under Article 605, and that under no circumstance can the time limit for appeal suspend the requirement of the law under Article 166 of the Criminal Code Procedure. Further that the grounds for his continuous detention based

on the suspensive effect of an appeal before the Court of Cassation, under Article 605 of the Criminal Code Procedure, is incompatible with international treaties ratified by the Respondent.

59. The Respondent State on the other hand argues that the continuous detention of the Applicant is justified under Article 605 of the Criminal Code Procedure and that the detention of the Applicant is compatible with the provisions of the ICCPR and other relevant international human rights instruments ratified by the Respondent.

60. For ease of recall, Article 605 Criminal Code Procedure is hereunder reproduced:

> *"During the period of appeal at the Court of Cassation, and if there was appeal before the pronouncement by the Court of Cassation, the enforcement of the judgment which forms the subject matter of the appeal shall be suspended, except for convictions or sentences in civil matters."*

61. A narrow interpretation of this Article will inevitably lead the Court to the conclusion that the continuous detention under this law is permissible thus lawful same being *in accordance with the law*. The gnawing question to ask is whether a lawful detention can be arbitrary. The simple and forthright answer is that once the detention is in accordance with the law, it is legal and cannot ordinarily be said to be arbitrary and thus a violation of the right to liberty. The danger that this interpretation poses to the protection of the liberty of individuals is grave and has engaged serious analysis by experts

and institutions of human right protection seeking a globally acceptable definition of arbitrariness. This concern is effectively captured below;

> *"The central issue in the interpretation of the word "arbitrary" is whether it simply introduces a qualification of lawfulness, or whether it imposes a higher international standard upon the content of domestic laws. If the word "arbitrary" simply means "unlawful," then the prohibition in Articles 9 and 9(1) of the ICCPR and Article 6 of the African Charter and other similar laws would not apply to any lawful governmental action, regardless of how oppressive the action, if it conformed to domestic law. Such an approach would essentially allow each state, through its own domestic law, to determine the scope of an individual's right to freedom from arrest or detention"* LAURENT MARCOUX, JR., PROTECTION FROM ARBITRARY ARREST AND DETENTION UNDER INTERNATIONAL LAW, 5 B.C. INT'L&COMP.L.REV.345(1982),HTTP://LAWDIGITALCOMMONS.BC.EDU/ICLR/VOL5/ISS2/3 (ACCESSED ON 12 APRIL 2021, AT 11.41AM). .

62. The danger of construing arbitrary detention within the ambit of compliance with the law is further captured below;

> *"The more a law allows, or provides for, the deprivation of the right to personal liberty, the more arbitrary that law becomes... One measures the "arbitrariness" of a law in reference to the degree to which it impinges on the fundamental right to personal liberty. As the degree of impingement increases, the state's burden to justify the law, and to demonstrate its non-arbitrariness becomes greater."* LAURENT

MARCOUX, JR., PROTECTION FROM ARBITRARY ARREST AND DETENTION UNDER INTERNATIONAL LAW, 5 B.C. INT'L & COMP. L. REV.345(1982),HTTP://LAWDIGITALCOMMONS.BC.EDU/ICLR/VOL5/ISS 2/3 (ACCESSED ON 12 APRIL 2021, AT 11.41AM).

63. The global consensus is not to concentrate on compliance with the national law alone to prove arbitrariness or otherwise, but to throw a searchlight on the essence of this law as it relates to the protection of the right of liberty. Thus the phrase *in accordance with the law* or other similar expressions which is a limitation on human rights needs to be further subjected to certain limitations to ensure the realisation of human rights protection.

64. In further elaboration of above the European Court of Human Rights in JAMES Vs UNITED KINGDOM ECHR2 1986 8 EHRR 123 held,

> *"It has consistently held that the term 'law' or 'lawful' in the Convention [do] not merely refer back to the domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law."*

65. This was equally confirmed the *when this Court held that:*

> *"It is not sufficient for an act on the basis of which a state limited the enjoyment of possession to be a formal legal source within the meaning of domestic laws, but it must furthermore contain certain qualitative characteristics and afford appropriate procedural safeguards as to ensure protection against arbitrary action and conformity with the rule of law.* See BEDIR SARL VS *NIGER* JUDGMENT NO. ECW/CCJ/JUD/11/20 PAGE 24

66. A concise conclusion was also reached by *The United Nations Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile,* while recognizing that human rights are

> *"subject only to such limitations as are determined by law, however, the law itself must be "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.". See 34 U.N. ESCOR Supp. (No.8) at 8, U.N. Doc. E/CN.4/826/Rev. 1 (1964).*

67. In essence, such limiting law must pass the test of compatibility with democratic principles. The Court espoused this principle when it held thus;

> *"Even when the interference is in accordance with the law it must in addition be necessary in a democratic society for any of the following purposes: public safety, economic well-being of the country, protection of health and morality and the prevention of disorder or crime. The nature of the democratic necessity is such that mere expediency is not sufficient. The interference must be justified by a "pressing social need" relating to one or more of the legitimate aims above. In CNDD V. COTE D' IVOIRE (2009), CCJELR PARA 44. PG. 325 the Court relied on the European Court of Human Rights decision in OPEN DOOR AND DUBLIN WOMAN VS. IRELAND. (1992) which affirmed that: "it had to examine if the disputed legal measure was in response to an urgent social need and particularly if it was proportionate to the legitimate goal pursued by Ireland; and the court had to monitor closely its compatibility with the principles of a democratic society.""*

HIS LORDSHIP JUSTICE PAUL OUTER DERRY & 2 ORS V. THE

PARAGRAPH 74.

68. The import of above is twofold,

1) While interference with a guaranteed right if done in accordance with the law is lawful, it may nevertheless be arbitrary. A caution in this regards is that arbitrariness is not be seen as synonymous with *against the law* but as held by the African Commission, the otherwise legal law *must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.* ARTICLE 19 Vs ERITREA COMMUNICATION 275/03.

2) Following from (1) above, the broad criteria for interpreting the said law that interferes with a guaranteed right is that it must be necessary in a democratic society. This necessity must be for any of the following purposes: public safety, economic well-being of the country, protection of health and morality and the prevention of disorder or crime. Any pressing need to interfere with a given right must be in relation to any of the above.

69. We will now subject Article 605 to these safeguards to determine if it meets the criteria of necessity in a democratic society. The said law seeks to suspend the application of Article 166 (1-3) which limits the maximum detention period without trial to 18 months whilst an appeal is in process. The Court takes judicial notice of the slow criminal justice delivery system in the ECOWAS region noting that an appeal period is indeterminable and can go on for years on end. In this regard, can a detention based on such fluidity of

time be considered to be *"solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society"*? In other words, does this detention support a pressing need to safeguard the *public safety, economic well-being of the country, protection of health and morality and the prevention of disorder or crime?* The answer is clearly in the negative. Flowing from above, what then is the import of the continuous detention of the Applicant after a judicial order of his release has been made? What justification has been canvassed by the Respondent in support of this action?

70. The legitimate aims in a democratic society listed above are; *public safety, economic well-being of the country, protection of health and morality and the prevention of disorder or crime.* The most relevant in the instant case will be the *prevention of disorder or crime.* A continuous detention of a suspect as a pressing need to prevent disorder or crime must be based on the criteria of necessity and proportionality, which includes the following considerations 1) whether the suspect will abscond and evade justice if released on bail pending trial; 2) the possibility of the suspect committing another offence and 3) the possibility of the suspect obstructing the investigations of the prosecuting authority. All of these must however be determined by a competent court or tribunal.

71. The Court is of the opinion that the Court of Appeal of the Respondent would have considered these possibilities and is also clearly aware of the provision of Article 605 of the Criminal Procedure Code, but chose to order the release of the Applicant based on Article 166 (1-3) of the same law. The Respondent

therefore cannot submit itself to the jurisdiction of the Court and still decide on its own motion to disregard the order of the Court by arrogating to itself the powers of interpretation and application of the law, a responsibility that is clearly reposed in the Courts.

72. Besides, Guideline 16 OF THE *GUIDELINES ON REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS LIBERTY* provides that: "*When a judicial order of release becomes operative, it must be complied with immediately, as continued detention would be considered arbitrary.*" This guideline gives the judiciary the oversight responsibility to make decisions concerning the detention and release of suspected offenders. This responsibility is not one that is given to or expected to be shared by the executive, which in this case is the Office of the Prosecutor.

73. In conclusion, the Court recapitulates the analysis in the preceding paragraphs and finds that;

a) Article 605 of the CCP suspends the timeline for detention provided in Article 166 and thus enables an indeterminable period of detention which does not find any seat within the tenets of the international norms for protection of the right to liberty of an individual as such is arbitrary.

b) Article 605 conflicts with Article 166 that provides for immediate release of the accused after the expiry of the timeline for detention.

c) Article 605 upon which an order of release by the court was disobeyed is not in accordance with guideline 16 of the UN Basic Guidelines that provides for an immediate compliance with a judicial order of release as continued detention would be considered arbitrary.

d) Furthermore, Article 605 has not been established to *be necessary in a democratic society to meet the pressing need of prevention of disorder and crime.*

74. In that wise, the Court finds that though the detention is lawful same being permitted by Article 605, it is nevertheless arbitrary for all the reasons herein adduced. The Court therefore holds that the continuous detention of the Applicant by the Respondent after an order of release by the Court of Appeal is arbitrary and a violation of his right to liberty and security of his person.

75. The Court also finds that Article 605 of the CCP is not in compliance with the tenets of international treaties on the right of liberty and security of persons as same has the potential to be used as a tool for inordinate detention of accused persons. This is more so that such persons are awaiting trial. In line with its jurisprudence and the precedent laid thereof, Article 605 ought to be reviewed to include decisions of a court on detention in the exceptions provided in the law. See FEDERATION OF AFRICAN JOURNALISTS & 4 ORS V. REPUBLIC OF THE GAMBIA ECW/CCJ/JUD/04/18 and THE INCORPORATED TRUSTEES OF LAWS AND RIGHTS AWARENESS INITIATIVE v. THE FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/16/20.

76. The Court therefore holds that Article 605 be repealed from the statutes of the Respondent.

Alleged violation of the presumption of innocence

77. The Applicant submits that the fact that he is being held in pre-trial detention beyond the legal limit and on the basis of a law that is incompatible with international human rights treaties, is a ploy to have him punished without a trial. This is a violation of his right to presumption of innocence.

78. The Respondent on the other hand, argues that the Applicant's detention is in accordance with procedures laid down by the law, specifically, Article 605 of the Criminal Procedure Code of the Respondent and is therefore justified under international human rights law. Thus, it urges the Court to disregard the Applicant's claims.

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Analysis of the Court

79. One of the fundamental principles of the right to a fair hearing is the right to be presumed innocent until proven guilty. Article 7 (1) (b) of the African Charter which relates to this right provides thus, "*Every individual shall have the right to have his cause heard. This comprises: ... b) The right to be presumed innocent until proven guilty by a competent court or tribunal.*"

80. In a criminal matter, in so far as a competent court has not pronounced on the guilt of a suspect, a presumption of innocence is attributed to that

individual. The public prosecutor has the burden of proving guilt of the accused in order for the accused to be convicted of the crime he is charged with. The prosecution must in most cases prove that the accused is guilty beyond a reasonable doubt. This principle is so sacred to the right of the accused that if reasonable doubt remains, the accused must be acquitted.

81. In recognition of this principle the Court held as follows:

> "*The right to the presumption of innocence results from the principle of criminal law that any person who is prosecuted or even simply suspected of having committed an offense is considered innocent as long as he has not been declared regularly guilty by a competent court. It is a fundamental right recognized and guaranteed by all the international legal instruments cited by the applicants, namely the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights*" See MR. KHALIFA ABABACAR SALL & 5 ORS V. REPUBLIC OF SENEGAL ECW/CCJ/JUD/17/18 @ PAGE 31-32.

82. Furthermore, in determining whether the presumption of innocence is applicable in a specific case, the conduct of public officials and the application of the criminal procedure of the State is of utmost importance. In elucidating same Court recalls its earlier holding thus:

> "... *A state can only be accused of violating the right of presumption of innocence if it is established that its officials, through their own acts of commission or omission, made an*

individual to appear as guilty of the crimes that he is accused, even before a courts judgment". ELLEN K CORKRUM v. THE REPUBLIC OF LIBERIA JUDGMENT NO ECW/CCJ/JUD/19/19 @ PAGE 20.

83. The Court recognizes that the Respondent has not provided any legitimate reason to justify the continuous detention of the Applicant for over eighteen months even after a lawful order of release by a Court of law. Therefore the conduct of the Prosecuting Authority is indicative of a presumption of guilt of the Applicant without a Court having found him guilty of the alleged crime.

84. In light of this analysis, the Court holds that the Respondent violated the Applicant's right to be presumed innocent until proven guilty by a competent court or tribunal contrary to of the Article 7 (1) (b) African Charter.

XI. REPARATIONS

85. The Applicant in his submission for reparations states that he is a business manager and financial analyst who undertook various profitable business activities before his arrest and detention. His businesses have been adversely affected because of his continued detention. He claims that his detention has caused him enormous loss including moral damages, for which reparations should be awarded to him. He therefore seeks an order of the Court for the Respondent to pay him the sum of one billion (1,000,000,000) FCFA, as compensation for the violation of his rights and the damages suffered by him.

86. The Respondent on its part states that the claims of the Applicant in seeking damages of one billion CFA Francs is unjustified and should be struck out.

Analysis of the Court

87. Reparations for a wrongful act is an important principle of international law, which requires a State which has been found liable for a human rights violation, to restore the victim to the status he would have been had his rights not been violated. This is done by giving effective remedies, including compensation and restitution to the victim. The Court recalls its earlier decision when it held that,

> *"A State must make full reparation for any injury caused by an illegal act for which it is internationally responsible. Reparation consists of full restitution of the original situation if possible or compensation where that is not possible or satisfactory that is, acknowledgement of or an apology for the breach, may contribute immensely to resolving wounds from the violation.* MOUKHTAR IBRAHIM V. GOVERNMENT OF JIGAWA STATE & 2 ORS ECW/CCJ/JUD/12/14, PAGE 40. See also HAMMA HIYA & ANOR V REPUBLIC OF MALI JUDGMENT NO. ECW/CCJ/JUD/05/21 PARAGRAPH 64.

88. Furthermore, concerning arbitrary detention, the Basic Principles on the Right to Liberty provides that,

"Anyone arbitrarily or unlawfully detained is guaranteed access to effective remedies and reparations, capable of providing restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparations should be adequate, effective and prompt".

89. The Applicant as a financial analyst and a company director claimed the sum of one billion (1,000,000,000) FCFA for damages suffered though without any documentary evidence to support same. It is not in doubt that the Applicant would have suffered psychological harm arising from the arbitrary detention for a period beyond the prescribed limit without been found guilty by a competent court

90. In the instant case, the Court having found the Respondent liable for international wrongs - the violation of the Applicant's right to liberty and the right to be presumed innocent before a competent court or tribunal is under an obligation to make reparations to the Applicant for the moral harm he has suffered. This was captured by the Court when it held that: "*The Court having determined that the arrest and detention of the Plaintiff were unlawful hereby awards the plaintiff damages for all the pain and suffering, humiliation, embarrassment and inconvenience he suffered because of his arrest and detention.*" MR. GODSWILL TOMMY UDOH V FEDERAL REPUBLIC OF NIGERIA JUDGMENT NO. ECW/CCJ/JUD/26/16 PAGE 22.

91. While moral damages cannot be quantified, reparations for same will be on a case by case basis. In view of the fact that the Applicant did not give details of the damages he claims and having not provided evidence of his profession

and earnings, The Court awards the applicant the sum of 14,000,000 FCFA as moral damages for the arbitrary deprivation of his liberty.

XI. COSTS

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

93. The Court notes that none of the Parties made submissions regarding costs of the proceedings. In light of the provision of Article 66 (11) of the Rules, which provides, *"if costs are not claimed, the parties shall bear their own costs..."* the Court orders both Parties to bear their own costs.

XII. OPERATIVE CLAUSE

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

As to jurisdiction:

i. **Declares** that it has jurisdiction.

As to admissibility:

ii. **Declares** the application admissible.

As to merits:

iii. **Declares** that the Respondent violated the Applicant's right to liberty contrary to Article 6 of the African Charter;

iv. **Declares** that the Respondent violated the Applicant's right to be presumed innocent by the Respondent contrary to Article 7 (1) (b) of the African Charter.

As to reparation:

Orders

v. The Respondent to take measures to immediately release the Applicant from detention;

vi. The Respondent to repeal Article 605 of the Criminal Code Procedure from its statutes.

vii. The Respondent to pay the Applicant the sum of fourteen million (14,000,000) FCFA as compensation for moral prejudice caused to him.

As to compliance and reporting

viii. **Orders** the Respondent State to submit to the Court within one (1) month of the date of the notification of this judgment, a report on the measures taken to implement the orders set-forth herein.

Hon. Justice Gberi-Be OUATTARA .....

Hon. Justice Dupe ATOKI – Judge Rapporteur .....

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

Mr. Tony ANENE- MAIDOH - Chief Registrar .....

Done in Abuja, this 26th Day of April 2021 in English and translated into French and Portuguese.