

Koutche v Benin (provisional measures) (2020) 4 AfCLR 38

Application 013/2020, *Komi Koutche v Republic of Benin*

Ruling (provisional measures), 2 April 2020. Done in English and French, the French text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicant brought an action challenging the independence of the Constitutional Court of the Respondent State and claimed that a decision of the Constitutional Council affecting him was in violation of his Charter protected rights. The Applicant also requested provisional measures to stay a decision referring him to face a criminal trial. The Court dismissed the request for provisional measures.

Jurisdiction (*prima facie*, 11)

Provisional measures (urgency and gravity, 31-32; request based on facts in dismissed application, 36-37)

I. The Parties

1. Komi Koutche (hereinafter, “the Applicant”), an economist and Benin national, residing at 120 Paramount Park Drive, MD 20979, United States of America.
2. The Republic of Benin (hereinafter, “Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter, the Charter) on 21 October 1986 and to the Protocol to the Charter on the Establishment of an African Human Rights Court (hereinafter, the Protocol) on 22 August 2014. The Respondent State also deposited, on 8 February 2016, the Declaration provided for in Article 34 (6) of the said Protocol by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organizations.

II. Subject of the Application

3. It emerges from the Application that by Decision DCC 18 - 256 rendered on 6 December 2018, the Constitutional Council of Benin dismissed the Applicant’s appeal seeking a declaration that Point 2.7.1 of Cabinet Report No.27/2017/PR/SGG/CM/OJ/ORD dated 2 August 2017, titled “Corporate Audit, Accounting and Finance Mission of the National Microfinance Fund (MNF) for

the 2013 to 2016 financial years “ is unconstitutional insofar as it violated his right to defense.

4. The Applicant submits that this decision is at the root of all the grievances and prejudices he is suffering insofar as all the acts committed against him (international arrest warrant, extradition request, cancellation of his passport, refusal to issue a tax receipt as well as criminal proceedings initiated against him) are based on this audit.
5. In the instant Application on the merits, the Applicant alleges violation of Articles 7 and 26 of the Charter. He also requests the Court to find and rule that the Constitutional Court of Benin is neither independent nor impartial, as well as to annul Decision DCC 18 - 256 of 6 December 2018 rendered by the Constitutional Court and all procedures initiated against him on the basis of the said audit report, more precisely the procedure before *Cour de Repression des Infractions Economique et du Terrorisme* (anti-terrorism and economic offenses court) (CRIET).
6. In his Application for provisional measures, he seeks, pending the examination of the application on the merits, a stay of execution of the 25 September 2019 decision of the Investigating Committee of CRIET, which referred him to the Criminal Chamber of the said Court.

III. Summary of the Procedure before the Court

7. The Application together with the request for provisional measures were filed with the Registry on 25 March 2020.
8. The Application was served on the Respondent State on 27 March 2020, with a request to submit its response as regards the provisional measures procedure, within five (5) days of receipt of the said notice.
9. The deadline for the Respondent State to submit its response has passed.

IV. Jurisdiction

10. The Applicant contends, based on Article 27(2) of the Protocol and Article 51 of the Rules of Procedure, that the Court has *ratione materiae* jurisdiction over his Application insofar as, on the one hand, the Respondent State is a party to the Charter and the Protocol and has deposited the Declaration provided for in Article 34(6) of the said Protocol accepting the jurisdiction and, on the other hand, he alleges violation of rights protected by the Charter.

11. When it receives an application, the Court conducts a preliminary examination of its jurisdiction based on Articles 3, 5(3) and 34(6) of the Protocol. The Court need not be satisfied that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.
12. Article 3(1) of the Protocol provides that “*The Court shall have jurisdiction in all cases and disputes submitted to it concerning the interpretation or application of the Charter, the Protocol or any other relevant human rights instrument ratified by the States concerned*”.
13. The Respondent State is a party to the Charter and the Protocol. It has also deposited the Declaration provided for in Article 34 (6) of the said Protocol by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organizations.
14. The Applicant further alleges in his Application the violation of rights protected by the Charter.
15. The Court concludes that it has *prima facie* jurisdiction to hear the Application for provisional measures.

V. Provisional measures requested

16. The Applicant seeks a stay of execution of the 25 September 2019 judgment of the Investigating Committee of the Court for the Repression of Economic Crimes and Terrorism (CRIET), which referred him to the Criminal Division of said Court, pending consideration of the merits of the Application.
17. In support of his request, he submits that there is extreme gravity resulting from the fact that the procedure before CRIET flouted the basic principles of law (absence of fair trial, of double degree of jurisdiction, disregard for the principle of equal protection of the law and of the presumption of innocence).
18. He contends that the appointment of the members of CRIET constitutes a violation of the right to an independent and impartial tribunal insofar as they were appointed directly by the executive at the Cabinet meeting of 25 July 2018.
19. He opines that the fact that this appointment had the prior approval of the Superior Council of the Judiciary renders CRIET inoperative insofar ten out of its fifteen members are directly attached to the executive, in accordance with Law of 2 July 2018 amending Articles 1 and 2 of Law 94 - 17 of 18 March 1999 relating to the said Council.
20. He further notes that the executive branch appointed the judges of the Chamber of Liberties and Detention, which is clearly illegal

since under Article 13 of the Law of 2 July 2018 establishing CRIET, only the president of the said court is vested with this power.

21. Secondly, he notes that the Respondent State has not guaranteed the independence of its judiciary, in particular that of CRIET, for reasons already stated.
22. Thirdly, he points out that in the instant case, there is a violation of the right to an effective remedy in criminal matters, the effect of which is the obligation to establish a double level of jurisdiction.
23. He notes that he was unable to appeal against the decision of CRIET's Investigating Committee, since only the cassation appeal was open to him, which makes it impossible to re-examine the facts, since the Supreme Court is only a judge of the law and cannot deal with the question of guilt, which is a matter of assessing the facts.
24. He further contends that the fact that the remand order of 25 September 2019, was not notified to him definitively prevented him from filing an effective appeal and that it was only on 23 March 2020 that the said notification was posted at the town hall, at the same time as a summons to appear on 3 April 2020.
25. Fourthly, he maintains that the Director of Communication of the President of the Republic accuses him, in the media, of stealing various sums of money whereas he has not been convicted of any offence.
26. Fifth, he submits that the FNM report covered a period during which he was no longer its Director General but rather Minister of Information and Communication and could not, in this capacity, be judged by CRIET, as the High Court of Justice is the only court with jurisdiction to do so.
27. As regards irreparable harm, the Applicant submits that it will be difficult for him, in the event of conviction, to have the proceedings annulled and to have a retrial in all fairness, especially as the conviction will serve as the basis for a new arrest warrant.
28. He contends that there is a risk of irreparable harm if the status quo is maintained until the decision on the merits is made, since the Criminal Division of CRIET intends to rule on his case on 3 April 2020.

29. The Court notes that Article 27(2) of the Protocol provides as follows: “In cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.”
30. Article 51(1) of the Rules provides: “The Court may, during the course of the proceedings and at any other time the Court deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation. The Court shall formally take note of any failure to comply”.
31. In view of the foregoing, the Court takes into account the laws applicable to provisional measures, which are preventive in nature and in no way prejudice the merits of the Application. It can only order provisional measures *pendente lite* if the basic requirements are met, namely, extreme gravity or urgency and the prevention of irreparable harm to persons.
32. The Court observes that urgency, which is consubstantial with extreme gravity, means that there is an “irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision”¹. There is therefore urgency whenever “ acts likely to cause irreparable harm may occur at any time before the Court makes a final decision in the case”².
33. The Court notes that on 23 April 2019, in Application 020/2019, (*Komi Koutche v Republic of Benin*), the same Applicant filed a request for provisional measures with the Court, asking it, inter alia, to order the respondent State to “suspend the pending proceedings before the *Cour de Repression des Infractions Economique et du Terrorisme* (CRIET)”³.
34. By a Ruling of 2 December 2019, the Court dismissed this request, considering that it “relates to the merits of the case”⁴.
35. The Court emphasizes that it is not in dispute that the judgment of 25 September 2019, for which the Applicant seeks a stay of execution, is an integral part of the procedure before CRIET, the

1 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gambia v Myanmar*), para 65, International Court of Justice, 23 January 2020; Alleged Violations of the 1955 Treaty of Amity, Commerce and Consular Rights (*Islamic Republic of Iran v United States of America*), 3 October 2018; Immunities and Criminal Proceedings (*Equatorial Guinea v France*), 7 December 2016, para 78, International Court of Justice.

2 Infra, Note 2.

3 Ruling of 2 Decembre 2020 (Application No.020/2019, *Komi Koutche v Republic of Benin*), paragraphe 20 – ii;

4 See Note 3, paragraph 25.

suspension of which he had already requested.

36. The Court notes that that the Applicant is clearly seeking again a measure that had already been dismissed by the Ruling of 2 December 2019.
37. The Court considers that between 2 December 2019 and 25 March 2020, i.e., the date of filing of the request for provisional measures that is the subject of the instant procedure, no circumstances have occurred that are of such a nature to warrant a decision different from that of 2 December 2019.
38. Accordingly, the Court dismisses the Applicant's request for provisional measures.
39. For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudice the findings of the Court on its jurisdiction, the admissibility of the Application and the merits thereof.

VI. Operative part

40. For these reasons,
The Court,
Unanimously,

- i.* Dismisses the request for provisional measures.