

Dibgolongo v Burkina Faso (ruling) (2022) 6 AfCLR 454

Application 013/2019, *Ulrich Sergio Dibgolongo v Burkina Faso*

Ruling, 22 September 2022. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a citizen of the Respondent State, was tried, convicted, and sentenced to prison for banditry, illegal possession of firearms and theft. The Applicant brought this Application alleging that the proceedings before the domestic courts of the Respondent State violated his human rights. Upholding the objections of the Respondent State, the Court held that the Applicant had not exhausted available local remedies. The Court accordingly declared the Application inadmissible.

Jurisdiction (material jurisdiction, 21-23)

Admissibility (exhaustion of local remedies, 35-44)

I. The Parties

1. Ulrich Sergio Dibgolongo (hereinafter, “the Applicant”), is a national of Burkina Faso was sentenced to fifteen (15) years’ imprisonment for acts of banditry, illegal possession of firearms and theft. He alleges a violation of his rights to a fair trial during the proceedings before domestic courts.
2. The Application is filed against Burkina Faso (hereinafter, “the 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 Court on Human and Peoples’ Rights (hereinafter, “the Protocol”) on 25 January 2004. On 28 July 1998, the Respondent State deposited the declaration provided for in Article 34(6) of the Protocol (hereinafter “the Declaration”), by which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organisations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that the Applicant was arrested in connection with an armed robbery incident that occurred on the night of 7 to 8 December 2014, which resulted in the death of one of the suspects in the armed robbery.
4. Following preliminary investigations, the Applicant was arraigned before the Correctional Chamber of the *Tribunal de Grande Instance* of Ouagadougou by the Prosecutor of Faso. At the hearing, he admitted having participated in the commission of the offence of theft.
5. By judgment No 120-1 of 2 March 2015, he was found guilty of the offences of banditry, illegal possession of firearms and theft and sentenced to fifteen (15) years of imprisonment including ten (10) years without parole.
6. The Applicant avers that on 5 March 2015 he appealed to the Correctional Chamber of the Ouagadougou Court of Appeal, which, by Judgment No 49 of 22 April 2016, upheld the judgment handed down by the Correctional Chamber of the Ouagadougou High Court.

B. Alleged violations

7. The Applicant alleges:
 - i. A violation of the right to a fair trial, protected by Article 7 of the Charter;
 - ii. A violation of the right to an effective remedy guaranteed by Article 8 of the Universal Declaration of Human Rights (UDHR);
 - iii. A violation of the right of access to the judge and to justice protected by Article 10 of the UDHR and Article 7 of the Charter;
 - iv. A violation of the obligation to state reasons in criminal proceedings as provided for in Article 6 *in fine* of Law No 010/93/ADP pertaining to the organisation of the judiciary in Burkina Faso;
 - v. A violation of the right to protection of the dignity of a person imprisoned as provided for in Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR);
 - vi. A violation of the right to equality of arms, protected by Article 7 of the Charter;
 - vii. A violation of the adversarial principle, protected by Article 7 of the Charter;
 - viii. A violation of the principle of proportionality of punishment.

III. Summary of the Procedure before the Court

8. The Application was received at the Registry on 23 April 2019 and served on the Respondent State.
9. The Parties filed their submissions within the time limits prescribed by the Court.
10. Pleadings were closed on 30 June 2022 and the Parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to:
 - i. Order the President of the Republic to grant him a presidential pardon;
 - ii. Order the due and proper commutation of the fifteen (15)-year-prison sentence to a shorter prison term;
 - iii. Order parole;
 - iv. Order an out-of-court settlement;
 - v. Order financial compensation for the damage suffered as a result of the unfair court decisions against him.
12. The Respondent State prays the Court to:
 - i. Declare that it has partial jurisdiction to order the measures requested by the Applicant;
 - ii. Declare the Application inadmissible for failure to exhaust local remedies;
 - iii. Dismiss the Application as unfounded.

V. Jurisdiction

13. The Court notes that Article 3(1) of the Protocol provides as follows:
 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
14. Under Rule 49(1) of the Rules of Court, “The Court shall conduct preliminary examination of its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules “.
15. On the basis of the above-mentioned provisions, the Court must, in each application, conduct an assessment of its jurisdiction and

rule on objections thereto, if any.

16. The Court notes that the Respondent State raises an objection to the Court's material jurisdiction. The Court will, therefore, (a) first rule on this objection, before examining (b) the other aspects of its jurisdiction, if necessary.

A. Objection to material jurisdiction

17. In support of its objection, the Respondent State alleges that the Court lacks jurisdiction to grant the following measures: (i) a presidential pardon; (ii) the proper commutation of the fifteen (15) year prison sentence to a shorter term of imprisonment; and (iii) parole.
18. The Respondent State asserts that these measures fall within the discretionary prerogative powers of the President of the Republic and a function of the sovereignty of domestic courts.
19. The Applicant did not make any submission in relation to the Court's material jurisdiction.

20. The Court notes that under Article 3(1) of the Protocol, it has jurisdiction to hear "all cases brought before it insofar as they relate to alleged violations of the Charter, the Protocol and any other human rights instrument ratified by the Respondent State".
21. The Court considers that for it to have material jurisdiction, it is sufficient that the rights allegedly violated are protected by the Charter or by any other human rights instrument ratified by the State concerned.¹
22. The Court notes that the instant Application relates to allegations of violations of the rights protected by Articles 7 of the Charter, 8 and 10 of the UDHR, and 10(1) of the ICCPR.²
23. Based on the foregoing, the Court dismisses the objection to its material jurisdiction and finds that it has material jurisdiction to hear the instant Application.

1 *Franck David Omary and Others v United Republic of Tanzania* (28 March 2014) (Admissibility) 1 AfCLR 358, § 74; *Peter Joseph Chacha v United Republic of Tanzania* (28 March 2014) (Admissibility) 1 AfCLR 398, § 118.

2 The Respondent State ratified the Covenant on 4 January 1999.

B. Other aspects of jurisdiction

- 24.** Noting that there is nothing on record indicating that there is a contest in respect of the other aspect of its jurisdiction, the Court finds that it has:
 - i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration.
 - ii. Temporal jurisdiction, insofar as the alleged violations were committed, in relation to the Respondent State, after the entry into force of the instruments in question.
 - iii. Territorial jurisdiction, insofar as the facts of the matter and the alleged violations took place in the territory of the Respondent State.
- 25.** Based on the foregoing, the Court finds that it has jurisdiction to consider the present Application.

VI. Admissibility

- 26.** Article 6(2) of the Protocol provides that: “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 27.** In accordance with Rule 50(1) of the Rules of Court, “ The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules “.
- 28.** Rule 50(2) of the Rules of Procedure, which in substance restates Article 56 of the Charter, provides:

Applications filed before the Court shall comply with all of the following conditions:

 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the

provisions of the Charter.

29. The Court notes that the Respondent State raises an objection based on non-exhaustion of local remedies. The Court will therefore rule on (a) this objection, before examining (b) the other aspects of admissibility, if necessary.

A. Objection based on non-exhaustion of local remedies

30. The Respondent State submits that the Application does not meet the requirement of exhaustion of local remedies, since the Applicant did not file a cassation appeal against the above-mentioned judgment of the Criminal Division of the Court of Appeal of Ouagadougou. According to the Respondent State, since the Applicant was assisted by counsel before the Correctional Chamber of the Court of Appeal, he cannot invoke the lack of respect for the right to appeal before the Cassation Court. The Respondent State further refutes the argument that the appeal in cassation is ineffective, a claim that the Applicant has not proved.
31. The Respondent State further contends that the Applicant did not exercise the remedy before the Constitutional Council which, since the promulgation of the constitutional law of 5 November 2015, can be seized by any citizen directly or through an exceptional mechanism based on unconstitutionality. The Respondent State submits that the said court has jurisdiction to hear allegations of violations of human rights as guaranteed by the Constitution and international legal instruments ratified by Burkina Faso.
32. Finally, the Respondent State submits that, before bringing his case before this Court, the Applicant did not address to the Burkinabe authorities either a request for conditional release or a request for a presidential pardon.

33. The Applicant, for his part, maintains that he was not aware of the remedy mentioned by the Respondent State, as he was not assisted by a lawyer “*in limine litis*”. He further avers that even if he had exercised it, the said remedy would have been unsuccessful in the current legal and judicial dispensation of the Respondent State.

34. The Court recalls that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be made after the exhaustion of local remedies, if any, unless it is clear that the proceedings in respect of those remedies are being unduly prolonged.³
35. The Court underlines that the local remedies to be exhausted are those of a judicial nature.⁴ The remedy must be available, that is, they must be available to the applicant without hindrance, be effective and satisfactory in the sense that they are “found satisfactory by the complainant or is capable of redressing the complaint”.⁵
36. The Court notes that in the present case the Applicant did not file a cassation appeal. To justify this inaction, the Applicant advances two (2) arguments, namely ignorance of the cassation appeal remedy and the ineffectiveness of the said remedy.
37. With regard to ignorance for the cassation appeal remedy, the records show that the Applicant was assisted by counsel before the Criminal Division of the Court of Appeal. Article 251-13 of the Code of Criminal Procedure of Burkina Faso defines assistance as “the lawyer’s mission entailing the power and duty to advise the person arrested and to prepare his defence”.
38. The Court recalls the general principle of law that “ignorance of the law is not an excuse”. In any event, the Applicant cannot rightly rely on ignorance of the existence of such a remedy.
39. It emerges from the foregoing that the Applicant was given the necessary assistance which clearly enabled him to be apprised of the functioning of the national judicial system, including his right to lodge a cassation appeal. The argument that he did not have access to that remedy cannot therefore succeed in the present case.
40. With regard to the argument that a cassation appeal is ineffective, the Court recalls that the effectiveness of a remedy must be

3 *Lohé Issa Konaté v Republic of Faso* (merits) (5 December 2014) 1 AfCLR 314, § 77.

4 *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 31.

5 *Norbert Zongo and Others v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 219, § 68; See also *Konaté v Burkina Faso* (merits), § 108.

understood as its ability to remedy the situation complained of.⁶

41. In this respect, the Court recalls, with reference to its constant jurisprudence, that the cassation appeal is not an ineffective remedy since it is likely, in certain cases, to change the substance of the contested decision; and that without having exercised this remedy, one could not prejudge the outcome of the related proceedings.⁷
42. The Court observes that in the Burkina Faso judicial system, a cassation appeal is a remedy which seeks to have a final judgment or ruling set aside on the grounds of a breach of the law.⁸ Consequently, it is a remedy that can bring about a change in the Applicant's situation, on the merits of the case, if it finds violations of the law in relation to the way in which the case was handled by the court whose judgment is being challenged. As the Applicant did not exercise this remedy in the present case, he did not comply with the requirement of exhaustion of local remedies.
43. The Court therefore upholds the Respondent State's objection based on the Applicant's failure to exercise the cassation appeal remedy.
44. Having concluded that the remedy before the Court of Cassation was not exhausted, and without the need to examine the Respondent State's objection in relation to the remedy before the Constitutional Council, this Court finds that in the present case local remedies were not exhausted as required by Rule 50(2)(e) of the Rules.

B. Other conditions of admissibility

45. Having found that the Application does not meet the condition of Rule 50(2)(e) of the Rules, the Court does not have to rule on the admissibility conditions set out in Article 56(1), (2), (4), (6), and (7) of the Charter as restated in Rule 50(2)(a)(b)(d)(f) and (g) of

6 *Norbert Zongo and Others v Burkina Faso* (Preliminary Objections) (28 March 2014), 1 AfCLR 197, § 68.

7 *Moussa Kanté and Others v Republic of Mali*, ACtHPR, Application No 006/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 30-36; *Komi Koutché v Republic of Benin*, ACtHPR, Application No 020/2019, Judgment of 25 June 2021 (jurisdiction and admissibility), §§ 91-94; *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No 027/2020, Judgment of 2 December 2021 (jurisdiction and admissibility), §§ 72-83; *Norbert Zongo et al v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 70.

8 Article 421 of the 1968 Code of Criminal Procedure.

the Rules, insofar as the admissibility conditions are cumulative.⁹ Therefore, if one condition is not met, the entire Application is inadmissible.

46. Accordingly, the Court declares the Application inadmissible and dismisses it.

VII. Costs

47. None of the Parties made any submissions on costs.

48. Rule 32(2) of the Rules¹⁰ provides that “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any “.

49. Having regard to the above provision, the Court decides that each Party shall bear its own costs.

VIII. Operative part

50. For these reasons,

The Court

Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Upholds* the objection based on non-exhaustion of local remedies;
- iv. *Declares* the Application inadmissible.

On costs

- v. *Orders* that each Party shall bear its own costs.

9 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 237, § 63; *Rutabingwa Chrysanthé v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018), 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACTHPR, Application No 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

10 Rule 30(2) of the Rules of 2 June 2010.