

Koutché v Benin (ruling) (2022) 6 AfCLR 507

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

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, brought this Application alleging that his indictment by a cabinet report without having been heard, the dismissal of his constitutional challenge by the Constitutional Court of the Respondent State and his trial by a special tribunal were all in violation of some of his human rights. Upholding the objection by the Respondent State, the Court held that the Applicant had not exhausted local remedies before bringing the Application. Accordingly, the Court declared the Application inadmissible.

Jurisdiction (material jurisdiction, 23-27)

Admissibility (exhaustion of local remedies, 38-44)

I. The Parties

1. Komi Koutché (hereinafter, “the Applicant”), is a national of Benin, residing in the United States of America. He alleges a violation of his rights in connection with criminal proceedings before the Court of Repression of Economic Offences and Terrorism (CRIET) in Benin.
2. The Republic of Benin (hereinafter, “the Respondent State”) 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 accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (hereinafter, “the Declaration”). On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed before the entry into force of the withdrawal, that is, one year after its deposit, which is on

26 March 2021.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that at the Cabinet Meetings of 28 June and 2 August 2017, two audit reports, one on the management of the cotton sector and the other, on the management of the National Microfinance Fund (FNM) were made public. The Applicant avers that his name was cited extensively in the said reports. On that occasion, the Attorney General was instructed to initiate proceedings against him.
4. The Applicant avers that he was surprised to learn of these facts in the media, whereas he was never approached by any auditing committee which, according to the applicable principles in the matter, must comply with the principle of adversarial proceedings. He states that he accordingly brought the matter before the Constitutional Court on 11 August 2017 to find a violation of the Constitution, in particular with regard to his rights.
5. He contends that by Decision DCC 18-256 rendered on 6 December 2018, the Constitutional Court of the Respondent State dismissed his request for a declaration that Cabinet Statement² of 2 August 2017 in its section³ entitled “*Organizational, accounting and financial audit mission of the National Microfinance Fund (MNF) for the financial years 2013 to 2016*”⁴ is unconstitutional for violation of his right to defence.
6. According to the Applicant, the decision of the Constitutional Court underpins all the grievances and prejudices that he suffered to the extent that all the acts taken against him, in particular, the issuance of the international arrest warrant, the extradition request, the withdrawal of his passport, the refusal to issue a tax

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

2 Cabinet Minutes No 27/2017/PR/SGG/CM/OJ/ORD.

3 Point 2.7.1.

4 The Constitutional Court had, in fact, held that “the fact that Cabinet instructed the Minister of Justice to initiate legal proceedings against the Applicant does not in itself constitute a decision that engages, either administratively or judicially, the responsibility of the person concerned; consequently, it cannot validly be argued, at this stage, that there has been a violation of the right to a defence; consequently, there ground to say that there is no violation of the Constitution”.

receipt as well as the criminal proceedings initiated against him were based on the audit.

B. Alleged violations

7. The Applicant alleges a violation of his right to have his cause heard, in particular,
 - i. The right to be presumed innocent, protected by Article 7(1)(b) of the Charter;
 - ii. The right to a defence, protected by Article 7(1)(c) of the Charter
 - iii. The right to be tried by an impartial tribunal, protected by Article 7(1)(d) of the Charter
8. The Applicant further alleges a violation of the obligation to guarantee the independence of the courts, in this case, the Constitutional Court of the Respondent State, as guaranteed by Article 26 of the Charter.

III. Summary of the Procedure before the Court

9. On 25 March 2020, the Application was filed together with a request for provisional measures. They were served on the Respondent State on 27 March 2020, for its observations on the request for provisional measures within five (5) days and its Response on the merits within sixty (60) days, all from the date of receipt of the notification.
10. The Respondent State did not file its response to the request for provisional measures. On 2 April 2020, the Court issued a ruling dismissing the requested provisional measures.⁵
11. The Respondent State filed its Response on the merits within the time prescribed by the Court. By a letter received at the Registry on 31 May 2021, the Applicant stated that he did not intend to file a Reply to the Respondent State's Response.
12. Pleadings were closed on 20 August 2022 and the Parties were duly notified.

5 The Applicant sought a stay of execution of the judgment of 25 September 2019 of the Investigating Committee of the Court of Repression of Economic Offenses and Terrorism (CRIET) which referred him to the Criminal Division of the said CRIET, pending consideration of the merits of the case.

IV. Prayers of the Parties

13. In the Application, the Applicant prays the Court to:
 - i. Find that the Respondent State violated Articles 7 and 26 of the Charter;
 - ii. Find that the Constitutional Court of the Respondent State is neither independent nor impartial;
 - iii. Find that the Respondent State violated Articles 6 and 7 of the Charter, Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR);
14. As regards reparations, the Applicant requests that the Court order:
 - i. The annulment of the Decision DCC 18-256 of 6 December 2018 as well as the entire procedure initiated against him based on the audit report, more precisely the one before the CRIET;
 - ii. That the sum of Two Billion Two Hundred and Ninety Million Two Hundred and Eleven Thousand Eight Hundred and Ninety-Eight (2,290,211,898) CFA francs, be paid to him as damages.
15. For its part, the Respondent State prays the Court to:
 - i. Find and declare that it lacks jurisdiction;
 - ii. Find and declare the Application is inadmissible;
 - iii. Find that the requests are unfounded and dismiss the action.

V. Jurisdiction

16. The Court notes that Article 3 of the Protocol reads 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.
17. Under Rule 49(1) of the Rules of Court⁶ “The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules”.
18. Based on the above-mentioned provisions, the Court must, in each application, ascertain its jurisdiction and rule on objections to its jurisdiction, if any.
19. The Court notes that the Respondent State raises an objection to its material jurisdiction. The Court will rule on the said objection before considering, if necessary, the other aspects of its jurisdiction.

6 Rule 39(1) of the Rules of Court, 2 June 2010.

A. Objection to material jurisdiction

20. The Respondent State contends that the Court lacks material jurisdiction insofar as it is not an appellate court. It submits in this connection that the Applicant is seeking review by this Court of the decisions rendered by the Constitutional Court of the Respondent State.
21. The Respondent State notes that in *Alex Thomas v United Republic of Tanzania*, *Ernest Francis Mtingwi v Republic of Malawi* and *Lohé Issa Konaté v Burkina Faso*, the Court held that it was not an appellate court in relation to domestic courts. It further submits that the Economic Court of West African States Court of Justice took the same position in *Jamal Olivier Kane v State of Mali*.
22. The Applicant did not file a reply to this objection.

23. The Court notes that pursuant to Article 3(1) of the Protocol, it has jurisdiction over “all cases and disputes submitted to it concerning the interpretation and application of the Charter, the [...] Protocol and any other relevant human rights instrument ratified by the States concerned”.
24. The Court underlines that its material jurisdiction is subject to the Applicant’s allegation of violations of human rights protected by the Charter or by any other human rights instrument ratified by the Respondent State.⁷
25. In the present case, the Court notes that the Applicant alleges a violation of the right to a fair trial, in particular, the right to the presumption of innocence, the right to defence and the right to be tried by an impartial court, protected by Article 7(1)(b)(c) and (d) of the Charter. He also alleges a violation of the obligation to guarantee the independence of the courts, guaranteed by the Charter, an instrument ratified by the Respondent State.
26. Furthermore, the Court notes, in line with its jurisprudence that it is not an appellate court in relation to the decisions rendered

⁷ Sébastien Germain Marie *Aïkoué Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, Judgment of 2 December 2021, § 37; *Laurent Métongnon et al v Republic of Benin*, ACTHPR, Application No 031/2018, Judgment of 24 March 2022, § 29.

by domestic courts. However, “that does not preclude it from assessing whether domestic proceedings were conducted in accordance with international standards set out in the Charter and other international human rights instruments ratified by the State concerned”.⁸

27. Based on the foregoing, the Court dismisses the Respondent State’s objection and declares that it has material jurisdiction to hear the instant Application.

B. Other aspects of jurisdiction

28. The Court notes that no objection has been raised to its personal, temporal and territorial jurisdiction.
29. Having established that nothing on the record indicates that it lacks jurisdiction, the Court concludes that it has:
 - i. Personal jurisdiction, in so far as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration. The Court recalls, as indicated in paragraph 2 of this Ruling, that on 25 March 2020 the Respondent State deposited the instrument of withdrawal of the Declaration. In this regard, the Court reiterates its position that the withdrawal of the Declaration has no retroactive effect and has no bearing on cases pending prior to the deposition of the instrument of withdrawal or on new cases brought before the Court before the withdrawal took effect. Given that such a withdrawal of the Declaration takes effect one year after the deposition of the instrument of withdrawal, in this case on 26 March 2021, it does not, therefore, have any impact on the present Application, filed on 25 March 2020.
 - ii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the above-mentioned instruments, in relation to the Respondent State.
 - iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.
30. Consequently, the Court finds that it has jurisdiction to hear the present Application.

8 *Laurent Métongnon et al v Republic of Benin*, ACTHPR, Application No 031/2018, Judgment of 24 March 2022, § 29.

VI. Admissibility

- 31.** Under Article 6(2) of the Protocol: “[T]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.
- 32.** In accordance with Rule 50(1) of the Rules⁹ “The Court shall proceed to an examination of admissibility (...) in accordance with Article 56 of the Charter and Article 6(2) of the Protocol and the (...) Rules of Court”.
- 33.** Rule 50(2) of the Rules, which restates the provisions of Article 56 of the Charter, reads as follows
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.
- 34.** The Court notes that the Respondent State has raised two objections to admissibility, one based on the non-exhaustion of local remedies and the second, on the fact that the Application was not filed within a reasonable time.

A. Objection based on non-exhaustion of local remedies

- 35.** The Respondent State submits that the Applicant did not exhaust local remedies. It notes in this regard that the Applicant should have raised, “in substance”, the complaints he raises before this Court before domestic courts.

9 Rule 39 of the Rules of Court, 2 June 2010.

36. The Respondent State contends, that in relation to the alleged violation of the right to defence, the Constitutional Court stated that the review of the alleged failure to comply with the adversarial principle in the preparation of the report is the responsibility of the competent authority.
37. The Applicant did not file a reply to this objection.

38. The Court notes that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be filed after the exhaustion of local remedies, if any, unless it is clear that the proceedings in respect of such remedies are being unduly prolonged.
39. The Court notes that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be accessible to the applicant without hindrance, effective and satisfactory in the sense that they are found adequate by the complainant or are capable of redressing the complaint.¹⁰
40. The Court also observes that the exhaustion of local remedies implies not only that the Applicant initiates local remedies, but also that he awaits the outcome thereof.¹¹ In the same vein, the Court notes that in order to determine whether the requirement of exhaustion of local remedies has been met, it is necessary that the domestic proceedings to which the Applicant was a party should have been completed at the time the Application was filed with the Court.¹²
41. The Court also emphasises that the requirement to exhaust local remedies is assessed, in principle, as at the date on which the

10 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Iboulo and Mouvement burkinabè des droits de l'homme et des peuples v Burkina Faso*, Judgment (merits) (5 December 2014), 1 AfCLR 219, § 68; *Ibid. Konaté v Burkina Faso* (merits), § 108; *Sébastien Germain Marie Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 73.

11 *Sébastien Germain Marie Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 74; *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 010/2018, Judgment of 25 September 2020, § 41.

12 *Komi Koutché v Republic of Benin*, ACTHPR, Application No 020/2019, Judgment of 25 June 2021, § 61; *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACTHPR, Application No 027/2020, § 74.

proceedings are instituted before it.¹³

42. The Court notes that on 23 April 2019, the Applicant filed an Application before it against the Respondent State. The said Application, which was based on the same facts¹⁴ and same alleged violations¹⁵ as those in the present Application, gave rise to the ruling of 25 June 2021 which declared the Application inadmissible for non-exhaustion of local remedies.
43. The Court considers that there are no circumstances in the present case that could lead to a different decision, in relation to the same facts and the same alleged violations, especially as the Applicant does not demonstrate, once again, that he exhausted local remedies in respect of the present Application.
44. Accordingly, the Court upholds the Respondent State's objection and holds that the Applicant did not exhaust local remedies.

B. Objection based on the failure to file the Application within a reasonable time.

45. Having found that the present Application does not satisfy the requirement of Article 56(5) of the Charter and Rule 50(2)(f) of the Rules of Court, and having regard to the cumulative nature of the admissibility requirements,¹⁶ the Court considers it superfluous to rule on the objection to admissibility based on the fact that the Application was not filed within a reasonable time, as well as on the other admissibility requirements in relation to the Application.

13 *Yacouba Traoré v Republic of Mali*, ACTHPR, Application No 010/2018, Judgment of 25 September 2020, § 41.

14 The facts arise from two audit reports on the management of the cotton sector and the National Microfinance Fund (FNM), on the basis of which criminal proceedings were instituted against the Applicant. The latter appealed to the Constitutional Court for violation of the adversarial principle and violation of the right to defence, see in this regard *Komi Koutché v Republic of Benin*, ACTHPR, Application 020/2019, Judgment of 25 June 2021, § 4-12.

15 The alleged violations are: violation of the right to be tried by an impartial court and of the obligation to guarantee the independence of the courts, in relation to the Constitutional Court of the Respondent State, *Komi Koutché v Republic of Benin*, ACTHPR, Application 020/2019, Judgment of 25 June 2021 § 13-i; violation of the right to a defence, in relation to the audit reports that led to the proceedings against the Applicant before the CRIET, *Idem*, §13-v and § 44-47; violation of the right to the presumption of innocence, in relation to the proceedings before the CRIET, *Idem*, § 13-v.

16 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018), 2 AfCLR 246, § 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* (Jurisdiction and Admissibility) (28 March 2019), 3 AfCLR 73, § 39.

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

VII. Costs

47. Each party requests that the other be ordered to pay the costs of the proceedings.

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