

Diakité v Mali (jurisdiction and admissibility) (2017) 2 AfCLR 118

Application 009/2016, *Diakité Couple v Republic of Mali*

Judgment, 28 September 2017. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSÉ, BENACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Court found the Application inadmissible for non-exhaustion of local remedies in a case where the Applicants, who were victims of robbery, alleged that the crime was not sufficiently investigated by the police.

Admissibility (exhaustion of local remedies, filing civil suit, 46, 51-55)

I. The Parties

1. The Applicants, Mr and Mrs Diakité are citizens of Mali residing in Bamako, Cité du CHU Point-G.
2. The Respondent is the Republic of Mali, which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 22 January 1982 and to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 20 June 2000. The Republic of Mali also deposited, on 19 February 2010, the Declaration recognizing the jurisdiction of the Court to hear cases filed by individuals and non-governmental organizations. She further, on 16 July 1974, acceded to the International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter referred to as "the Covenant").

II. Subject of the Application

3. The Court was seized of this matter by an Application dated 19 February 2015 together with written observations. Also annexed thereto was the correspondence addressed by the Applicants to the Malian judicial authorities in respect of the instant case.

A. The facts

4. The Applicants submit that, on 14 November 2012, their home was robbed and vandalized by unknown persons. The items stolen included an HP laptop computer, medical appliances, USB flash disks, books, land allocation letter and copies of educational certificates.

5. According to the Applicants, a complaint against an unknown person (complaint against X) was filed on the same day at the Office of the State Prosecutor for Bamako District.

6. Fifteen (15) days after the robbery, a certain Oumar Maré was found in possession of a knife from the home of the Applicants' immediate neighbour, stolen on the same night their home was robbed and vandalized.

7. Mr Oumar Maré was then brought to the Bamako 12th District Police Station which took the statements of the complainants and the witnesses. The suspect was however released after only five days in custody.

8. The Applicants indicate that they seized, one after the other, the Superintendent of the Police Unit concerned, the State Attorney and the Prosecutor General of Bamako, and that no reply was received to their complaint.

B. Alleged violations

9. The Applicants submit that this attitude of the Bamako 12th District Police headquarters constitutes a serious violation of their rights as enshrined in Article 7 of the Charter which stipulates that everyone shall have the right to have his cause heard; in particular, the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

10. They also submit that by leaving unpunished the aggression of which they have been victim, whereas they did all they could to get one of the criminals arrested, the judicial authorities of Mali violated their right to equality before the law and equal protection of the law as set forth in Article 3 of the Charter; their right to peace as enshrined by Article 23 of the Charter; their right to property as guaranteed by Article 14 of the same Charter as well as Article 2(3)(a) and (b) of the Covenant.

III. Summary of the procedure before the Court

11. The Application was filed on 19 February 2016.

12. On 4 April 2016, the Applicants filed their observations on the question of exhaustion of local remedies. The said observations were subsequently served on the Respondent on 6 April 2016.

13. On 22 April 2016, the Application was transmitted to all States Parties to the Protocol and to the other entities mentioned in Rule 35(3) of the Rules of Court (herein-after referred to as the "Rules").

14. On 13 May 2016, the Respondent submitted its Response which

was transmitted to the Applicants on the same day. On 9 August 2016, the Applicants filed their Reply.

15. On 17 August 2016, the Respondent sought leave of Court to file a Rejoinder to the Applicants' Reply.

16. The Court granted the request, and on 9 September 2016, the Respondent filed its Rejoinder.

17. On 26 September 2016, the Registry notified the Parties that the written procedure was closed. The Court decided not to hold a public hearing on the matter.

IV. The Parties' Prayers

18. The Applicants pray the Court to:

- i. declare their Application admissible and founded in fact and in law;
- ii. order the Respondent to enact special legislation restricting the preliminary investigation to a set time limit;
- iii. rule that failure to observe the set time limit will negatively affect the preliminary investigation report;
- iv. order the State of Mali to enact legislation recognizing the responsibility of the State for the procedural misconduct of its agents;
- v. order the Respondent to pay them the following sums of money:
 1. 10,867,000 CFA F being the value of the items stolen;
 2. 7,000,000 CFA F, being the hard-to-assess value of the items and the works stolen;
 3. 5,000,000 CFA F being the moral prejudices suffered by the entire members of their family;
 4. 9,000,000 CFA F being lawyer's fees for the procedure at local level and for the current procedure;
 5. 1,000,000 CFA F being the procedural costs".

19. The Respondent prays the Court :

- i. *with respect to form*: to declare the Application inadmissible for failure to exhaust the local remedies;
- ii. *on the merits*: should this issue arise, to dismiss the Application as unfounded."

V. Jurisdiction of the Court

20. In terms of Rule 39(1) of its Rules, the Court "...shall conduct

preliminary examination of its jurisdiction ...”

21. The Court notes that the Respondent does not contest its jurisdiction. However, it notes that even if the Respondent has not raised objection regarding its jurisdiction, it must, of its own motion, satisfy itself that it has material, personal, temporal and territorial jurisdiction to hear the Application.

22. As regards material jurisdiction, Article 3(1) of the Protocol provides that:

“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”.

23. The Court notes that the violations alleged by the Applicants all relate to the Charter and the Covenant, instruments to which the Respondent is a Party. It therefore holds that it has the material jurisdiction to examine the instant case.

24. As regards the other aspects of its jurisdiction, the Court holds that:

- i. it has personal jurisdiction given that the Republic of Mali is a Party to the Protocol, and has also deposited the declaration prescribed under Article 34(6) cited above (*supra* paragraph 2);
- ii. it has temporal jurisdiction given that the alleged violations occurred after the entry into force of the afore-mentioned instruments in respect of the Respondent (*supra* paragraph 2);
- iii. it has territorial jurisdiction in so far as the facts occurred on the Respondent’s territory.

25. It thus follows from all the foregoing considerations that the Court has jurisdiction to hear the instant case.

VI. Admissibility of the Application

26. In terms of Article 6(2) of the Protocol: “the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

27. Rule 40 of the Rules which essentially reproduces the contents of Article 56 of the Charter, provides that:

“Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

- (1) disclose the identity of the Applicant notwithstanding the latter’s request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;

4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed 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 seized with the matter;
7. not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.”

28. Of the seven (7) conditions mentioned above, the Respondent raised only one objection in relation to exhaustion of local remedies.

A. Conditions that are not in contention

29. The Court notes that the conditions mentioned in sub-paragraphs 1, 2, 3, 4, 6 and 7 of Rule 40 of the Rules are not in contention between the Parties.

30. The Court further notes that nothing in the records submitted to it by the Parties suggests that any of the said conditions would not be fulfilled in the instant case.

31. Consequently, it finds that the afore-mentioned conditions have been met in the instant case.

B. The objection to admissibility on the ground of failure to exhaust the local remedies

32. The Respondent submits that it was premature on the part of the Applicants to have brought the instant case before this Court given that there were still local remedies available to them.

33. According to the Respondent, the Applicants, by virtue of Article 62 of Law No. 01-080 of 20 August 2001 on the Code of Criminal Procedure of Mali, could have instituted civil action before the investigating judge. It maintains that this procedure does not even require, as a precondition, discontinuation of a case by the State Attorney.

34. The Respondent maintains that, contrary to the Applicants' allegations, there has been no inaction on the part of the Public Prosecutor's Office or an attempt by the Police to stifle the complaint; that the Applicants had it in their imagination that Mr Oumar Maré apprehended two weeks after the burglary and interrogated on another robbery committed in the home of their neighbour, was the author of the

robbery of which they are victims, whereas the two cases are distinct and have no proven link between them.

35. It contends that in the context of Mr Oumar Mar 's arrest, a search was conducted at his home and none of the items stolen from the Applicants' home was found there; that despite all that, the Applicants are intent on getting justice to prosecute and convict Mr Oumar Mar  as the author of the robbery, whereas no evidence of guilt has been found against him.

36. It further contends that if the Applicants were so convinced that Mr. Oumar Mar  was the perpetrator of the robbery, and given the alleged inaction of the Police and the Office of the State Attorney, they could have brought a civil action before the competent investigating judge; that, in reality, the Applicants were apprehensive of the uncertain outcome of such a procedure and would want this Court to substitute itself for the domestic Courts in order for them to obtain redress.

37. The Respondent, in conclusion, submits that it has not violated any rights of the Applicants in terms of the domestic proceedings.

38. In their Reply, the Applicants maintain that filing a civil suit is not a remedy within the meaning of Article 56(5) of the Charter; that in the Republic of Mali, a victim has the option of referring a case to the State Attorney or to an Investigating Judge; that the use of either option closes the other for the purposes of proper administration of justice; that, besides, the two procedures have the same finality, that is, investigation by an investigating judge.

39. They maintain that the attitude on the part of the judicial authorities of Mali of abandoning the procedure at the initial stage for over three (3) years constitutes an undue prolongation of the procedure within the meaning of Article 56(5) of the Charter.

40. Relying on the Decision of the African Commission on Human and Peoples' Rights in Communication *Dawda K Jawara v The Republic of The Gambia* (Communication No. 147/95-149/96), the Applicants submit that the remedy proposed by the Respondent is neither effective nor sufficient and that, the undue prolongation of local procedures provides justification for the Court to declare their Application admissible.

41. As the Court underscored in its previous judgments, the rule regarding the exhaustion of local remedies prior to referral to an international human rights Court is one that is recognized and accepted internationally.¹

42. It is clear from the records that the Applicants do not contest

1 Application 004/2013, *Loh  Issa Konat  v Burkina Faso* (Preliminary Objections), Judgment of 5 December 2014, para 78.

that they have not used the totality of the judicial remedies existing in the Respondent State's system. What is in contention between the Parties is, on the one hand, the question as to whether the duration of the procedure at national level has been unduly prolonged within the meaning of Article 56(5) of the Charter and Rule 40(5) of the Rules; and, on the other, the question as to whether referral to the investigating judge is, in the judicial system of the Respondent State, a remedy that is available, effective and sufficient.

43. Whereas the Respondent contends that the procedure was stalled because the Police was unable to apprehend the perpetrator(s) of the robbery, the Applicants, for their part, maintain that the author of the robbery was identified, but that the Police and Office of the State Attorney did not take steps to close the case at their level.

44. The question that arises at this juncture is whether there exists in the Respondent's judicial system a remedy that the Applicants could have exercised to by-pass what they have described as "lack of diligence on the part of the Police and the Office of the State Attorney".

45. In this regard, Article 62 of the Code of Criminal Procedure of Mali states that: "Any person claiming to be aggrieved by a crime or a misdemeanor may lodge a complaint in a civil suit before a competent investigating judge".

46. It is clear from the foregoing provision that the Applicants had, at least, the possibility of bringing the case directly before an investigating judge by filing a civil suit.

47. As regards the effectiveness and sufficiency of this remedy, Article 90 of the Code of Criminal Procedure of Mali provides that: "The investigating judge shall, in accordance with the law, undertake all such acts of information as he deems useful to ensure manifestation of the truth."

48. Article 112 of the same Code stipulates that: "Counsel for the accused and the civil party, both during the investigation and after communication of the proceedings to the registry, may in writing close the hearing of new witnesses, adversarial sessions, expert opinions and all such acts of investigation as they consider relevant for the defense of the accused and the interests of the civil party. The judge shall give reasons for the order by which he refuses to carry out any additional investigative measures requested of him. The accused and the civil party may appeal the order, either by themselves or through their counsel."

49. It is apparent from the foregoing provisions that the investigating judge can undertake all acts of investigation requested of him by the accused or the injured party, and that the latter even has the right to appeal an order that refuses to undertake the investigative measures requested.

50. It is noteworthy at this juncture that a complaint filed together with a civil suit enables the victim to get associated with the conduct of the procedure and that, in his capacity as a Party to the penal process has the right to directly request the investigating judge to commence an investigation.

51. In view of the foregoing, the Court holds in conclusion that referral to the investigating judge is, in the Respondent’s judicial system, an effective and sufficient remedy which the Applicants could exercise to obtain, or at least seek to obtain consideration of their complaint.

52. Having failed to exercise this remedy, the Applicants are not founded in submitting that the proceedings have been unduly prolonged or that this remedy has supposedly not resolved their problem.

53. In its previous judgments, the Court established that exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust or at least endeavor to exhaust local remedies; and that it is not enough for the Applicant to question the effectiveness of the State’s local remedies on account of isolated incidents².

54. In view of the foregoing, the Court finds that the Applicants have not complied with the requirement of exhaustion of local remedies set forth in Article 56 (5) of the Charter, and that, consequently, their Application is inadmissible.

55. Having found that the Application is inadmissible for failure to exhaust local remedies, the Court decides that the matter shall not be examined on the merits.

VII. Costs

56. In accordance with Rule 30 of its Rules: “Unless otherwise decided by the Court, each party shall bear its own costs”.

57. Having taken the circumstances of the instant case into account, the Court decides that each Party shall bear its own costs.

58. For these reasons,

The Court

Unanimously

- i. *Declares* that it has jurisdiction to hear this matter;
- ii. *Upholds* the Respondent’s objection regarding the inadmissibility of the Application for failure to exhaust the local remedies;
- iii. *Declares* the Application inadmissible;
- iv. *Rules* that each Party shall bear its own costs.

2 *Peter Joseph Chacha v United Republic of Tanzania* (Application No 003/2012), Judgment of 28 March 2014, paras 142,143 and 144.