AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF

ADAMA DIARRA (A.K.A. vieux BLÉN)

V.

REPUBLIC OF MALI

APPLICATION NO. 047/2020

RULING

1 DECEMBER 2022

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The Court, composed of: Imani D. ABOUD, President, Blaise TCHIKAYA, Vice-President, Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, and Dumisa B. NTSEBEZA - Judges, Dennis D. ADJEI; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as “the Protocol”) and Rule 9(2) of the Rules of Procedure of the Court (hereinafter referred to as “the Rules”), Judge Modibo SACKO, a Malian national, did not hear the Application.

In the Matter of:

Adama DIARRA also known as Vieux BLÉN
represented by:

> Mr. Alifa Habib KONE, Advocate at the Bar of Mali, *Société Civile Professionnel d’Avocats DO-FINI CONSULT*.

Versus

REPUBLIC OF MALI
represented by:

i. Mr. Youssouf DIARRA, Director General of State Litigation.
ii. Mr. Daouda DOUMBIA, Deputy Director General of State Litigation.

After deliberation,

delivers this ruling:

I. THE PARTIES

1. Mr. Adama DIARRA, also known as “Vieux Blén” (hereinafter “the Applicant”) is a Malian national and radio host. He challenges the legality of the procedure that led to him being held in detention for contempt of court and cybercrime.

2. The Application is filed against the Republic of Mali (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 on 20 June 2000. The Respondent State also deposited, on 19 February 2010, the Declaration provided for in Article 34(6) of the Protocol (hereinafter “the Declaration”), by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organisations (NGOs).

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the records that on 22 October 2020, the deputy public prosecutor of Bamako Commune III district High Court placed the Applicant under detention following a joint complaint lodged by the two magistrates' unions of the Respondent State, namely the *Syndicat Autonome de la Magistrature* (SAM) and the *Syndicat Libre de la Magistrature* (SYLIMA), for contempt of court and insults, committed through an information system by posting a video on the internet. According to the said complaint, the Applicant “gratuitously attacked the magistrates in charge of the case of the State versus Sidiki DIABATE who, according to him, refused, in flagrant violation of the laws of the Republic, to hear the latter (the accused) who is in detention”.

4. The Applicant submits that under Article 83 of the Respondent State's[1] Code of Criminal Procedure (CCP), trial should take place within three (3) months. The Applicant further avers that under Article 151 of the said code,[2] he was entitled to apply for bail at any stage of the proceedings provided that this measure does not constitute a threat and that he is guaranteed legal representation. He further avers that by applications dated 25 October and on 10 and 11 November 2020, his three (3) lawyers requested that he be granted bail.

5. The Applicant states that the said three applications for bail were heard on 15 December 2020. By preliminary Ruling No. 25 of 27 January 2021, the Bamako Commune III High Court granted the Applicant bail. The Prosecution appealed the said ruling.

6. According to one of the Applicant's lawyers, the said preliminary Ruling No. 25 of 27 January 2021 was upheld by the Appeal Court on 25 February 2021 and the Applicant was released on bail.

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[1] Article 83: “"In the event of a flagrant offence, where the act is punishable by imprisonment, and if the investigating judge is not seized, the public prosecutor may place the accused under a detention order, after having questioned him about his identity and the acts with which he is charged.
The same shall apply where, following a preliminary investigation, a criminal offence punishable by imprisonment appears to have been established against an accused, either by his or her own confession or by the unanimous testimony of several witnesses; in this case, the accused must be summoned to appear before the court no later than three months after the detention order.
If the public prosecutor fails to comply with this time limit, the administrator of the prison is required to notify him. He shall then immediately bring the accused before the public prosecutor, who shall have him released after having made him observe the formalities of election of domicile.
The Justice of the Peace shall be under the same obligation for detentions ordered under this article.
The requirement laid down in this Code in respect of proceedings before the trial courts shall apply.
The provisions of this article shall not apply to media offences, or offences the prosecution of which is provided for by a special law, or if the persons suspected of having participated in the offence are minors under the age of eighteen years”.

[2] Article 151 provides: "Bail may also be requested in any case by any accused or defendant, and at any stage of the proceedings.
When a trial court is seized, it shall be responsible for ruling on bail; before referral to the Assize Court and during the interval between assize sessions, this power shall be vested in the indictment chamber.
In the event of an appeal, and until the Supreme Court has given its ruling, the application for bail shall be decided by the court which last heard the case on the merits. If the appeal has been lodged against a judgment of the assize court, the detention shall be decided by the indictment chamber.
In the event of a decision of lack of jurisdiction and generally in all cases where no court is seized, the indictment chamber shall hear applications for release.
In cases where a foreign national, whether charged, accused or convicted, is left or released on bail, only the competent court may assign him or her to a place of residence from which he or she may not be removed, subject to the penalties provided for in Article 191 of the Criminal Code.

B. Alleged violations

7. In the Application, the Applicant alleges violation of the following rights:

   i. The right to liberty, protected by Article 6 of the Charter;
   ii. The right to a fair trial, protected by Article 7(1) of the Charter and Article 14 of the International Covenant on Civil and Political Rights (hereinafter the ICCPR);[3] and
   iii. The right to freedom of conscience, protected by Article 8 of the Charter.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application and the request for provisional measures were received on 1 December 2020.

9. On 15 January 2021, the Registry served the Application and the Request for provisional measures on the Respondent State with a request to file its Response within ninety (90) and fifteen (15) days, respectively, of receipt of notification**.**

10. On 2 March 2021, the Registry requested additional information from the Applicant on the outcome of the hearing of 25 February 2021 by the Bamako Appeal Court, which was to rule on the appeal against the decision granting the Applicant bail. On 11 March 2021, the Applicant's lawyer informed the Registry that the ruling releasing the Applicant on bail had been upheld.

11. On 29 March 2021, this Court issued a ruling for provisional measures by which it declared the Applicant's request moot.

12. All pleadings and procedural documents were duly filed and notified to the Parties.

[3] The Respondent State became a party to the ICCPR on 16 July 1974.

13. On 28 October 2021, the pleadings were closed and the Parties were informed.

IV. PRAYERS OF THE PARTIES

14. In his Application, the Applicant prays the Court to order the Respondent State as follows:

    i. Review its legislation to ensure strict separation of prosecutorial power and judicial power by prohibiting the public prosecutor from issuing detention orders, as guarantee of non-repetition of the said violations;
    ii. Ensure the independence of the authorities responsible for adjudicating cases brought by magistrates, by bringing the procedure into line with that which pertains in complaints against judges, in particular by vesting jurisdiction in the Supreme Court;
    iii. Publish the various judgments in two media outlets.

15. As reparation for the moral damage suffered, the Applicant prays the Court to order the Respondent State to pay:

    iv. Fifty Million (50,000,000) BCEAO CFA Francs, as reparation for the moral prejudice suffered by the Applicant and his family.

16. In follow-up, Applicant prays the Court to:

    v. Request the Respondent State to report back to it on the measures taken to cease the said violations, by ordering the release of the Applicant within one month.

17. As regards costs, the Applicant prays the Court to order the Respondent to bear all costs.

18. For its part, the Respondent State prays the Court to:
    i. Declare the Application inadmissible as to form;
    ii. In the alternative, on the merits, dismiss it as unfounded.

V. JURISDICTION

19. The Court notes that Article 3 of the Protocol reads as follows:

> 1. [t]he 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.

20. Under Rule 49(1) of the Rules of Court "[t]he Court shall conduct preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules".

21. Based on the above-mentioned provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections thereto, if any.

22. The Court notes that the Respondent State does not contest the jurisdiction of the Court. However, the Court must satisfy itself that it has jurisdiction to hear the Application.

23. Having found that nothing on record indicates that it lacks jurisdiction, the Court finds that it has:

    i. Material jurisdiction, insofar as the Applicant alleges a violation of Articles 6, 7(1)(a)(b)(c) and 8 of the Charter and Article 14 of the ICCPR, human rights instruments to which the Respondent State is a Party.
    ii. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and Non-Governmental Organisations having

observer status with the Commission to bring cases directly before the Court.

iii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force in relation to the Respondent State of the instruments mentioned in sub paragraph (i) of this paragraph.

iv. Territorial jurisdiction insofar as the facts of the matter and the alleged violations occurred in the territory of the Respondent State.

24. In view of the foregoing, the Court finds that it has jurisdiction to hear the present Application.

VI. ADMISSIBILITY

25. Article 6(2) of the Protocol provides: "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

26. In accordance with Rule 50(1) of the Rules of Court,

> [t]he 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.

27. Rule 50(2) of the Rules, which essentially restates 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 the Commission is seized 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 Charter of the Organization of African Unity or the provisions of the Charter.

28. The Respondent State raises an objection based on non-exhaustion of local remedies. The Court will rule on this objection (A) before deciding, if necessary, on the other admissibility requirements (B).

A. Objection based on non-exhaustion of local remedies

29. The Respondent State submits that, although the Applicant has been charged and arraigned for contempt of court and other offences, his trial has not commenced. The Respondent State contends that no final decision has been issued in the matter. The Respondent State therefore submits that the Applicant did not exhaust local remedies.

30. The Applicant submits that the Respondent State does not in any way indicate what remedies were available to him. He further submits that although it is true that cases must be submitted to the Court only after exhaustion of local remedies, it is nonetheless the case that that the remedies, in line with the jurisprudence of the Court, must not only be available, that is, they can be pursued without impediment, but must be effective and satisfactory in the sense that they are “capable of redressing the complainant or of remedying the situation in dispute” (African Commission on Human and Peoples' Rights decision, Communication No. 147/95-149/96, Application No. 1/95) - *Dawda K.*

Jawara v. Republic of the Gambia). He further submits that the said remedies must clearly not be unduly prolonged.

31. The Applicant submits that during the proceedings in respect of which he was held in detention, the public prosecutor, assumed various legally incompatible roles in order to deprive him of freedom. He explains that the latter acted variously as trade unionist, a party to the trial and a judicial authority. He contends that his rights were not violated because he was prosecuted, but rather because the public prosecutor, who is a party to the proceedings and who is in fact the complainant in his capacity as president of the trade union, can issue a detention order without the intervention of another judicial authority.

32. In this regard, the Applicant submits that Article 83(1) of the CCP[4] empowers the public prosecutor to issue a detention order, whereas this power should be the preserve of a judge of the court. He avers that this prerogative violates the principle of the separation of the prosecuting and adjudicating authorities. He further contends that his rights were also violated by the fact that his application for bail was prevented from being examined within a reasonable time.

33. He states that while he has not yet exhausted local remedies on the merits of the case, the same cannot be said of the decision by the Public Prosecutor to place him under a detention order, or the refusal to examine his application for bail, against which there is no local remedy.

34. The Applicant further submits that it is “incongruous” to note that in the event of a dispute between a magistrates’ union and a litigant, the case is decided by a magistrate who is himself a member of the magistrates’ union. The Applicant contends that it is difficult, if not impossible, to be judged by a judge who is independent of the two judicial unions, of which 99.99% of magistrates are members. He avers that it took until 15 December 2020 for the prosecutor to

[4] Article 83 paragraph 1 of the Code of Criminal Procedure states: "In the event of a flagrant offence, when the act is punishable by imprisonment, and if the investigating judge is not seized, the public prosecutor may place the accused under a detention order, after interrogating him or her about his or her identity and the facts of the matter.

agree to list his application for bail and that the exhaustion of remedies is no longer in doubt. Finally, the Applicant avers that it is the reason the Respondent State filed its submissions on the merits, knowing that the Application is indeed admissible for the above-mentioned reasons.

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35. The Court recalls that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Court, applications must be filed after exhaustion of local remedies, if they are available, unless it is clear that the procedure in respect of such remedies is being unduly prolonged.

36. The Court underscores that the local remedies to be exhausted are those of a judicial nature, which must be available, that is, they must be available to the applicant without impediment, effective and satisfactory in the sense that they are "capable of satisfying the applicant or of redressing the situation in dispute".[5]

37. The Court recalls, on the other hand, that the requirement of exhaustion of local remedies implies that the issue which an Applicant intends to bring before an international body has been raised, in substance, before domestic bodies if the latter exist and if they are adequate, accessible and effective.[6]

38. The Court notes that the requirement of exhaustion of local remedies is assessed, in principle, at the date on which the Application is brought before it.[7]

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[5] *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo, Blaise Ibouldo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v. Burkina Faso* (28 March 2014) (merits) 1 AfCLR 219, § 68; *Konaté v. Burkina Faso* (merits), § 108; *Sébastien Germain Marie Ajavon v. Republic of Benin*, ACtHPR, Application No. 027/2020, § 73.

[6] *Koumi Koutché v. Republic of Benin* (jurisdiction and admissibility; § 49; *Sébastien Germain Ajavon v. Republic of Benin* (Judgment of 29 March 2019) (merits) 3 AfCLR 130, § 98. See also, ACHPR, *Dabalorivhuma Patriotic Front v. Republic of South Africa*, Decision of 9-23 April 2013, Communication No. 335/2006, §§ 81-83; ECHR, (GC), *Azinas v. Cyprus*, Judgment of 28 April 2004, §§ 40- 41; CHR, Kavanagh v. Ireland, Views of 26 April 2001, Communication No. 819/1998, § 9.3.

[7] *Yacouba Traoré v. Republic of Mali*, ACtHPR, Application No. 010/2018, Judgment of 25 September 2020, § 41.

39. The Court points out that, in order to determine whether the requirement of exhaustion of local remedies has been met, the domestic proceedings to which the Applicant was a party must have been concluded at the time the Application was lodged with it.[8]

40. Furthermore, it is for the Applicant to take all necessary steps to exhaust, or at least attempt to exhaust, local remedies.[9]

41. The Court notes that in the present case, the Applicant was prosecuted for contempt of court and insults committed through an information system, offences provided for and punishable under Article 147 of the Malian Criminal Code[10] and Article 21 of Law 2019-056 of 5 December 2019 on the fight against of cybercrime.[11]

42. The Court notes that, in the circumstances, following a referral from the public prosecutor of the Bamako Commune III district High Court in respect of the complaint lodged by the magistrates' unions (SAM and SYLIMA), the Applicant was invited by the criminal investigations brigade of Bamako on 21 October 2020, and subsequently placed in police custody, in accordance with Articles

[8] *Komi Koutché v. Republic of Benin*, ACtHPR, Application No. 020/2019, Ruling of 25 June 2021, § 61; *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, ACtHPR, Application No. 027/2020, § 74.

9 *Peter Joseph Chacha v. United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, § 143. See also, *Epoux Diakité v. Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 53; *Komi Koutché v. Republic of Benin*, ACtHPR, Application No. 020/2019, Ruling of 25 June 2021 (Jurisdiction and admissibility), § 92.

[10] Article 147 of the Penal Code states: 'Anyone who, either through speeches, clamour or threats made in public meetings or places, or through written material sold or distributed, put on sale or exhibited in public meetings or places, offends the person of the Head of State shall be liable for imprisonment of between three months and one year and a fine of between 50,000 and 600,000 CFA francs, or by either of these two penalties only. The same provisions shall apply to foreign Heads of State visiting Mali. Where one or more administrative or judicial magistrates, or one or more assessors, in the exercise of their functions or on the occasion of such exercise, have been the target of any insult by word, in writing or by drawing, not made public, intended in these various cases to undermine their honour or delicacy, the person who has addressed such insult shall be liable to at least fifteen days and at most one year in prison. If the contempt by word has taken place in a court or tribunal, the imprisonment shall be of at least three months and at most two years. Contempt by gesture or threat or by sending any object with the same intention and directed at a magistrate or assessor in the exercise of his duties, shall be punishable by imprisonment for a term of one month to six months; if the contempt took place at a court or tribunal hearing, it shall be punishable by imprisonment for a term of three months to two years.

[11] Article 21 of Law 2019-056 of 5 December 2019 on the fight against cybercrime provides: “Anyone who utters an insult through an information system against a person shall be liable for six (6) months to two (2) years in prison and a fine of one million (1,000,000) to ten million (10,000,000) CFA francs or one of these two penalties.”

76[12] and 77[13] of the Malian Code of Criminal Procedure, after which he was taken before the public prosecutor who charged him and then placed him on remand pending his appearance in court on 15 December 2020, in accordance with the established procedure in preliminary investigations.[14]

43. The Court notes that the Applicant brought his Application before it even before the pre-trial judgment ordering his release on bail.

44. With regard to the allegation relating to fair trial, the Court notes that the Applicant himself acknowledges that he did not exhaust the local remedies available to him, such as that provided for under Article 616 of the Respondent State's CCP.

45. With regard to the allegation relating the Prosecutor's power, the Court notes that the Applicant raises a principle for which he does not indicate the basis; he merely alleges that there is no local remedy.

46. The Court notes, however, that the Applicant does not demonstrate the efforts made or the difficulties encountered or the obstacles to pursuing existing remedies such as remedies for unconstitutionality or for violation of his rights.

47. In the light of the foregoing, the Court considers that the Application was filed while the domestic proceedings were still ongoing and is therefore premature.

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[12] Article 76 paragraph 2 states: “If there is serious and corroborating evidence against a person that could justify his or her indictment, the forty-eight-hour period of police custody may be extended by twenty-four hours by written authorisation from the public prosecutor (...)”.

[13] Article 77 paragraph 2 provides: "The judicial police officer must make mention on the record of the proceedings, in respect of any person in custody, the day and time from which he or she was held in custody, as well as the day and time from which he or she was either released or brought before the competent magistrate. This note must be specially signed by the persons concerned in the event of refusal. It must include the reasons for the accused being held in custody.

[14] Article 83, paragraphs 1 and 2, provide that: "In the event of a flagrant offence, where the offence is punishable by imprisonment, and if the examining magistrate is not seized, the public prosecutor may place the accused under a detention order, after having questioned him about his identity and the acts of which he is accused.

The same shall apply when, following a preliminary investigation, a criminal offence punishable by imprisonment appears to be established against an accused, either by his confession or by the unanimous testimony of several witnesses; in this case, the accused must be summoned to appear before the court at the latest within three months of the committal order.

48. In the light of the foregoing, the Court upholds the Respondent State's objection to admissibility and finds that the Applicant did not exhaust local remedies.

B. Other admissibility requirements

49. Having found that the present Application does not satisfy the requirement of Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, and having regard to the cumulative nature of the admissibility requirements,[15] the Court considers it superfluous to rule on the other admissibility requirements.

50. Accordingly, the Court declares the Application inadmissible.

VII. COSTS

51. The Court notes that the Applicant requests the Court to order the Respondent State to bear costs.

52. The Respondent State did not submit on costs.

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53. Rule 32(2) of the Rules provides as follows: “Unless otherwise decided by the Court, each Party shall bear its own costs, if any”.

54. The Court considers that, in the present case, there is no reason to depart from that principle.

55. Accordingly, the Court decides that each Party shall bear its own costs.

[15] *Yacouba Traoré v. Republic of Mali*, ACtHPR, Application No. 002/2019, Judgment of 22 September 2022 (jurisdiction and admissibility), § 49; *Mariam Kouma and Ousmane Diabaté v. Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; *Rutabingwa Chrysanthe 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

VIII. OPERATIVE PART

56. For these reasons,

THE COURT,

Unanimously

On jurisdiction

i. *Declares* that it has jurisdiction;

On admissibility

ii. *Upholds* the objection to admissibility based on non-exhaustion of local remedies*;*

iii. *Declares* the Application inadmissible*;*

On costs

iv. *Orders that* each Party shall bear its own costs.

Signed by:

Imani D. ABOUD, President;

Blaise TCHIKAYA, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

Done at Arusha, this First day of December in the year Two Thousand and Twenty-Two, in the English and French languages, the French text being authoritative.