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Matter of Alfred Agbesi Woyome v. Republic of Ghana

(Merits and Reparations)

Application No. 001/2017

Judgment of 28 June 2019

Dissenting Opinion of Judge Gérard Niyungeko

1. I agree with the findings and decisions of the Court, as reflected in the operative part of the judgment, *except* the finding regarding the non-violation of the right to be heard by an impartial judge, as concerns the comments made by Judge Dotse of the Respondent State's Supreme Court. In my opinion, this Court should have found that there has been a violation in this respect, not only because of the perception of the Judge's partiality in the circumstances (II), but also because of the perceived partiality on the part of the Review Bench of the whole Supreme Court of which he was a member (III). Before explaining myself on these two points, it is necessary to briefly recall the context in which the question of impartiality arose (I).

I. Factual background

2. Judge Dotse who had sat at the Ordinary Bench of the Supreme Court in the matter concerning the Applicant, had at the time attached to the judgment of that Court a concurring opinion in which he had referred to the Applicant as having formed an alliance with another party, Waterville Holding Ltd to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise", and further referred to the Applicant as being at the center of the "infamous Woyome payment scandal" (paragraph 124 d the judgment). Subsequently, Judge Dotse sat in the same case, but this time in the Review Bench of the Supreme Court, along with other Judges, most of whom, like him, had sat at the Ordinary Bench of the Supreme Court. He even drafted the *lead judgment* of the Court Review Bench.

3. The question which arises in the circumstances is whether or not Judge Dotse's participation in the Supreme Court Review Bench, after having made the aforesaid

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comments while sitting at the Supreme Court Ordinary Bench, calls to question, first, his impartiality, and then the impartiality of the Supreme Court as a whole.

II. The question of Judge Dotse's impartiality

4. On this point, this Court holds that although the impugned statements of the Judge were "unfortunate", and "went beyond what can be considered as an appropriate judicial comment, they however did not give an impression of preconceived opinions and do not reveal bias" (paragraph 129 of the judgment). To arrive at this conclusion, the Court relies on two main arguments, (i) that the personal philosophy and moral convictions of a judge cannot be regarded as constituting bias (paragraph 127); and (ii) that the impartiality of a judge is presumed, and undisputable evidence is required to refute this presumption (paragraph 128). The problem is that these arguments, in themselves valid in principle, are not applicable in the instant case.

5. As to the argument invoking the philosophy and moral convictions of a Judge, Judge Dotse's statements have nothing philosophical or moral in them. To say that the Applicant is a looter of the country's resources and that he is at the heart of a scandal, is an opinion on purported or real facts, whichever, and is not an expression of a philosophical or moral principle. The statements are subjective assessments of the Applicant's conduct and actions, assessments which express the negative feelings he has towards the Applicant and which, as the Court acknowledges, were misplaced. As stated in the *Commentary on the Bangalore Principles on Judicial Conduct*, "A judge's personal values, philosophy or beliefs about the law" which do not constitute a bias, refers to "a *general opinion about a legal or social matter* directly related to the case ...¹". In this case, however, the Judge concerned expresses, through his remarks, no general opinion on a legal and social question, but only a specific and detailed opinion on pure facts.

6. With regard to the presumption of the Judge's impartiality, this in the instant case is clearly refuted by his undisputed statements. The said statements show, without any shadow of doubt that the Judge concerned had a negative opinion of the acts of the

¹ United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007, para. 60. Italics added.

Applicant, acts which were at the center of the case in respect of which he subsequently sat at the Supreme Court Review Bench.

7. In any event, what is at stake here is not the actual partiality of the Judge - which is not established in this case - but the *perception of bias* that his words may have generated in the eyes not only of the party concerned, but also of any reasonable observer. According to the *Commentary on the Bangalore Principles of Judicial Conduct* referred to above:

"Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and *as a matter of reasonable perception*. *If partiality is reasonably perceived*, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. *The perception of impartiality is measured by the standard of a reasonable observer.*"²

8. In the same vein, the Commentary further indicates that:

"Impartiality is not only concerned with the actual absence of bias and prejudice, but also with the *perception of their absence*. This dual aspect is captured in the often repeated words that justice must not only be done, *but must manifestly be seen to be done*"³.

9. As regards the conduct of a Judge, the Commentary provides examples of the following acts of bias:

"...A judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice. Unjustified reprimands of advocates, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgments and intemperate and impatient behaviour may destroy the appearance of impartiality, and must be avoided".⁴

10. Lastly, on the same point, the said Commentary makes the following clarification:

² *Ibidem*, paragraph 52. Italics added

³ *Ibidem*, paragraph 56. Italics added

⁴ *Ibidem*, paragraph 62.

"Depending on the circumstances, a reasonable apprehension of bias might be thought to arise in the following cases: ... (d) If the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind..."⁵

11. In light of the foregoing, one is obliged to conclude that Judge Dotse's statements in his individual opinion at the Ordinary Bench of the Supreme Court gave rise to a perception of partiality when he sat at the Review Bench of the Supreme Court, and that consequently, in accordance with the general principles of law in judicial matters, the Judge should thereafter have refrained from sitting at the Review Bench. As noted by the very *Bangalore Principles of Judicial Conduct*:

"A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially"⁶.

12. The fact that the Judge persisted in sitting, despite the risk of perception of bias, must be regarded as a violation of the Applicant's right to be heard by an impartial court, within the meaning of Article 7(1) (d) of the Charter, a violation attributable to the Respondent State of which the court is an organ.

13. I am conscious that Judge Dotse's comments were made in a concurring opinion, at least partially favorable to the Applicant, but this does not change the perception of bias on his part, in as much as he accepted to subsequently sit at the Review Bench of the Supreme Court on the same case.

III. The issue of the impartiality of the Supreme Court sitting as the Review Bench

14. It now remains to determine whether the fact that Judge Dotse was a member of the Supreme Court Review Bench affected the impartiality of the entire Bench. In this respect, the Court replies in the negative, relying mainly on the arguments (i) that the

⁵ *Ibidem*, paragraph 90.

⁶ *Bangalore Principles of Judicial Conduct*, Annex to the Resolution of the UN Economic and Social Council, ECOSOC 2006/23, 27 July 2006, paragraph 2.5.

statement of a single judge cannot call to question the impartiality of the other Judges (ten judges in this case), even though the Judge concerned wrote the *lead judgment* (paragraph 131); and (ii) that the Applicant did not show how Judge Dotse's remarks at the Ordinary Bench of the Supreme Court subsequently influenced the decision of the Court's Review Bench (paragraph 131). Neither argument is really convincing.

15. With regard to the argument that the bias of a single judge cannot affect the impartiality of the entire bench, it is important to again distinguish between the *actual impartiality* of a jurisdiction - which is not at issue here - and the *perception of the impartiality* of that jurisdiction. In the instant case, what is at issue is not the impartiality of all the other Judges, but rather the perception of impartiality of the Bench of the Court, arising from the perception of partiality of one of its members.

16. It is generally accepted that the perception of partiality of a member of a Court will also affect, indirectly, the perception of impartiality of the Bench in its entirety. The African Commission on Human and Peoples' Rights established a link between these two situations in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. In its view, the impartiality of a judicial body may be called to question, *inter alia*, if⁷ ... the position of the judicial officer allows him or her to play a crucial role in the proceedings; 2. the judicial officer may have expressed an opinion which would influence the decision-making ...⁷

17. It follows from this principle that where a judge has expressed an opinion that might influence decision-making by the judicial body, there is a problem of impartiality, not just of the judge concerned, but of the judicial body as a whole.

18. With respect to the argument that the Applicant did not provide proof that Judge Dotse's remarks influenced the decision of the Supreme Court Review Bench, this is a demand which is impossible to prove. The Applicant cannot in fact be asked to provide such proof, since by definition he cannot access the deliberations of the Court which occur naturally in private session and are covered by the principle of confidentiality.

⁷ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, General Principles Applicable to All Legal Proceedings, 2003, paragraph 5.c

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19. It follows from the foregoing that Judge Dotse's participation in the Supreme Court Review Bench may have given rise in any reasonable person, to a perception of bias on the part of the entire Bench, even though the other judges actually adjudicated with complete impartially.

20. For all these reasons, this Court to my mind should have found that the Applicant's right to be tried by an impartial tribunal within the meaning of Article 7(1) (d) of the Charter has been violated. Consequently, the Court could have, in the process, determined the nature and form of the reparation to be awarded to the Applicant solely in connection with this violation.

Judge Gérard Niyungeko

