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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF SEBASTIEN GERMAIN AJAVON V. THE REPUBLIC OF BENIN

APPLICATION NO. 013/2017

JUDGMENT OF 29 MARCH 2019

SEPARATE OPINION OF JUDGE GERARD NIYUNGEKO

1. I concur with the findings and the decisions of the Court, as seen in the operative part of the judgment [paragraph 292]. However, I am of the view that on certain issues, the reasoning in the judgment could have been strengthened (I). Furthermore, I find that the Court failed to draw a clear conclusion on one issue (II). Again, it failed to reflect in the operative part some findings made in the body of the judgment (III). Lastly, it also included in the operative part measures which were not specifically analysed in the body of the judgment (IV).

I. On certain issues, the reasoning of the judgment could have been stronger

2. As we are all aware, the 10 June 1988 Protocol establishing the Court obliges the latter in its Article 28 (6), to give reasons for all its judgements without exception[1]. In my opinion, on certain issues, the reasoning of the Court is either incomplete or insufficient.

3. This is the case with the allegation made by the Applicant that the procedure of immediate appearance to which he was subjected in 2016 was a violation of his right to defence [paragraph 143].

4. On this allegation, the Court responded in one paragraph as follows:

"Regarding the argument according to which the summons to appear immediately would have been a violation of the right to defence of the Applicant, *the Court notes [that] immediate appearance in itself is not a violation of the right to defence*" [paragraph 151. Italics added].

5. In doing so, the Court did not at all explain the finding it made. The Court ought to have indicated, based on the information contained in the file on the legislation of the Respondent State, that the procedure of immediate appearance is simply an expedited

[1] This article has: "the judgment of the Court is motivated". See also Article 61 (1) of the Rules of Procedure of the Court

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procedure, within which the right to defence may be guaranteed. This lapidary conclusion of the Court is quite questioning.

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6. It is same with the allegation made by the Applicant according to which his right to presumption of innocence was violated. In paragraph 194, the Court declares as follows:

"In the instant case, the *public statements made by some high political and administrative officials* on the issue of international drug trafficking, before and after the acquittal judgment on the benefit of the doubt of 4 November 2016, could raise suspicion of guilt of the Applicant in the minds of individuals *or even a survivor of the said suspicion of guilt*" [Italics added. See also paragraph 198].

7. On the one hand however, the Court did not indicate the relevant excerpts of declarations made by political and administrative authorities in support of its position. The only declarations referred to by the Court are those of the Brigade Commander of the Gendarmerie of the Port of Cotonou, and former senior officials of the Port of Cotonou [paragraph 193], who are neither political nor administrative authorities. In particular, the Brigade Commander of the Gendarmerie in Cotonou may have made his declaration simply to explain to the media and to public the reasons for the Applicant's arrest, which in itself should not necessarily constitute a violation of the right to presumption of innocence. As regards the former senior officials of the port of Cotonou, the Court failed to state whether or not they were still in active service, or else why should their statements be attributed to the Respondent State. In that regard, to be more convincing, the Court ought to have clearly indicated the excerpts of the incriminating public declarations of "some senior and administrative officials" of the Respondent State.

8. On the other, in the same paragraph 194 above, the Court finds that even the public declarations of political and administrative authorities made *after* the acquittal judgement on the benefit of the doubt could constitute a violation of the presumption of innocence. Article 7(1) (b) of the Charter however is clear and refers to the presumption of innocence "until his guilt is proven by a competent court". The Court cannot even rely on the appeal of the Prosecutor General against the acquittal judgment of 4 November 2016 to consider that the issue of the guilt of the Applicant had not been determined, because, it considers elsewhere that this appeal cannot be opposed to the Applicant [paragraph 139]. On this issue, the Court ought to have limited itself to the declarations eventually made *before* the judgment of 4 November 2016.

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9. There is a similar problem concerning the alleged violation of the right to a two-tier jurisdiction. In that regard, the Applicant complains that the establishment of "the Court for the repression of Economic Crimes and Terrorism" (CRIET) whose judgements are not subject to appeal "*deprive* him of the right to make use of the rule of the two-tier jurisdiction" [paragraph 207. Italics added], and that "the law establishing

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CRIET ignores the principles of a *two-tier* jurisdiction and is a violation of his right to fair trial" [paragraph 209. Italics added].

10. In determining these issues, the Court finds that "the provisions of Article 19 (2) of the law establishing CRIET is a violation by the Respondent State of the *right of the Applicant* to challenge the declaration of guilt and his sentence by a higher court [paragraph 215. Italics added].

11. Here the fact is, the Applicant seems to be contradicting himself by contending on the one hand, that the judgement of the Court of First Instance, First Class of Cotonou dated 4 November 2016 granting his acquittal on the benefit of the doubt is itself not subject to any appeal and that it is a *res judicata* [paragraphs 125 -127], and on the other hand, as this was stated earlier, that the law establishing CRIET prevents him from going on appeal against the decision of the latter which sentenced him to a twenty year term. In the face of such a situation, in my opinion, the Court ought to have taken note of this contradiction, and finally decided that what is at stake here is not the *rights of* the Applicant himself to a two-tier jurisdiction, but the *law establishing CRIET*, in its Article 19 (2) and make findings on the inconsistency of this provision with Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR), without considering the peculiar situation of the Applicant[2].

12. Failing to do so, the Court finds a violation which does not exist [paragraph 215]. The Court should rather have drawn an appropriate conclusion, that through Article 19 (2) of the law establishing CRIET, the Respondent State violated Article 14 (5) of the ICCPR.

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13. Lastly, the situation is not different regarding the allegation of violation of the duty incumbent on the Respondent State to guarantee the independence of the judiciary. On this issue, the Applicant complains about the language used by the Head of State [paragraph 275], as well as the language used by the Chargé de mission at the Presidency of the Republic and by the Minister of Justice [paragraph 276].

14. While dealing with these allegations, the Court finds that there is violation of the obligation of the Respondent State to guarantee the independence of the judiciary by relying only on the statements of the Minister of Justice [paragraphs 281 and 282]. In so doing, the Court fails to explain why it does not discuss and does not also take into consideration the statements made by the Head of State (which as a matter of fact have not been put in the passage), as well as the statements made by the Chargé de mission at the Presidency of the Republic.

15. In my opinion, the Court should also have reflected the impugned statements made by the Head of State, and ought to have decided in one way or the other on how they affect the independence of the judiciary and should have proceeded in the same manner to deal with the statements made by the Chargé de mission in question. This

[2] It is well known in this regard that in the Charter system, the Applicant is not required to prove a personal interest in having a *locus standi*. See especially: African Commission on Human and Peoples' Rights, Communication 277/2003 *Brian Spilg et alt. Botswana*, paragraphs 73- 85, and the jurisprudence cited.

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approach would have made it possible not only to deal with all the arguments and counter arguments of the parties, but would also have made it possible to consider the Executive as a whole, and not only through one of its representatives without any kind of justification.

II. The Court failed to make a clear finding on one **issue**

16. In paragraph 197 of the judgement, after noting and rightly so, that the appeal against a judgement "should not be considered as a violation of the presumption of innocence", the Court however went on to consider that "the absence of a notice of appeal of the Prosecutor General before the seizure of CRIET maintained the latter in a position of suspicion of guilt".

17. The Court however does not draw any consequence, in terms of violation of the right to presumption of innocence in paragraph 198 where it states its position. The result is that finally we do not really know whether the Respondent State violated the right of the Applicant in that regard. On this issue, the Court should have made a finding in one way or the other, instead of leaving the latter in suspense and shrouded in ambiguity.

III. The Court failed to reflect in the operative part certain **findings made in the body of the judgment.**

18. This is the case, first of all with regard to their allegation of the right of the Applicant for the investigation to be complete and for his right to adduce evidence.

19. In paragraph 151 cited above in the judgement, the Court finds that there is no violation in the following terms:

"Regarding the argument that immediate appearance would have violated the rights of the Applicant to defence, the Court notes [that] *immediate appearance in itself is not a violation of the right to defence"* [Italics added].

20. This finding is however not indicated anywhere in the optative part of the judgement.

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21. It is same with regard to the allegation of violation of the right to defence on the grounds that the Applicant was acquitted by the Court of First Instance, First Class of Cotonou *on the benefit of the doubt*. In paragraph 198 of the judgement, the Court makes the following findings:

Based on the foregoing, the Court finds that in the instant case, *the acquittal judgement on the benefit of the doubt is not a violation of the right to presumption of innocence"* [Italics added. See also paragraph 196]

22. Once again, this finding is not reflected in the operative part of the judgement.

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23. This is once again the case with regard to the allegation of the right to have his honour, his reputation and his dignity respected. In paragraph 257 of the judgement, the Court makes the following findings:

"On this issue, the Court finds that the acquittal judgement on the benefit of the doubt is not a violation of the honour, the reputation or the dignity of the Applicant *and is not a violation of Article 5 of the Charter*" [Italic added].

24. Once again, the operative part of the judgement does not reflect this finding.

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25. All these omissions are problematic because we all know the importance of the operative part of the judgement. The operative part contains alone the decisions of the Court and a measure or a finding not contained in the operative part is reputed not to be part of the decision of the Court.

IV. The Court included a measure in the operative part which was not discussed in the body of the judgement

26. In the same manner, a decision or a finding which is contained in the operative part, but which has not been discussed in the body of the judgement could be problematic.

27. In that regard, the measure found in paragraph (xxii) of the operative part and which orders the Respondent State to take all necessary measures to annul the sentence of the Applicant of twenty years in prison, was not discussed in the body of the judgement.

28. We understand without doubt that this measure is a logical and direct consequence of the finding that the Applicant's right to be tried by a competent court was violated (CRIET was not the appropriate court in this case) [paragraph 140]. However, the Court ought to have stated and explained it clearly in the part of the judgement dealing with reparations as it usually does.

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29. In all, these lacunae or shortcomings in the reasoning of the Court on certain issues, in addition to the lack of concordance between the reasoning and the operative part in some areas unfortunately leave a vague impression that the Court was in a haste to produce its judgement, which naturally does not suit the usual serenity of justice.

Judge Gérard Niyungeko