

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

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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:

LOHÉ ISSA KONATÉ

vs

BURKINA FASO

Application No: 004/2013

SEPARATE OPINION

Elsie N. THOMPSON, Vice President, Justices Sophia A. B. AKUFFO, Bernard M. NGOEPE and Duncan TAMBALA

1. While we agree substantially with the outcome of the majority judgment, there is **FIRSTLY**, one particular point on which we disagree. Although this point is not material to the outcome of the case, it is in our view nevertheless important, inasmuch as the majority view on it purports to be an accurate reflection of the content of Rule 39(1) of the Rules of Court. We clarify from the outset that there is nothing wrong in starting



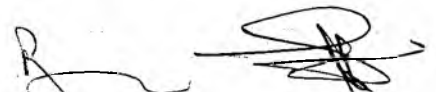
with the examination of jurisdiction first, and then deal with admissibility later, as the majority judgment does. It, however, needs to be mentioned that there has never been unanimity in this Court that that should necessarily always be the case; there has always been a view that it would not necessarily be wrong, in a given case, to examine admissibility first.

2. The above debate cannot be resolved in favour of starting with jurisdiction, by, as the majority judgment seeks to do, importing into Rule 39(1) a word which is not in there, namely, the word "first". Apparently, the importation is made to strengthen the case for starting with jurisdiction first as opposed to admissibility. The relevant paragraph of the majority judgment, being paragraph 30, reads: "*Rule 39(1) of the Rules ... provides that the Court must first conduct preliminary examination of its jurisdiction*" (own underlining). Yet, with respect, the Rule does not say that; it reads: "*The Court shall conduct preliminary examination of its jurisdiction and the admissibility of the application ...*". The word "first" appears nowhere in the Rule, let alone specifically prescribing that one should start with jurisdiction first. Whatever reason may be behind importing that word into the Rule, it remains factually incorrect to say, as the majority judgment does, that the Rule contains that particular word, when it does not; accordingly, we disagree with that statement. It may well be that starting with jurisdiction may be justified on



other premises. We say nothing more, as we do not wish to enter the debate referred to in paragraph 1 above.

3. SECONDLY, regarding the merits, we would, while agreeing with the outcome of the majority judgment, have in some respects approached the matter differently and also framed the Orders differently.
4. Having found that the application is admissible and that the Court has jurisdiction, we would zoom onto the crisp question in the matter: are the Burkinabe laws in terms of which the Applicant was convicted of defamation, namely, Articles 109 and 110 of the Information Code, and Article 178 of the Penal Code, in conflict with Article 9 of the African Charter on Human and Peoples' Rights, and other instruments relied upon and cited by the Applicant? In our view, the answer is in the affirmative. As presently framed, the above legislative measure are, for the reasons set out in the majority judgment, an unjustified restriction to the right of freedom of expression; that is, criminalization of defamation is not justified. If such criminalization can be justified under certain circumstances, such as prohibiting for example hate speech or incitement, the above legislative measures, as they currently read, are too broad and problematic. It must be mentioned though, that the possible exceptions referred to are more theoretical than real. This is because once a so-called criminal defamation amounts to say hate speech or incitement, it is no longer criminal defamation; it mutates into one of the already existing and well known specific crimes such as



sedition or high treason and there would be no talk of criminal defamation. The State's duty to enforce the obligation on an individual under Article 27(2) of the Charter to exercise rights "*with due regard to the rights of others, collective security, morality and common interest*" cannot justify the criminalization of expression of speech by way of criminal defamation laws of any kind, whether punishable by incarceration or not. Access to civil action, civil sanction, together with specifically defined crimes for safeguarding national security, public peace and the common interest, should be sufficient. For this Court to hold otherwise would not only be a step backward in the evolution of human rights in Africa, but also out of consonance with the letter and spirit of the Charter, which it is established to uphold.

5. Finally, given our view that the Applicant's conviction was in the first place invalid, it is immaterial whether the punishments imposed are excessive or lenient. There should have been no punishment based on criminal defamation at all; the aggrieved person should have resorted to other avenues than to criminal recourse. That being our view, we would therefore frame the Orders differently, as follows:

(A) Articles 109 and 110 of the Burkinabe Information Code, as well as Article 178 of the Burkinabe Penal Code, are in conflict with Article 9 of the African Charter on Human and Peoples' Rights and therefore invalid;

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(B) Consequently, the conviction of Lohe Issa Konate under the above Burkinabé laws, and all the sanctions imposed on him as a result of the conviction, are invalid.

Done in Addis Ababa, this 5th day of December 2014.

Elsie N. Thompson, Vice President:



Sophia A. B. Akuffo, Judge:



Bernard M. Ngoepe, Judge:



Duncan Tambala, Judge:

