001/2017
28/06/2019
(005040 – 005032) JF

005040

Judgment

ALFRED AGBESI WOYOME

V.

REPUBLIC OF GHANA

APPLICATION No. 001/2017

Dissenting Opinion

of

Judge Rafaâ Ben Achour

1. In the instant case, *Alfred Agbesi Woyome v. Republic of Ghana*, I subscribe to all the reasoning and the Operative Part except one issue and its consequence on the claims for reparation.

2. As a matter of fact, I do not share the majority opinion of the Court on "the question as to whether judge Dotse's remarks call to question the impartiality of the Review Bench of the Supreme Court"[1]. According to the Court, the views expressed by one of Respondent State's Supreme Court judges about the Applicant were "unfortunate, and went beyond what can be considered as an appropriate judicial comment"[2], and that, consequently, "the Respondent State has not violated the Applicant's right to be heard by an impartial tribunal guaranteed under Article 7(1)(d) of the Charter"[3]

[1] §§ 122 – 132
[2] § 129 of the judgment
[3] § 132 of the judgment

3. Indeed, I believe that the Court should have found that Article 7(1)(b) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") has been violated, the remarks of the judge in question having cast a perception of bias not only on the author of the remarks but also on the entire judicial bench.

4. It is to be recalled that in his concurring opinion of 14 June 2013, at the hearing before the Ordinary Chamber of the Supreme Court, judge Dotse found that the applicant had formed an alliance with others. The Court "notes from the record that it is not in contention between the Parties that judge Dotse in his concurring opinion at the Ordinary Bench 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", further referring to the Applicant as being at the center of the "infamous Woyome payment scandal".[4]

5. Analyzing the effects of Honorable Justice Dotse's remarks on the impartiality of the Review Bench of the Supreme Court, this Court rightly began by laying down relevant criteria to resolve this issue. It emphasizes that "to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt.[5] However, the Court notes that the impartiality of a judge is presumed and undisputable evidence is required to refute this presumption. In this regard, the Court shares the view that "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge"[6], that "whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question[7]. The Court then seems to move in the direction of bias when it stated in paragraph 129 of the judgment that "...although the said statements 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".

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[4] § 124 of the judgment

[5] *Findlay v United Kingdom* (1997) 24 EHRR 221 § 73. See also *Nsongurua J Udombana,* "The African Commission on Human and Peoples' Right and the Development of Fair Trial Norms in Africa' 2006, African Human Rights Law Journal Vol 6/2.

[6] *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (Wewaykum).

[7] §128 of the judgment

6. Prior to explaining the reasons for our dissent, and whether the judge's remarks are or are not likely to cast an impression of bias on the entire panel of judges, namely, the Review Bench of the Supreme Court of the Republic of Ghana, it is needful to revert to the definition of the notion of impartiality **(I)** and to subject the remarks of the judge in question to the criteria of impartiality as codified in certain international instruments (**II**).

I. The notion of impartiality

7. Aware of the fragility of its position, the Court has taken the trouble to provide the doctrinal definition of impartiality[8] based on the definition thereof in the *Dictionnaire de droit international public Law* and the *Commentary on the Bangalore Principles of Judicial Conduct.* The definitions in question, however, support the flip side of the position taken by the Court, and that is the partiality, or at least the impression of partiality, of judge Dotse.

8. More specifically, that is, in its legal sense, impartiality is the attitude which should help eliminate subjectivity in a judgment. It implies that the judge should cast aside his feelings of sympathy or antipathy vis-à-vis all those who will stand trial before him, and rid himself of any preconceived ideas, prejudices based on any discriminatory considerations (gender, religion, colour, morality, opinion, etc.) or stereotypes, and that he pronounces himself with the greatest possible objectivity. As the Court itself says, impartiality presupposes "the absence of bias, prejudice, conflict of interest in a judge, arbitrator, expert or similar person in relation to the parties appearing before him or in relation to the matter to be decided by him."[9]

9. In its judgment in the case *Piersack v. Belgium* of 1 October 1982[10], the European Court of Human Rights (hereinafter referred to as "the ECHR"), identified impartiality "by the absence of prejudice or bias and its existence or

[8] § 126 of the judgment.
[9] SALMON (Jean) (Dir). *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, p. 562.
[10] Application No. 8692/79, Série A No. 53

otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect[11].

10. In that same case of *Piersack v. Belgium* brought before the ECHR by the Commission, the applicant complained that the President of the Assize Court who sentenced him, had handled his case during the investigation in his capacity as substitute for the King's Prosecutor. In its judgment of 1 October 1982, the ECHR found an infringement of Article 6 § 1[12] of the Convention: the impartiality of the "court" which ruled on 10 November 1978 "on the merits" of a "criminal charge" against the person concerned, namely the Brabant Assize Court, "may appear questionable".[13]

11. In another case, *Daktaras v. Lithuania*[14], the ECHR "recalls that there are two aspects to the condition of impartiality laid down in Article 6 § 1 of the Convention. First, the court must be subjectively impartial, that is, none of its members shall express bias or personal prejudice. Personal impartiality is presumed until proven otherwise. Secondly, the court must be objectively impartial, that is, offer sufficient guarantees to exclude any legitimate doubt in this respect."[15] As regards the second aspect (objective impartiality),"it leads to the question as to whether certain verifiable facts allow the impartiality of the judges to be suspected" and the European Court adds "...in this matter, even

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[11] § 30 of ECHR judgment

[12] "In the determination of his civil rights and obligations or of any criminal charge against him... everyone is entitled to a fair and public hearing...by an independent and impartial tribunal established by law".

[13] According to ECHR, "the Court of Cassation of Belgium dismissed Mr. Piersack's application because the Court held that the documents which it could take into account did not reveal that after the public prosecutor's department had received the covering note mentioned in the ground of appeal, Mr. Van de Walle, who was then a senior deputy to the Brussels *procureur du Roi*, had taken any decision or intervened in any manner whatsoever in the conduct of the prosecution relating to the facts in question" (paragraph 17 above). (d) Even with the latter precision, such a criterion does not fully satisfy the requirements of Article 6 § 1 (Article 6 (1)). In order for the courts to inspire the public with the necessary trust, it is necessary to take into account considerations of an organic character. If a judge, after having occupied the office of the prosecutor a charge likely to cause him to handle a certain file within the scope of his duties, is seized of the same case as a sitting judge , the litigants are entitled to fear that it does not offer enough guarantees of impartiality ".

[14] ECHR. Third Section, Judgment of 10/10 2000. Application No. 42095/98.

[15] § 30 of ECHR judgment

appearances can take on importance. It is a matter of confidence that the courts of a democratic society must inspire the litigants, starting with the parties to the proceedings"[16]. In the instant case, the President of the Criminal Chamber of the Supreme Court had referred to the judges of this Chamber a case of cassation, at the request of the trial judge who was dissatisfied with the judgment of the Court of Appeal. The President proposed that the appeal judgment be quashed and the judgment of the trial court upheld. He then appointed the judge rapporteur and set up a panel to examine the case. At the hearing, the prosecution upheld the president's cassation request which the Supreme Court finally upheld. For the Court, "this opinion cannot be regarded as neutral from the view point of the parties: by recommending that a given decision should be upheld or overturned, the President necessarily becomes the defendant's ally or adversary"[17].

12. Furthermore, in the *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa,* adopted by the African Commission on Human and Peoples' Rights in 2003[18], it is recommended that in determining impartiality or partiality, three criteria should be taken into account, namely:

- that the position of the judicial officer allows him or her to play a crucial role in the proceedings;
- the judicial officer may have expressed an opinion which would influence the decision-making ;
- the judicial officer would have to rule on an action taken in a prior capacity.

13. Under these Guidelines, a jurisdictional proceeding is impartial if:

" - a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
- a judicial official secretly participated in the investigation of a case;

[16] § 32 of ECHR judgment
[17] § 35 of ECHR judgment
[18] *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa,* adopted in 2003 by the African Commission on Human and Peoples' Rights (DOC/OS (XXX) 247).

- a judicial official has some connection with the case or a party to the case;
- a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body".

14. In the judgment *Ingabire v. Rwanda* (Merits) of 24 November 2017, this Court referred to those same guidelines when it determined whether or not[19] the applicant had been tried by a neutral and impartial court, and held in conclusion that "in the instant case, the evidence adduced by the Applicant does not sufficiently demonstrate that any of the above factors existed in the course of her trial".

15. In addition, the *Bangalore Principles*[20] of Judicial Conduct, cited by the Court, establish an international standard of judicial ethics for the conduct of judges and provide a framework for regulating their conduct. In the commentary on the Bangalore Principles, impartiality is recognized as "the fundamental quality required of a judge and the core attribute of the judiciary.... A reasonable appearance of bias may create a sense of injustice, which destroys trust in the justice system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge's behaviour on the bench....".[21]

16. Moreover, "a judge exercises his judicial functions without favour, bias or prejudice. When a judge appears biased[22], public confidence in the justice system is undermined. ... Impartiality is not limited to the actual absence of bias and prejudice, because it also concerns their apparent absence. This dual aspect is rendered by the often-repeated formula that justice must not only be done but must also be clearly seen to be done"[23]. The standard test is whether the reasonable observer, examining the issue in a realistic and pragmatic manner, perceives (or could

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[19] Application No. 003/2014. Judgment of 24/11/2017, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, §§ 103 and 104.

[20] *The Bangalore Draft Code of Judicial Conduct 2001* adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002) https://www.unodc.org/documents/corruption/bangalore_f.pdf

[21] United Nations Office against Drugs and Crime, *Commentary on the Bengalore Principles of Judicial Conduct,* September 2007, § 52.

[22] Emphasis is mine.

[23] United Nations Office against Drugs and Crime, *Commentary on the Bengalore Principles of Judicial Conduct,* September 2007, § 52.

perceive) a lack of impartiality in the judge. It is from the reasonable observer's point of view that the existence or otherwise of reasons to suspect bias should be considered[24]. "The personal values, philosophy or convictions of a judge on the subject of law must not be biased. The fact that a judge has proffered a general opinion on a legal or social issue directly related to an ongoing case, does not make him unfit to preside. Opinion, which is acceptable, should be distinguished from bias, which is not[25].

II. Judge Dotse's attitude reveals a perception of bias that pervades the entire Review Chamber

17. The crucial question which arises concerning the remarks and attitude of Judge Dotse is not so much that of the influence exerted by this Judge on his other colleagues in the Review Chamber, but above all, that of the appearance or perception of bias. In other words, the issue is not that of determining whether the judge in question influenced his other colleagues, but whether judge Dotse exceeded his own obligation of neutrality. Even if it is assumed that the opinion of this judge did not directly influence the other judges, the fact remains that the mere fact that this senior judge expressed an opinion which seems directed against the applicant, exceeds the limits and the characteristics of a legal opinion on the case under examination.

18. In the instant case, the Court notes that judge Dotse played a crucial role in the proceedings, both in the Ordinary Chamber judgment of which he drew up the concurring opinion, and in the Review Chamber, in which he drafted the lead judgment. Besides, he expressed his opinion when he referred to the Applicant as having formed an alliance with another party, Waterville, to "create, plunder and share the resources of the Republic of Ghana", and that the Applicant "was in the center of the infamous Woyome payment scandal."

19. As indicated above, the Court seems, at first, to be going in the direction of the partiality of the judge when it held ... that "these remarks [were] unfortunate

[24] *Commentary on the Bengalore Principles of Judicial Conduct,* §§55 and 56
[25] *Commentary on the Bengalore Principles of Judicial Conduct,* § 60

and went beyond what can be considered as an appropriate judicial comment"[26]. The Court very quickly retracted, disregarding the criteria of impartiality, and declaring that the said remarks "did not give the impression of the existence of preconceived ideas and revealed no bias"[27]. The Court declares, besides, that "while the record shows that there is no dispute between the Parties that judge Dotse in his concurring opinion in the Ordinary Chamber had asserted that the Applicant had formed an alliance with another party, namely Waterville Holding Ltd, to 'create, loot and share the resources of the country as if a brigade had been set up to do so'", adding later that the Applicant was at the center of "Woyome's infamous payment scandal"[28].

20. It is impossible to subscribe to this reasoning. In this case, judge Dotse clearly demonstrated his bias towards the Applicant by his remarks in the concurring opinion before the Ordinary Chamber. It may well be that judge Dotse simply expressed views without necessarily being biased. It is, however, rather regrettable that the honourable Judge made these remarks while the Applicant's case was still pending before the High Court, before which the judgment was rendered on 12 March 2015, subsequent to the judgment of the Review Chamber of the Supreme Court. The conclusion reached by this Court seems doubtful to me: "The Court notes that judge Dotse prepared the lead judgment rendered by the Review Chamber which was composed of eleven (11) judges ... The Court believes that the remarks of a single judge cannot be considered sufficient to influence the entire Chamber. Nor has the Applicant demonstrated how the remarks made by the judge in the Ordinary Chamber influenced the decision of the Review Chamber downstream."[29]

21. In my view, the Court's reasoning of the Court does not hang together: as acceptable and logical as it is in its premise, so is it illogical and contradictory in its conclusions.

22. It seems that, the views expressed by Judge Dutse, despite the fact that they were contained in an opinion attached to the Judgment, goes far beyond what

[26] § 129 of the judgment.
[27] *Idem.*
[28] § 124 of the judgment.
[29] § 131 of the judgment.

is common in the expression of dissenting or separate opinion on a jurisdictional or quasi- jurisdictional decision. This practice, inherited from Anglo-Saxon law by international jurisdictions, allows a judge to express his position in terms of law. It does not allow for an attack on any of the litigants at trial and for making a value judgment on him.

23. A dissenting or separate opinion is defined as the "expression of their personal opinion that members of a court or tribunal may attach to the decision of the court". In this perspective, the "separate opinion" is that of a judge who has voted along with the majority on the operative part of a judgment, but does not accept all or part of the reasoning. Thanks to the possibility of attaching his individual opinion to a judgment, the judge can justify his partial dissent and express the reasons which led him to accept the operative part, anyway."[30] As for dissenting opinion, it is that of a judge who did not vote with the majority because he disagrees with the operative part of the decision and, consequently, with its reasoning. In a dissenting opinion, he can give the reasons for his disagreement and thus make public the points which gave rise to controversy among the judges."[31]

24. Having not agreed with point (ix) of the Operative Part, I could dissent only from the Court's decision not to award the applicant any compensation for the injury suffered. In the logic of my position, having been convinced of a violation of a human right, I would have granted the applicant a just and adequate reparation.

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Arusha, 4 July 2019

Judge Rafaâ Ben Achour

[30] SALMON (Jean) (Dir). *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, p :781.
[31] *Idem*, p. 782.