

Human rights — Right to freedom of expression — Treaties — African Charter on Human and Peoples' Rights, 1981 — International Covenant on Civil and Political Rights, 1966 — Revised Treaty of the Economic Community of West African States, 1993 — Rights of journalists — Whether Sections 109 and 110 of the Information Code and Section 178 of the Penal Code of Burkina Faso restricting freedom of expression — Defamation — Whether criminalization of defamation violating international human rights principles — Whether Burkina Faso violating Article 9 of Charter, Article 19 of Covenant and Article 66(2)(c) of ECOWAS Treaty — Whether provisional measures appropriate — Whether compensation payable

International tribunals — African Court on Human and Peoples' Rights — Jurisdiction — Whether Court required to investigate jurisdiction *proprio motu* — Admissibility — Local remedies rule

Damages — Reparations — Claim for damages for violations of African Charter on Human and Peoples' Rights, 1981, International Covenant on Civil and Political Rights, 1966 and Revised Treaty of the Economic Community of West African States, 1993 — Restitution — Material damage — Moral damage — Whether amounts claimed justified — Evidence — Amounts to be awarded

KONATÉ *v.* BURKINA FASO¹

(Application No 4/2013)

African Court on Human and Peoples' Rights

Provisional Measures. 4 October 2013

(Akuffo, *President*; Ngoepe, *Vice-President*; Niyungeko, Ouguegouz, Ramadhani, Tambala, Thompson, Oré, Guissé, Kioko and Aba, *Judges*)

Merits. 5 December 2014

¹ The applicant was represented by Yakaré-Oulé (Nani) Jansen and John R. W. D. Jones QC throughout the proceedings, and additionally by Stephen P. Finizio at the reparations phase. The respondent was represented by Antoinette Ouedraogo and Anicet Some throughout the proceedings.

See para. 25 of the judgment on the merits for details of the *amici curiae* and their representatives.

(Ramadhani, *President*; Thompson, *Vice-President*; Akuffo, Ngoepe, Niyungeko, Tambala, Oré, Guissé, Kioko and Aba, *Judges*)

Reparations. 3 June 2016

(Ramadhani, *President*; Thompson, *Vice-President*; Niyungeko, Ouguergouz, Tambala, Oré, Guissé, Kioko, Ben Achour, Bossa and Matusse, *Judges*)

SUMMARY:² *The facts*:—The applicant, a national of Burkina Faso and editor-in-chief of the weekly publication *L'Ouragan*, wrote and published two articles that accused the Prosecutor of Burkina Faso of corruption. In response, the Prosecutor instituted criminal proceedings against the applicant for defamation, public insult and contempt of court. Upon conclusion of the proceedings, the High Court of Burkina Faso sentenced the applicant to twelve months' imprisonment and ordered him to pay substantial fines and damages. The court also ordered a six-month suspension of *L'Ouragan*. The decision of the High Court was upheld by the Court of Appeal.

The applicant instituted proceedings against Burkina Faso ("the respondent")³ alleging that his conviction and prison sentence, the fines imposed upon him, the closure of the paper and sections of Burkina Faso's Information Code and Penal Code violated his right to freedom of expression, as provided for under Article 9 of the African Charter on Human and Peoples' Rights, 1981 ("the Charter")⁴ and Article 19 of the International Covenant on Civil and Political Rights, 1966 ("the Covenant")⁵ to which Burkina Faso was party. He also alleged that the respondent had infringed his rights as a journalist in violation of Article 66(2)(c) of the Revised Treaty of the Economic Community of West African States, 1993 ("the ECOWAS Treaty"). He sought provisional measures in accordance with Article 27(2) of the Protocol to the Charter,⁶ requesting immediate release from prison or, alternatively, adequate medical care.

The respondent claimed that the application was inadmissible. It stated that the application had incorrectly identified the State of Burkina Faso as the "People's Democratic Republic of Burkina Faso". The respondent further argued that the applicant had not been registered as a journalist as required by Burkinabé law. The respondent stated that the applicant had not exhausted

² Prepared by Ms C. Kimeu and Ms Karen Lee, Co-Editor.

³ For the text of the application, see para. 5 of the order on provisional measures.

⁴ For the text of Article 9 of the Charter, see para. 10 of the judgment on the merits.

⁵ For the text of Article 19 of the Covenant, see para. 11 of the judgment on the merits.

⁶ Article 27(2) of the Protocol provided that: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary."

local remedies and had failed to prove that an appeal to the *Cour de Cassation* was inaccessible, ineffective and insufficient to address his alleged violations. It denied any violation of Article 9 of the Charter and Article 19 of the Covenant and contended that the applicant's sentence was a necessary and proportionate response to protect the Prosecutor.

Thirteen non-governmental organizations, which generally agreed with the applicant's contentions, joined the application as *amici curiae*. They also submitted that having criminal sanctions for defamation against a public figure violated the right to freedom of expression.

Provisional Measures

Held:—(1) The Court had prima facie jurisdiction to hear the case pursuant to Articles 3 and 5 of the Protocol to the Charter. Burkino Faso was party to both the Charter and its Protocol, having ratified them on 6 July 1984 and 31 December 1998 respectively. On 28 July 1998, it had made the declaration accepting the competence of the Court to receive cases from individuals and non-governmental organizations (paras. 11-16).

(2) (by majority, Judges Ramadhani, Tambala and Thompson dissenting) The applicant's request for immediate release was rejected. The measure could not be considered since it corresponded in substance with the relief sought in the substantive case (paras. 17-20).

(3) (unanimously) The respondent was to provide the applicant with adequate medical care. Since the applicant was in a situation that could cause irreparable harm, he was entitled to access all medical care that his health condition required (paras. 21-2).

Joint Dissenting Opinion of Judges Ramadhani, Tambala and Thompson: There was no reason why the applicant could not be released immediately since the release was to be provisional pending the determination of the application and would aid his request for health care. The respondent had not objected; the applicant could be returned to jail if necessary. Failure to release him would cause irreparable harm; loss of freedom could not be compensated by monetary damages (paras. 2-4).

Merits

Held (unanimously):—The application was admissible. The respondent had violated the applicant's right to freedom of expression under Article 9 of the Charter and Article 19 of the Covenant and his rights as a journalist under Article 66(2)(c) of the ECOWAS Treaty due to the existence of custodial sentences on defamation in its laws, the conviction and sentence of the applicant to a prison term for defamation, the conviction of the applicant to pay an excessive fine, damages and procedural costs, and the suspension of his newspaper.

(1) (unanimously) The Court had jurisdiction. While the respondent had not raised any objections to jurisdiction, the Court had an obligation to satisfy itself that it had jurisdiction (paras. 30-42).

(2)(a) (unanimously) The application was admissible. Although the applicant had made an error in naming the respondent in the title of the application, that did not render the application inadmissible as it did not affect the procedural or substantive rights of the respondent (paras. 43-8 and 60-3).

(b) The applicant had the *de facto* status of a journalist since the respondent's courts had convicted him as one. In any case, the right to freedom of expression under Article 9 of the Charter and Article 19 of the Covenant was not limited to journalists but guaranteed to every individual (paras. 49-59).

(c) An appeal to the *Cour de Cassation* was in theory an available local remedy. The time limit of five days for the applicant to file an appeal was short but did not constitute an impediment to the right of appeal. However, the applicant was not obliged to exhaust this remedy since the *Cour de Cassation* did not have the power to declare Burkinabé laws void (paras. 64-115).

(3) (unanimously) Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the ECOWAS Treaty had been violated in relation to the existence of custodial sentences on defamation in the respondent's laws, the applicant's conviction, prison sentence and excessive fines, and the suspension of his publication.

(a) Articles 109, 110 and 111 of the Information Code and Article 178 of the Penal Code were clear on the limitations of the right to freedom of expression and consistent with international standards on such limitations (paras. 126-38).

(b) The penalty of a custodial sentence under Articles 109 and 110 of the Information Code and Article 178 of the Penal Code violated the Charter, the Covenant and the ECOWAS Treaty. The respondent had failed to show how a custodial sentence was a necessary limitation to the right to freedom of expression (paras. 139-64).

(c) Other non-custodial penalties such as fines would only violate the Charter and other relevant human rights instruments if they were disproportionate or excessive (para. 166).

(d) The judgments of the Burkinabé courts violated the provisions of the Charter, the Covenant and the ECOWAS Treaty since they enforced laws that were inconsistent with those instruments (paras. 167-71).

(4) (by six votes to four) The respondent had not violated Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the ECOWAS Treaty in respect of the existence of non-custodial sanctions on defamation in its laws (para. 176(4)).

(5) (unanimously) The respondent was to amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66(2)(c) of the ECOWAS Treaty. Custodial sentences for acts of defamation were to be repealed. Legislation was to be adapted to ensure that other sanctions for defamation meet the test of

necessity and proportionality in accordance with the respondent's obligations under the Charter and other international instruments. Such measures were to be reported to the Court within a reasonable time and not exceeding two years from the date of the judgment (para. 176(8) and (9)).

(6) (unanimously) The applicant was to submit his brief on reparation within thirty days of the date of the judgment (para. 176(10)).

Separate Opinion of Vice-President Thompson and Judges Akuffo, Ngoepe and Tambala: (1) The rules of Court did not oblige it to examine jurisdiction issues before admissibility issues (paras. 1-2).

(2) There was no justification for criminalizing the right to freedom of expression, whether punishable by a custodial sentence or a non-custodial sentence. The decision of the Court that a non-excessive non-custodial sentence was justifiable was a hindrance to the evolution of human rights in Africa (para. 4).

(3) Since the applicant's conviction was invalid, the Court should have found it immaterial whether the punishments imposed were excessive or lenient (para. 5).

Reparations

On 9 January 2015, the applicant requested that the respondent set aside his conviction and the order to pay fines, damages and costs, award him 153,123,000 CFA francs in pecuniary damages, US \$35,000 in non-pecuniary damages, all to be paid in CFA francs with interest and taking into account inflation.

Held (unanimously):—(1) A State found liable for an internationally wrongful act was required to make full reparation for the damage caused. Such reparation included all damage suffered by the victim. There had to be a causal link between the established wrongful act and the alleged prejudice; the burden of proof lay with the applicant.⁷ As such, the respondent was required to make full reparation for the damage caused to the applicant and his family by the violations of the Charter, Covenant and ECOWAS Treaty found in its judgment on the merits (paras. 15-18).

(2) As restitution, the respondent was to expunge from the judicial record all criminal convictions against the applicant. Since it was not an appellate jurisdiction for national courts, the Court could not set aside the order on the payment of fines, damages and costs. It could and did, however, require that they be reduced so as to comply with the criteria of necessity and proportionality (paras. 19-24).

⁷ See judgment on reparations in *Mtikila v. United Republic of Tanzania*, 172 ILR 141 at 192 and *Beneficiaries of the late Zongo and Others v. Burkina Faso*, 173 ILR 214 at 266.

(3) For material damage, the respondent was to pay the applicant 25 million CFA francs for loss of income and 108,000 CFA francs for medical and transport expenses (paras. 25-51).

(4) For moral damage suffered by the applicant and his family, the respondent was to pay 10 million CFA francs (paras. 52-9).

(5) All amounts payable were to be paid within six months of this judgment, after which date interest was payable. A summary in French of the judgment was to be published within six months and a report on the status of implementation submitted (para. 60(vii), (viii) and (ix)).

The texts of the judgments on the merits and on reparations commence at pp. 10 and 46 respectively. The following is the text of the order on provisional measures:

PROVISIONAL MEASURES

ORDER

I. Subject of the Application

1. The Applicant, Lohé Issa Konaté, who is the Editor-in-Chief of “*Ouragan*”, a Burkinabé weekly, filed an Application dated 14 June 2013, which was received at the Court on 17 June 2013, and registered as Application No 4/2013.

2. The Applicant is represented by Advocates Yakaré-Oulé (Nani) Jansen and John R. W. D. Jones.

3. In a criminal matter brought against him, the Ouagadougou High Court in its ruling sentenced the Applicant to a one-year term of imprisonment for libel and to a fine of 1,500,000 francs (USD 3,000). In a civil suit, the same court ordered the Applicant to pay the sum of 4,500,000 francs (or USD 9,000) as damages to the parties and 250,000 francs (USD 500) as costs.

4. The Applicant submits that his sentence to a one-year term of imprisonment and to the payment of a substantial fine as damages and costs are in breach of his right to freedom of expression, which is protected by various treaties to which Burkina Faso is party. He alleges, in particular, the violation of his rights under Article 9 of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights.

5. On the merits, the Applicant prays the Court:

1. To declare that his sentence, in particular, to a term of imprisonment and to the payment of a substantial fine as damages and costs, amounts to a violation of his right to freedom of expression;

2. To declare that the laws of Burkina Faso with regard to libel and slander are inconsistent with the right to freedom of expression or, failing that, to find that the term of imprisonment for slander is inconsistent with the right to freedom of expression and therefore, to order Burkina Faso to amend its legislation accordingly; and
3. To Order Burkina Faso to pay him compensation, *inter alia* for the loss of income and benefits, and as damages for the moral hardship he has suffered.

6. In his Application, the Applicant, who was immediately sent to prison, seeks provisional measures “requiring Burkina Faso to release him immediately or, alternatively, to provide him with adequate medical care”.

II. Proceedings before the Court

7. By letter dated 10 July 2013, addressed to Counsel for the Applicant, the Registrar acknowledged receipt of the Application pursuant to Rule 34(1) of the Rules of Court.

8. By another letter dated 10 July 2013, addressed to the Foreign Minister of Burkina Faso, the Registrar forwarded a copy of the Application to the Respondent, pursuant to Rule 35(2) of the Rules. In the letter, the Respondent was asked to indicate, within thirty (30) days of receipt of the Application, the names and addresses of its representatives as required under Rule 35(4) of the Rules and to respond to the Application within sixty (60) days as required under Rule 37 of the Rules.

9. By letter dated 10 July 2013, addressed to the Chairperson of the African Union Commission, the Registrar informed her and, through her, the Executive Council of the African Union and other States Parties to the Protocol establishing the Court (hereinafter referred to as “the Protocol”) of the filing of the Application, pursuant to Rule 35(3) of the Rules.

10. By Note Verbale dated 18 July 2013, addressed to the Court, the Embassy of Burkina Faso and Permanent Mission to the African Union in Addis Ababa acknowledged receipt of the Registrar’s letter mentioned in the preceding paragraph.

III. On the prima facie jurisdiction of the Court

11. As stated in paragraph 6 above, the Applicant prays the Court to Order provisional measures.

12. In considering an Application, the Court must ensure that it has jurisdiction to hear the case, pursuant to Articles 3 and 5 of the Protocol.

13. However, before ordering provisional measures, the Court need not conclusively satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.

14. Article 3(1) of the Protocol provides that “the 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”.

15. Burkina Faso ratified the Charter on 6 July 1984 and the Protocol on 31 December 1998, and is therefore party to both instruments; it has equally on 28 July 1998 made the declaration accepting the competence of the Court to receive cases from individuals and non-governmental organizations, within the meaning of Article 34(6) of the Protocol.

16. In light of the above, the Court finds that it does have *prima facie* jurisdiction to hear the Application.

IV. On the provisional measures sought

17. Article 27(2) of the Protocol provides that “in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary”.

18. The first provisional measure sought by the Applicant is his immediate release.

19. The Court observes that consideration of the measure sought here corresponds in substance to one of the reliefs sought in the substantive case, namely that the punishment of imprisonment is in essence a violation of the right to freedom of expression; in the opinion of the Court, consideration of this prayer would adversely affect consideration of the substantive case.

20. For this reason, the Court cannot grant the Applicant's request for his immediate release within the framework of a provisional measure.

21. The second provisional measure sought by the Applicant is that, in the event his immediate release is denied, the Respondent be ordered to provide him with adequate medical care. He states that his health had deteriorated since his detention and that he needed medication and adequate medical care.

22. The Court observes that the Respondent, having been duly informed of these allegations, has not raised any objection. In the opinion of the Court, the situation in which the Applicant finds

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himself appears to be a situation that can cause irreparable harm. The Court is therefore of the opinion that the Applicant is entitled to access all medical care that his health condition requires.

23. For these reasons,

The Court:

- (i) By majority (Justices Ramadhani, Tambala and Thompson dissenting), *Rejects* the Applicant's request for immediate release;
- (ii) Unanimously,
 - Upholds his request to be provided with medication and health care for the entire period of his detention, in view of his health situation;
 - Consequently, Orders the Respondent to provide the Applicant with the medication and health care required;
 - Further Orders the Respondent to report to the Court within 15 days from the receipt of this Order on the measures it has taken to enforce the said Order.

Pursuant to Article 28(7) of the Protocol and Rule 60(5) of the Rules, the Joint Dissenting Opinion of Justices Ramadhani, Tambala and Thompson is appended to this Order.

JOINT DISSENTING OPINION OF JUSTICES RAMADHANI, TAMBALA AND THOMPSON

1. We have had the privilege of reading the Order of Provisional Measures in draft. We are however having great difficulty agreeing with the reasoning of the majority for refusing the first request by the Applicant, that is, "his immediate release". Surely the Applicant is not saying that he be released without more. He is asking that he be released provisionally pending the determination of his Application before this Court.

2. There is no reason why this cannot be done, especially when the Respondent that has been served with the Application which incorporates the request for provisional measures has not raised any objection.

3. The granting of this leg of the request for provisional measures will in no way touch or prejudice the substantive application. If the Application is refused the Applicant will simply be sent back to jail to complete his sentence.

4. Failure to grant this leg of the Application will cause irreparable harm. Admittedly, every case has to be judged on its own merits, but generally it can be said that personal freedom cannot be compensated

by monetary damages. In the present case, the Applicant's release from prison will aid, to a great extent, his request for medication and health care

[Report: Transcript]

[The following is the text of the judgment on the merits:]

JUDGMENT ON THE MERITS

I. SUBJECT OF THE APPLICATION

1. The Court is seized of this matter by way of an Application dated 14 June 2013 and filed by Barristers John R. W. D. Jones QC and Yakaré-Oulé (Nani) Jansen, acting on behalf of Lohé Issa Konaté, a Burkinabé national and Editor-in-Chief of *L'Ouragan* weekly published in Burkina Faso; the Application was received at the Registry on 17 June 2013 and registered as No 004/2013.

2. Attached to the Application is a request for provisional measures on which the Court ruled by Order dated 4 October 2013.

A. *Facts of the case*

3. Prosecution for defamation, public insult and contempt of court was initiated against the Applicant following the publication, in *L'Ouragan* on 1 August 2012, of an article written by him and titled "*Contrefaçon et trafic de faux billets de banque—Le Procureur du Faso, 3 policiers et un cadre de banque, parrains des bandits*" ("Counterfeiting and laundering of fake bank notes—the Prosecutor of Faso, three Police Officers and a Bank Official—Masterminds of Banditry") as well as an article by Roland Ouédraogo titled "*Le Procureur du Faso: un torpilleur de la justice*" ("The Prosecutor of Faso—a saboteur of justice"). The Applicant had published a second article written by himself in another issue of *L'Ouragan* dated 8 August 2012; that article was titled "*Déni de justice—Procureur du Faso: un justicier voyou?*" ("Miscarriage of Justice—the Prosecutor of Faso: a rogue officer?").

4. Having been accused in all three above-mentioned articles, the Prosecutor, Placide Nikiéma, filed a complaint for defamation, public insult and contempt of court, against the Applicant and Mr Ouédraogo. It is on these grounds that criminal proceedings were brought and damages sought, against the Applicant, before the Ouagadougou High Court.