**FESTUS A.O. OGWUCHE ESQ & ANOTHER V FEDERAL REPUBLIC OF NIGERIA**

Nigeria, Africa

**CLOSED**

**EXPANDS EXPRESSION**

MODE OF EXPRESSION

**Electronic**

DATE OF DECISION

**December 11, 2018**

OUTCOME

**Decision - Procedural Outcome, Application Granted, Decision Outcome (Disposition/Ruling), Injunction or Order Granted, Declaratory Relief, Violation of a Rule of International Law, ICCPR Violation, ACHPR Violation**

CASE NUMBER

**SUIT NO: ECW/CCJ/APP/10/15**

**JUDGMENT NO: ECW/CCJ/JUD/31/18**

JUDICIAL BODY

**Sub-regional African court (ECOWAS)**

TYPE OF LAW

**International/Regional Human Rights Law**

THEMES

**Content Regulation/Censorship**

TAGS

**Freedom of Expression and the Press, Political Broadcast, Censorship, Radio, Television, Social Media**

**CASE ANALYSIS**

**Case Summary and Outcome**

The Community Court of Justice of Economic Community of West African States (ECOWAS Court) held that freedom of speech of the plaintiffs was violated by the defendant as the act of the defendant was tantamount to censorship and granted the reliefs sought by the plaintiffs. The court went further to restrain the defendant from further violating the plaintiffs’ human rights to freedom of expression. The first plaintiff in the suit is a member of the ECOWAS community, a lawyer, broadcaster and the head of the second Plaintiff. The second plaintiff is a firm of solicitors that engage in human rights advocacy, advancement of democracy and good governance and sponsors radio and television broadcast on the aforementioned subjects. The ECOWAS Court held in particular that the letter sent by the defendant to the plaintiffs titled “Additional Regulation for Live Political Broadcasts” dated May 30, 2014 constitutes censorship and thereby infringed upon the plaintiffs’ freedom of expression.

**Facts**

The Plaintiffs who are into broadcasts of programmes on human rights advocacy, advancement of democracy and good governance in 2014 received a letter from the defendant through its agency, National Broadcasting Commission (the Commission)directing that the plaintiffs and indeed all Broadcasting Houses to give 48 hours prior notification to the commission before airing any live political programme. The directive is contained in a letter titled “Additional Regulation for Live Political Broadcasts” dated May 30, 2014. The letter indeed alleges that contents of political live programmes which are inciting, provocative, highly divisive and threaten the peace and unity of the country are being transmitted, hence the plaintiffs and all Broadcasting Houses must give 48 hours prior notification to the Commission before airing any live political programme. The defendant further threatened “withdrawal of broadcast license, outright closure of broadcast outfits, direct censorship of all broadcast materials and seizure of broadcast equipment of any organization that does not comply with the directives of the said letter” The defendant afterwards went ahead to stop the plaintiffs’ live broadcasts on Radio, Television, Social Media thereby hampering Plaintiffs’ programmes on social advocacy for good governance and human rights. The Plaintiffs in response, wrote to the defendant about the unlawfulness of the defendant’s action and requested for any specific proof of abuse of transmission program which threatens the peace and unity of the country. The defendant however, provided no response to this request from the plaintiffs.

Aggrieved by this development, the plaintiffs instituted an action before the ECOWAS Community Court of Justice by an application dated March 18th, 2015 and same was served on the defendant on April 7th, 2015. The defendant in response to this suit filed a Notice of Preliminary Objection challenging the jurisdiction of the court in the Notice of Preliminary Objection dated May 14th, 2015 and served on the Plaintiff on May 15th, 2015 the following day. The defendant in the said Preliminary Objection argued that the issues raised in the suit by the plaintiffs are non-justiceable under the Nigerian Constitution of 1999 (as amended) and do not fall within the jurisdiction of this court as they are part of Directive Principles of State Policy. The defendant further argued in the said Objection that National Broadcasting Commission was only performing its oversight functions in accordance with the laws of Nigeria and there was no violation of human rights of the plaintiffs and as such no cause of action arose for the plaintiffs, the suit is frivolous and same should be dismissed. On June 11th, 2015, Plaintiffs filed a response to the Defendant’s Preliminary Objection submitting to the court that the subject matter of the suit is premised on allegation of violation of fundamental rights of the plaintiffs which is within the jurisdiction of the court. The plaintiffs further submitted in particular that the letter from the defendant raises and issue of violation of the plaintiffs’ fundamental right to freedom of expression.

On January 24th, 2017 the defendant’s Preliminary Objection was however struck out for want of diligent prosecution as the suit has been consistently stalled at the instance of the defendant. Previously, the matter could not go on November 7th, 2016 at the instance of the defendant for absence of the defendant’s lead counsel and adjournment was sought and granted at the instance of the defendant, while the defendant was not at all represented on December 7th, 2016, the next date of proceedings. The court on 24th, 2017 after striking out the Preliminary Objection of the defendant subsequently ordered that the suit would proceed to determination mainly on the basis of the claims of the plaintiffs. The matter was therefore adjourned to 20th March, 2017 for hearing. The suit was subsequently called on October 16th 2017, the plaintiff represented himself in court. The defendant was absent and was not represented. The matter was heard and was adjourned to December 5th, 2017 for judgment.

On November 8, 2018 the matter came up again and the court was constituted by a new panel of judges. The 1st Plaintiff was present in court but the defendant was neither present nor presented, even after having been served with several hearing notices. Plaintiffs adopted all their pleadings and prayed the court for a date for judgment. The court deemed all the submissions adopted and ordered that the judgment date will be communicated to the parties.

**Decision Overview**

Asante J led the three man panel that sat on the matter and delivered judgment. The panel comprised the trio of Asante, Atoki and Costa JJJ. The two issues for determination are: (i) Whether the Court has Jurisdiction to adjudicate on this case (ii) Whether there is any violation of the Human Rights of the Plaintiffs to Freedom of Speech/Expression (Pg.6). The Plaintiffs argued that the suit is for the enforcement of their fundamental rights to freedom of Speech/Expression and that the court has jurisdiction to adjudicate on the suit. The plaintiffs premised their contention that the court is seized with jurisdiction over the matter on the fact that the complaint on fundamental human rights violation in any member state by virtue of Article 9(4) and 10 (d) of the 2005 Protocol on the court confers jurisdiction on the court in the matter.

Article 9 (4) of the 2005 Protocol on the court as amended states that *“The Court has jurisdiction to determine cases of violations of Human Rights* *that occur in any Member State.”*

While Article 10 (d) of the 2005 Protocol on the Court as amended states *“Individuals on application for relief for violations of their Human Rights; the* *submission of application for which shall:*

*(I) not be anonymous; nor*

*(ii) be made whilst the same matter has been instituted before another international court for adjudication”*

The plaintiffs proceeded to argue that the requirement to notify the National Broadcasting Commission in writing 48 hours before live political broadcast will be aired and the eventual closure of the transmission of their media programs are violations of their human right to freedom of speech. The Plaintiffs further relied on Article 19 of the ACHPR to support their claim. Article 19 of African Charter on Human and People’s Rights (ACHPR) states that:

*“All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by*

*another.”*

In submitting that there were violations of their rights to freedom of speech The Plaintiffs alleged that they received a letter from the defendant directing that all political live programs must be submitted 48 hours before broadcast to the defendant to avoid divisive, inciting and hateful speech that were being transmitted on the plaintiffs’ programme. The plaintiffs however requested by a letter to the defendant that the defendant should produce the proofs of allegation of divisive, inciting and hateful speeches in the plaintiffs’ programme. The defendant did not give any response, rather followed up with a decision to close down Plaintiffs’ media programs in violation of their human rights to freedom of speech. The plaintiffs in arguing the alleged violation of their human right to freedom of speech cited the provisions of Article 9 of African Charter on Human and People’s Rights (ACHPR) that provide that:

1. *Every individual shall have the right to receive information.*

*2. Every individual shall have the right to express and disseminate his*

*opinions within the law”* They also cited Article 19 (2) of the International Covenant on Civil and Political Rights (ICCPR) which provide that:

*“Everyone has the right to freedom of opinion and expression; this right*

*includes the right to hold opinions without interference and to seek, receive*

*and impart information and ideas through any media regardless of*

*frontiers.”*

The plaintiffs also relied on Article 19 of the Universal Declaration on Human Rights (UDHR) which provides for freedom of expression. The plaintiffs therefore argued that any interference with the right to freedom of expression and the right to hold free opinions in any media as in their circumstance constitutes a violation of human right to freedom of expression.

In determining whether the court has jurisdiction over the matter, the court stated that “mere allegation of Human Rights violation as opposed to the veracity of the claim has been held by the court in decided cases, to be sufficient enough to trigger its jurisdiction to adjudicate on allege violation of Human Rights provided for in the African Charter on Human Rights” (Pg.8). In establishing this position, the court relied on its decision **His Excellency Vice-President Alhaji Samuel Sam-Sumana V Republic of Sierra Leone.-SUIT NO: ECW/CCJ/APP/38/16 and JUD NO:ECW/CCJ/JUD/19/17 (At page 14 of the judgment)** where the court held that “*“Indeed Allegations of violations of Human Rights by an Applicant is sufficient to invoke the jurisdiction of this Court. This is distinct from the issues of the veracity of the allegation.”*”

The honourable court again went ahead to cite the case of **Hissein Habre v. Republic of Senegal; ECW/CCJ/APP/07/08 & ECW/CCJ/03/10**, where the court held that in determining whether it has jurisdiction, itshall consider:

*If the issues submitted before it deals with a right which has been*

*enshrined for the benefit of the human person;*

*Whether it arises from international or community obligations of the state*

*complained of, as Human Rights to be promoted, observed, protected, and*

*enjoyed;*

*Whether it is the violation of that right which is being alleged.*

The court gave the only condition that can make it impossible for a party to invoke the jurisdiction of the court. That condition if when the case has already been taken up by another competent international court. This position was emphasized in the decision of the court in **El Haji Mame Abdou Gaye v. Republic of Senegal ECW/CCJ/JUD/01/12 at Para 28 and 46.** The court finally held that it was satisfied that the subject matter of the instant case being a human rights violation is “sufficient to activate the jurisdiction of the court on the matter” (Pg.9).

On the issue ofwhether there is a violation of the rights of the Plaintiffs tofreedom of expression, the Court needs to examine the Human Rights instrumentwhich provides for the right to freedom of expression. Freedom of expression is protected under Article 9 of the African Charter on Human and Peoples’ Rights (ACHPR), Article 19 International Covenant on Civil and Political Rights (ICCPR) and Article 19 of the Universal Declaration on Human Rights (UDHR). The court cited its decisions bothering on issues on freedom of expression and significant among them was the recent case of **Federation of African Journalists & 4 Ors v. The Gambia (Judgment No: ECW/CCJ/JUD/04/18)** where the applicants instituted the action based on breach of rights to freedom of expression. The Court held that:

*“Having critically examined the criminal laws of The Gambia, the Court*

*declares that the criminal sanctions imposed on the applicants are*

*disproportionate and not necessary in a democratic society where freedom*

*of speech is a guaranteed right under the international provisions cited’’.*

The court went on;

*‘’It is our view that the impugned provisions cast excessive burden upon the*

*applicants in particular and all those who would exercise their right of free*

*speech and violates the enshrined rights to freedom of speech and*

*expression under Article 9 of the African Charter, Article 19 of the ICCPR and Article 19 of UNDHR”*

The Court found that the letter of “Additional Regulations” from the defendant directing the Plaintiffs to submit their Political Live programs for vetting 48 hours before broadcast every time, cast excessive burden upon the Plaintiffs and violates their rights to freedom of speech and expression. In emphasizing and establishing the extent of violation of the plaintiffs’ right to freedom of speech and expression, the court cited the case of **Deyda Hydara JR. and Anor v. The Gambia (Suit No: ECW/CCJ/APP/30/11 Judgment No: ECW/CCJ/JUD/17/14) where it held that** *“These provisions, guarantee the right to life and also freedom of expression… A State also will be in breach of international law and treaty obligations, if it fails to protect media practitioners including those critical of the regime. For freedom of expression also includes the freedom to criticize the government and its functionaries, subject to limitations imposed by the domestic laws”*

The court however noted that freedom of expression may be restricted but must be in accordance with laid down parameters. These parameters the court noted are contained in Article 19 (3) of the ICCPR which provides that:

*A. For respects for the Rights or reputations of others.*

*B. For the protection of National Security or of public order (ordre public) or*

*of public health and morals.*

The court further observed that Article II of the African Commission on Human and Peoples’ Rights Declaration of Principles on Freedom of expression in Africa ( 32nd Session, 17-23 October, 2002) Banjul, The Gambia, Article XII (2) also makes such a limiting provision:

*1. No one shall be subject to arbitrary interference with his or her freedom*

*of expression.*

*2. Any restrictions on freedom of expression shall be provided by law, serve*

*a legitimate interest and be necessary in a democratic society.*

The Defendant indeed failed to establish proof of Plaintiffs’ media programs which constituted a threat to National Security, Public Order, or Public health and morals, to justify the internationally recognized exceptions within the law, in which freedom of expression may be restricted. This the defendant failed to do even when the plaintiffs demanded for proof of inciting and divisive programme content that may fall within the exception provided for by the law to warrant the closure of their outfit but the defendant did not provide any.

Finally, the court declared it had jurisdiction to hear the matter which was premised on allegation of violation of Human Rights. Having held that it had jurisdiction, the court found that the freedom of speech of the Plaintiffs has been violated by the defendant and granted the declarations sought by the Plaintiffs in paragraphs 23, 24, 25, 27 and 28 of their originating process and in the judgment. The court further ordered that the said defendant’s letter titled “Additional Regulation for Live Political Broadcasts” dated May 30, 2014 be withdrawn and restrained the defendant from further violations of the Plaintiffs’ Human Rights to freedom of Expression.

**DECISION DIRECTION**

This decision expands Freedom of Expression as it found that that the act of request for prior notification by 48 hours before airing a live political programme and that of threat of direct censorship by the defendant violated the Plaintiff’s Freedom of Expression.

**GLOBAL PERSPECTIVE**

**Related International and/or Regional Laws**

African Charter on Human and People’s Rights, art.9

International Convention on Civil and Political Rights, art.19

Universal Declaration of Human Rights, art.19

African Commission on Human and Peoples’ Rights Declaration of Principles on Freedom of expression in Africa (32nd Session, 17-23 October, 2002) Banjul, The Gambia, Article XII (2)

ECOWAS Protocol on Democracy and Good Governance

ECOWAS, Private Alimu Akeem v. Federal Republic of Nigeria ECW/CCJ/RUL/05/11, pg. 119

ECOWAS, Federation of African Journalists & 4 Ors v. The Gambia (Judgment No: ECW/CCJ/JUD/04/18)

ECOWAS, El Haji Mame Abdou Gaye v. Republic of Senegal ECW/CCJ/JUD/01/12 at Para 28 and 46

ECOWAS, His Excellency Vice-President Alhaji Samuel Sam-Sumana v. Republic of Sierra Leone.-SUIT NO: ECW/CCJ/APP/38/16 and JUD NO: ECW/CCJ/JUD/19/17

ECOWAS, Hissein Habre v. Republic of Senegal; ECW/CCJ/APP/07/08 & ECW/CCJ/03/10

ECOWAS, Deyda Hydara JR. and Anor v. The Gambia (Suit No: ECW/CCJ/APP/30/11 Judgment No: ECW/CCJ/JUD/17/14)

Chief Ebrimah Manneh v. The Gambia (2004 – 2009) CCJELR, 181

Musa Saidykhan v. The Gambia (2010) CCJELR, 139

**National Standards, Laws or Jurisprudence**

Constitution of the Federal Republic of Nigeria, 1999 (as amended): Sections 6(6)(c), 22 and 39(1)

National Broadcasting Commission Act, Cap NII, Laws of Federation 2004

**CASE SIGNIFICANCE**

The decision establishes influential or persuasive precedent outside its jurisdiction.

**OFFICIAL CASE DOCUMENTS**

The Judgment