IN THE COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

HOLDEN AT ABUJA - NIGERIA

In the Case of

KABIROU MBODJE against STATE OF SENEGAL.

Application N°: ECW/CCJ/APP/46/23Judgment N°. ECW/CCJ/JUD/23/25

JUDGMENT

Delivered in

ABUJA

On 12th April 2025

CASE N°: ECW/CCJ/APP/46/23

JUDGMENT N° ECW/CCJ/JUD/23 / 25

KABIROU MBODJE

APPLICANT

V.

STATE OF SENEGAL

RESPONDENT

BEFORE THEIR LORDSHIPS:

Hon. Judge Ricardo Claúdio Monteiro GONÇALVES - Presiding

Hon. Judge Gberi-Bè **OUATTARA** - Judge Rapporteur/Member

Hon. Juge Edward Amoako **ASANTE** - Member

ASSISTED BY:

I. ***REPRESENTATION OF THE PARTIES:***

Legal and Fiscal Law Firm
A Firm registered with the Barr in Dakar, Senegal Counsel to the
Applicant

STATE Judicial Agent
Legal Representative of Senegal Counsel to the
Respondent

II. ***JUDGMENT OF THE COURT***

This is the judgment delivered by the Court in a virtual public hearing in accordance with Article 8(1) of the Practice Directions on Electronic Case Management and Virtual Hearings, 2020.

III. ***DESIGNATION OF THE PARTIES***

1. The applicant is:

Kabirou MBODJE a Senegalese citizen domiciled in Paris, France, (hereinafter referred to as 'the Applicant');

2. The Respondent is the State of Senegal, a Member State of the Community, signatory to the African Charter on Human and Peoples' Rights and other international instruments relating to the protection of human rights (hereinafter "the Respondent");

IV. *INTRODUCTION*

3. The purpose of these proceedings is to examine the application by which the applicant seeks a declaration that the defendant has infringed his right to a fair trial, in particular the principle of *res judicata* or '*non bis in idem*' and the violation of his right of defence;

V. *PROCEDURE BEFORE THE COURT*

4. On 23 November 2023, the Applicant filed an Application with the Court Registry against the Respondent for violation of his human rights.
The Respondent was notified of this Application on the same day, 23 November 2023;

5. On 22 December 2023 the Respondent filed a statement of defence with the Registry.
The Applicant was notified of the statement of defence on 9 January 2024;

6. Reacting to the Respondent's Statement of Defence served on it, the Applicant lodged a Reply at the Registry on 24 January 2024.
The Respondent was notified of the Applicant's reply on the same day;

7. On 7 February 2024 the defendant lodged at the Registry a rejoinder in response to the applicant's reply.
The defendant's rejoinder was served on the Applicant the following day, 8 February 2024;

8. The written phase of the proceedings having been completed with the production of the respondent's rejoinder, there was a Court hearing on 25 September 2024 where the parties were heard. At this hearing, all the parties were represented by their lawyers, who pleaded the case on the merits. At the end of the hearing, the Court slated the case for deliberations;

VI. *ARGUMENTS BY THE APPLICANT*

a) *Summary of facts*

9. By application dated 21 November 2023, registered at the Court Registry on 23 November 2023, Kabirou MBODJE, a Senegalese citizen, brought an action before the Court against the State of Senegal for violation of his fundamental rights;

10. Kabirou MBODJE states that following a dispute between him and Seyni CAMARA and Malick FALL relating to the management of the company called Cellular System International (CSI), in which they were all shareholders, Seyni CAMARA lodged a complaint against him with the Public Prosecutor on 27 December 2012 for misuse of company assets, forgery and use of forged documents;

11. The applicant states that in response to this complaint, a judicial investigation was launched at the office of the Dean of Investigating Judges of the Dakar's ***Tribunal de Grande Instance hors classe*** (a Higher and special Tribunal);

12. The applicant states that, as he considered that the charges against him had not been established, he applied, through his counsel, to the Examining Magistrate for an order dismissing the case. As his application was declared as inadmissible by the Examining Magistrate, he appealed against that decision to the Indictments Division of the Dakar Court of Appeal;

13. The applicant states that, at the end of the proceedings before it, the Indictments Division quashed the order of the Examining Magistrate and, ruling afresh, held that there was no case to answer against him for misuse of corporate assets pursuant to Articles 200(2) and 203(3) of the Senegalese Code of Criminal Procedure;

14. The applicant states that this judgment of the Indictments Division of the Dakar Court of Appeal was appealed against by Seyni CAMARA before the Criminal Chamber of the Supreme Court of Senegal which, by judgment no. 10 of 5 April 2018, dismissed the appeal. (**Judgment No. 143 of 24 May 2016 of the Indictment Chamber and Judgment No. 10 of 5 April 2018 of the Criminal Chamber are produced in the case file**);

15. The applicant submits that the decisions to dismiss the case should put a definitive end to the misuse of company assets proceedings brought against him

because of the principle that there should be 'no new proceedings for the same facts', a principle expressed by the expression '*non bis in idem*';

16. However, he states that against all expectations, Malick FALL, Cheikh TAGUE and Seyni CAMARA have filed a new complaint against him for breach of trust pursuant to Article 383 of the Criminal Code;

17. The applicant states that following their complaint, a judicial investigation was opened at the Second Investigating Chamber of the Dakar High Court (TGIHCD) which, by order of 28 May 2020, referred him to the Criminal Court for trial;

18. The applicant submits that by judgment No 772/2021 of 24 November 2021, the 3rd Criminal Chamber of the TGIHCD sentenced him to two (2) years' imprisonment, six (6) months out of which he would be in confinement, and to a fine of one million (1,000,000) CFA francs, after reclassifying the offence of breach of trust as a misuse of company assets, and to pay the sum of five billion (5,000,000,000) CFA francs in damages;

19. The Applicant considers that the defendant, through its public service of Justice, has violated his rights, in particular his right not to be tried twice for the same offences.

b) ***Pleas – in - law invoked***

20. In support of his application, the applicant relies on the following pleas-in-law:

-Violation of article 14.3-d, 14.7 of the ICCPR.

- Violation of articles 1, 5 and 7 of the ACHPR;

- Violation of articles 3 and 11 of the UDHR;

-Violation of article 7 of the Constitution of the State of Senegal.

c) ***Conclusions***

21. The applicant solicits that may it please the Honourable Court

-To find that the Respondent has violated the provisions of the Senegalese Constitution;

-To find that the defendant has violated the provisions of Articles 1, 5 and 7 of the ACHPR;

-To find that the Respondent has violated the provisions of Article 14.7 of the ICCPR;

-To find that the Respondent has breached the provisions of Articles 3 and 11 of the UDHR;

-To order the defendant to comply with the principle of '*non bis in idem*';

-To order the defendant to pay the applicant the sum of two hundred billion (200,000,000,000) CFA francs as compensation for the financial, material and moral prejudice suffered;

-To order the respondent to bear all costs in accordance with Articles 66 et seq. of the Rules of Court.

VII. ARGUMENTS BY THE DEFENDANT

a) Summary of facts

22. The defendant counters that the applicant merely recounts the court decisions without setting out the facts underlying those decisions;

23. The Respondent explains that the first proceedings which resulted in a dismissal were based on misuse of corporate assets and the credit of the company CSI. These proceedings were initiated by Seyni Camara;

24. In fact, the Respondent reports that on 27 December 2012, Seyni CAMARA lodged a complaint against the applicant for misuse of corporate assets, forgery and use of forged private documents. In order to dismiss the case against the applicant, the Indictment Chamber's judgment of 24 May 2016 (**Exhibit 1**) relied on the existence in the file of a report dated 28 September 2014 drawn up by the expert Amadou SAMB, which attests that the expenses incurred by the company CSI (salaries, accommodation, telephone and travel expenses) for the benefit of the applicant for the period from 22 February 2011 to 04 December 2012, were certainly not authorised by the corporate bodies but did not constitute fraud with harmful consequences for the company. The same applies to the remuneration paid by the company to the applicant during the same period;

25. The defendant states that the second set of proceedings, which resulted in the order for partial dismissal and referral to the criminal investigation department on 28 May 2020, was initiated by Malick FALL, Cheikh TAGUE and Seyni CAMARA, who lodged a complaint with the Public Prosecutor against the Applicant for misuse of corporate assets and illegal increase in share capital on 09 January 2015;

26. The Respondent states that the ***Tribunal de Grande Instance Hors Classe*** (a Higher and special Tribunal) of Dakar (TGIHCD) convicted him of misuse of corporate assets on 24 November 2021, on the grounds that the Applicant had put the assets of the company CSI to personal use. The judgment noted that the applicant had made several expenses, in particular by using the bank credit card without supporting documents, and that this state of affairs had been confirmed by Expert Ngor DIOUF, who noted in his report that with regard to the CSI bank account opened in the books of CNCAS, cash withdrawals and credit card payments were estimated at six hundred and ninety-one million nine hundred and ninety-nine thousand six hundred and fifty-nine (691,992,659) CFA francs. According to the court, the expert specified that of the four hundred and twelve million four hundred and twenty-eight thousand two hundred and ninety-one (412,428,291) CFA francs that he had analysed, only an amount of seventy-eight million ninety-eight thousand six hundred and forty-three (68,098,643) CFA francs had been justified;

27. The defendant maintains that the two judicial investigation proceedings instituted against the applicant were conducted concurrently in the two investigating chambers without the applicant raising the slightest objection;

28. The defendant states that it was in this context that on 24 November 2021, the Dakar Criminal Court sentenced the applicant to two (2) years' imprisonment, in six (6) months out of which he was to be placed in confinement, and a fine of one million (1,000,000) CFA francs for misuse of corporate assets. Through his counsel, the applicant appealed against this judgment and the case is still pending before the Dakar Court of Appeal. However, citing an alleged malfunction of the public justice system, the applicant brought the present case before the ECOWAS Court of Justice;

b) *Pleas – in – law invoked*

29. In support of its arguments, the defendant pleads

-The absence of the violation of the Applicant's human rights;

c) *Conclusions*

30. The defendant requests that may it please the Honourable Court

-To declare that the defendant has not violated the provisions of the Senegalese Constitution;

-To find that the defendant has not violated the provisions of Articles 1, 5 and 7 of the ACHPR;

-To find that the Respondent has not violated the provisions of Article 14.7 of the ICCPR;

-To find that the respondent has not violated the provisions of articles 3 and 11 of the UDHR;

To order the applicant to pay the defendant the sum of one hundred million (100,000,000) CFA francs as damages for non-material loss and one hundred million (100,000,000) CFA francs for legal costs incurred;

-To order the applicant to bear all costs;

VIII. *JURISDICTION*

31. The Court points out that its jurisdiction in human rights matters is governed by the provisions of Article 9(4) of Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 on the Court of Justice, which provides that: « *The Court has jurisdiction to hear cases of breaches of human rights that occur in any Member State* »;

32. The Court notes that the rights relied on by the applicant, namely the violation of his right to a fair trial, in particular res judicata and the right of defence, form part of the human rights within its jurisdiction;

33. Since the Respondent is a Member State of ECOWAS, all the conditions are met for the Court, in accordance with its settled case-law, to assume jurisdiction;

IX. *ADMISSIBILITY*

34. The Court recalls that the admissibility of applications before it is governed by the provisions of Article 10-d of Supplementary Protocol A/SP.1/01/05 of 19

January 2005 amending Protocol A/P.1/7/91 on the Court, which provides that: « *Access to the Court is open to individuals who are victims of the violation of their human rights;*

The application submitted for this purpose:

i) *i) shall not be anonymous ;*

ii) *ii) shall not be brought before the Court of Justice of the Community where it has already been brought before another competent international court.*;

35. In the present case, the Court notes that the applicant is clearly identified. He is Kabirou MBODJE. The application is therefore not anonymous;

36. Furthermore, there is no evidence that the applicant has referred the same matter to another international court or tribunal with jurisdiction in human rights matters. In these circumstances, in accordance with its settled case-law, the Court has no option but to declare the application admissible in so far as it has satisfied all the textual requirements;

X AS TO THE MERITS OF THE CASE

37. The applicant alleges that the defendant violated his right to a fair trial under Article 7 of the ACHPR, Article 10 of the UDHR and Article 14 of the ICCPR, in particular by violating the principle of *res judicata* (A) and violating the right of defence (B).

Before making any decision, the Court will examine all the applicants' claims in turn;

38. The Court notes that the concept of a fair trial encompasses a number of rights accorded to persons who are the subject of judicial proceedings or a preliminary investigation. These include, in particular, the right of defence, the adversarial principle, the exception of *res judicata*, equality of arms, the right to an effective remedy, the presumption of innocence, the right to be tried within a reasonable time and so on;

39. The right to a fair trial is a fundamental right. It is governed in particular by Article 14 of the ICCPR, which provides that « *All persons are equal before the courts and tribunals. In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing by a competent tribunal established by law.... » ;*

40. The Court observes that in the present case, although the applicant contends that the defendant violated his right to a fair trial, he insists that the principle of *res judicata* (A) and the right of defence (B) were violated;

A ON THE VIOLATION OF THE PRINCIPLE OF *RES JUDICATA*

41. The applicant alleges a violation of Article 14.7 of the ICCPR, Article 3 of the UDHR and Article 6 of the ACHPR;

42. He maintained that the provisions of Article 14.7 of the ICCPR set out the principle of *non bis in idem*, which designates the principle of *res judicata* in

criminal proceedings and absolutely prohibits further proceedings against the same person for the same facts;

43. The applicant asserts that the said principle responded to a concern to protect the individual freedoms of the person prosecuted, which constituted a fundamental guarantee for the protection of human rights;

44. He maintained that the defendant had violated that principle with regard to the facts of the legal proceedings between him and the other shareholders of CSI Sarl;

45. Indeed, the applicant points out that by **judgment no. 143 of 24 May 2016**, the Indictments Division ordered a dismissal of the case against him and that it is common ground that the appeal lodged by Seyni CAMARA, the civil party, was dismissed by the Criminal Division of the Supreme Court, thereby confirming the dismissal of the case ordered by the Indictments Division of the Dakar Court of Appeal;

46. Thus, he considers that the criminal proceedings initiated against him were terminated by the aforementioned judgments and that it was in violation of the principle set out in Article 14-7 of the ICCPR that he was convicted by the 3rd Criminal Chamber of the TDIHC of Dakar, in **judgment no. 772/2021 of 24 November 2021** for the same facts (offence of misappropriation of corporate assets) even though he had been prosecuted for the same facts and benefited from a total dismissal;

47. The applicant points out that Article 182 of the Senegalese Code of Criminal Procedure provides that: « *An accused person in respect of whom the Examining Magistrate has ruled that there are no grounds for prosecution may no longer be prosecuted for the same act, unless new evidence emerges.*» ; In his opinion, through this text, the defendant has clearly enshrined the principle set out in Article 14-7 of the ICCPR in its legal arsenal, with a view to protecting the rights of those being prosecuted, while at the same time making an exception to this principle (discovery of new evidence), the implementation of which is the sole responsibility of the Public Prosecutor (Article 184 of the Code of Criminal Procedure);

48. In light of all these facts, the applicant concludes that he was prosecuted a second time for the same charges, whereas during the second proceedings he had to invoke the *non bis in idem* principle, i.e. the authority of *res judicata* on the basis of the decisions handed down by the Indictments Division of the Dakar Court of Appeal, and the Criminal Division of the Supreme Court of Senegal;

49. He alleges that in the present case, there is no doubt that Article 14-7 of the ICCPR has been violated because he was tried twice for the same facts, i.e. the offence of misuse of corporate assets;

50. The Applicant states that the violation of article 14-7 of the ICCPR results in the violation of the other articles cited in support of the application, in particular article 6 of the ACHPR and article 3 of the UDHR, because by convicting him of acts for which he had already benefited from a dismissal, the Respondent has,

through its public service of justice, infringed his freedom, his security and even his dignity;

51. The respondent asserted that the applicant was seeking to have the idea accepted that he was being prosecuted for the acts for which his case was earlier dismissed. He points out that the judicial decisions, in particular the **decision of 24 May 2016** by the Dakar Court of Appeal to dismiss the case and the **judgment of 24 November 2021** by the Dakar TGIHC, refer to proceedings based on different facts committed at different times;

52. The defendant points out that there is nothing in Senegalese positive law, or in international law, that prohibits new prosecutions based on new evidence. Senegal points out that the *non bis in idem* rule means that no one can be prosecuted or punished afresh on the basis of the same facts and that this cannot in any way concern evidence of the same nature which emerges after a decision has become final and therefore irrevocable; it also means that no one can be prosecuted or punished for the second time on the basis of the same charges and that this cannot in any way concern facts of the same nature which emerge after a decision has become final and therefore irrevocable;

53. Furthermore, the respondent criticises the applicant for invoking the *non bis in idem* principle even though he had lodged an appeal against the judgment of conviction, as evidenced by the extract from appeal document number 0875 dated 13 December 2021 in the file;

54. The Respondent points out that in criminal matters, an appeal against a judgment lodged by the accused nullifies the criminal provisions of that judgment in accordance with the provisions of Article 495 of the Code of Criminal Procedure, which provides that "*During the time limits for appeal and during the appeal proceedings, the enforcement of the judgment is suspended, subject to the provisions of Articles 451, paragraphs 2 and 3, 458, 496 and 679*".

55. The defendant points out that the decision of the criminal court becomes final when all avenues of appeal have been exhausted and that there is no longer any possibility of bringing an action before the Court of Appeal or appealing to the Supreme Court, but that only an exceptional remedy revision, can modify it.

Senegal concludes that it had not violated the applicant's rights.

LEGAL ANALYSIS BY THE COURT

56. The Court notes that the principle of *res judicata* is the legal consequence of a judicial decision which is no longer subject to appeal either because the remedies have already been exercised or because the time-limit for exercising them has already expired;

57. The Court observes that the principle of *res judicata* applies only in respect of what has been the subject of a judicial decision where the claim is based on the same cause of action between the same parties acting in the same capacities and the relief sought is the same;

58. The Court notes that it is universally recognised, as a cardinal principle of national and international law, that once an investigation has been closed, it must not be reopened in order to avoid the risk of double jeopardy for the accused for the same offence;

59. The Court points out that the rule of law requires that when proceedings are brought against an individual, the decision rendered may, under certain conditions, become final and acquire the force of *res judicata*. If this were not the case, the principle of legal certainty, which protects individuals from being sued afresh by the same party, for the same purpose and on the same grounds, would be seriously compromised. This position was affirmed by the European Court of Human Rights in the Eco Swiss, part and Klöber judgment of 30 September 2003. In this judgment, while stressing the importance of the principle of *res judicata*, which in its view cannot be challenged, the Court ruled that '*in order to guarantee*

both the stability of the law and of legal relations and the proper administration of justice, it is important that judicial decisions which have become final after all available remedies have been exhausted or after the time-limits for such remedies have expired should not be called into question';

60. The Court is of the opinion that it is to avoid judicial harassment that once a court has ruled and its decision has become *res judicata*, no other court may rule again on the same dispute;

61. The Court notes that in the present case it is apparent from the case file that the applicant was involved in two different criminal proceedings brought successively by some of his associates;

62. The Court notes that in the first set of proceedings initiated by Seyni CAMARA and concerning the company Cellular System International (CSI) Sarl, a judgment dismissing the case was handed down and became *res judicata*, but that despite that judgment, another set of criminal proceedings was brought against the Applicant by Malick FALL, Cheikh TAGUE and Seyni CAMARA concerning the company INTERACTIVE Sarl. At the end of the second set of proceedings, he was convicted of misuse of corporate assets, which was also the offence against him in the first set of proceedings. The applicant therefore maintains that the defendant, through its justice public service, violated his rights, i.e. the right not to be tried twice for the same offense;

63. The Court notes, however, that the first set of proceedings, initiated by Seyni Camara on 27 December 2012, related to charges of misuse of corporate assets, forgery and use of forgeries in private documents drawn from facts of misuse of corporate assets and the company's credit card;

64. The Court notes that the judgment dismissing the case in these first proceedings was based on an expert report dated 28 September 2014 drawn up by Expert Amadou Samb, according to which the expenses borne by the company CSI (salaries, accommodation, telephone and travel) for the benefit of the

applicant, for the period from 22 February 2011 to 04 December 2012, was certainly not authorised by the corporate bodies but it did not constitute fraud with a harmful consequence for the company. The expert added that the same applied to the remuneration paid by the company to the claimant for the period from 22 February 2011 to 04 December 2012.

With regard to the second set of proceedings initiated by Malick FALL, Cheikh TAGUE and Seyni CAMARA on 09 January 2015, the Court emphasised that they related to charges of misuse of corporate assets and illegal increase in share capital, for which the case was partially dismissed in favour of the applicant and also referred to the criminal court on 28 May 2020. The Dakar TGIHC sentenced him to overall two years' imprisonment, out of which he must spend six months in confinement on 24 November 2021;

65. In this second case, the judge found that the accused had used the assets of the CSI company for personal purposes and that he had made several expenses, in particular by misusing his bank credit card without supporting documents. The judgement stated that this fact was confirmed by the expert Mr. Ngor Diouf, who noted in his report,

66. Finally, the Court notes that in the first proceedings, the judgment of 24 May 2016 dismissing the case by the Indictment Chamber was based on the management of the current account, which was associated with some expenses that were supported by the company CSI to the credit of the Applicant (salaries, travels in business class, lodging in expensive hotels, electricity and telephone bills, non-professional travels, payment for accommodation), all occurring during the period from 2008 to December 2012 ;

67. In the second proceedings, the judgment of 24 November 2021 by the 3rd Criminal Chamber was delivered upon the case filed by the three Applicants i.e. Messrs. Seyni Camara, Cheikh Tague and Malick Fall, following more extended evidence by investigations and statements by many shareholders and employees

of the company. These charges border on the unlawful sack of the Manager of the company called INTERACTIVE Sarl, the self-awarded exorbitant salaries, the abusive use of the company CSI Sarl's credit card, which translated into non – justified expenses, the non-distribution of dividends to the company's associates, fund transfers and the pushing of the activities of the company INTERACTIVE Sarl to other companies, among other things. The said charges occurred during the period 2013-2015 ;

68. The Court concludes that if in the first and second proceedings the offenses retained against the Applicant were the same i.e. the misuse of *corporate assets,* the second proceedings were distinguished from the first by different charges, which were more important and posterior to those of the first proceedings, as well as a higher number of Applicants i.e. three, instead of one, even if the only Applicant in the first proceedings was also part of these Applicants in the second. Thus, the two proceedings were not the same, as the facts of the second case were different, and they occurred at different moments, even if the offenses in the two proceedings were qualified to by the same appellation;

69. The Court therefore considers that the applicant is wrong to allege a violation of Article 14.7 of the ICCPR, which provides that: '*No one shall be liable to be tried or punished again for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of each country'*;

70. The Court also considers that the Respondent has not violated the provisions of Article 3 of the UDHR and Article 6 of the ACHPR insofar as the Applicant himself considers the violation of those Articles to be a necessary consequence of the violation of the principle of *res judicata* or *non bis in idem*;

71. Indeed, the Court points out that an independent analysis of the said allegations reveals that the applicant has not been arrested, that he is not being detained and that he lives outside Senegal, in France, and concludes that his allegations are therefore unfounded;

B. ON THE VIOLATION OF THE RIGHTS OF DEFENCE

72. The applicant alleged a violation of article 7.1.c of the ACHPR, article 11 of the UDHR and article 14.3 of the ICCPR. He maintains that his rights of defence had been violated and that he had therefore not received a fair trial. He states that he was outside Senegal and that his counsel had requested the application of Article 401 of the Code of Criminal Procedure, which he invoked when the court had to rule on the admissibility of the civil parties' claims;

73. The applicant maintained that, despite everything, the 3rd Criminal Chamber had rejected all his arguments and had not allowed his counsel to present his defence on the merits. He added that the court had taken into account only the arguments of the civil parties and their counsel, in breach of the adversarial principle as a result of a misinterpretation of article 401 of the Code of Criminal Procedure;

74. The defendant submits that this argument is unfounded.

It explained that if the applicant's counsel had not been heard on the merits, it was because the applicant had not appeared at the hearing;

LEGAL ANALYSIS BY THE COURT

75. The Court notes that the rights of the defence are prerogatives available to a person during a trial. They make it possible to ensure equality and fairness between adversaries in the context of that trial;

76. The Court notes that respect for the rights of the defence is a fundamental rule of justice which consists in the fact that every person has the assistance of counsel and that every party may be represented or assisted by a lawyer;

77. The Court observed that, in the present case, the applicant alleged that his procedural rights had been infringed by the fact that the criminal court had not granted his request for dispensation from appearing, even though he considered that, even in his absence, his lawyers should have been authorised to defend him;

78. The Court notes that Articles 7(1)(c) of the African Charter on Human and Peoples' Rights (ACHPR), 11 of the Universal Declaration of Human Rights (UDHR) and 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR), invoked by the applicant, provide respectively that:

:

Article 7.1.c of the ACHPR: *"Everyone is entitled to a fair hearing. This right includes: (...) the right to a defence, including the right to be assisted by counsel of his own choosing'';*

Article 11 of the UDHR: *'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law in a public hearing at which he has been afforded all the guarantees necessary for his defence.*

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal act was committed'';

Article 14.3.d of ICCPR: "*Everyone charged with a criminal offence has the right, in full equality, at least to the following guarantees: (...) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right to legal assistance; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it''*;

79. The Court points out that a combined effect of the afore - mentioned Articles reveals that the rights of defence comprise, among other things the right to be present at one's trial, and the right to be assisted by a Counsel of one's choice;

80. The Court notes that it can be deduced from the proceedings that on 18 November 2021, through his counsel, the applicant applied to the Criminal Court for a postponement of the hearing and for dispensation from appearing on the basis of Articles 398(1) and (2) and 401 of the Code of Criminal Procedure;

81. The Court underlines that the applicant argued that the said articles apply to offences punishable by a fine or imprisonment of less than one year and for which the court may, at the request of the accused, grant dispensation from an appearance and accept the plea of his lawyer;

82. The Court recalls that the applicant was referred to the criminal court by an order of partial dismissal and referral to the criminal investigation department by the judge of the 2nd investigating chamber on 28 May 2020, for breach of trust as provided for and punishable under Article 383 of the Criminal Code. This offence is punishable by a prison sentence of at least 6 months and at most 4 years and a fine of at least 20,000 CFA francs and at most 3,000. 000, the court, ruling on the defendant's request to be excused from appearing, decided in **judgement number 772/2021 of 24 November 2021** that '*in application of the combined provisions of articles 398 and 401 of the Code of Criminal Procedure and by virtue of the general principle of law according to which the law is the same for all, whether it punishes or protects, Kabirou Mbodje who is being prosecuted for the offence of breach of trust... and who ... has not provided any serious reason*

for his failure to appear despite the multiple postponements of the case at his request, even though the proceedings do not concern civil interests, cannot be excused from appearing';

83. The Court also points out that while in civil cases the lawyer represents his client so that he can validly file pleadings, exhibits or submissions in the case file or even plead the case in his client's absence, in criminal cases he merely assists his client, which means that in the latter's absence the court seized cannot authorise the counsel to plead unless the law exceptionally provides otherwise;

84. It follows that in the present case, as the applicant had not appeared although he was not exempted from appearing, he could not be defended either orally or by way of submissions, as only the accused who appears may be assisted by his lawyer in accordance with Article 404 of the Code of Criminal Procedure;

85. The Court accordingly holds that the applicant is wrong to argue that, even though he did not appear, the court should have authorised his counsel to represent and defend him. The defendant's failure to appear prevented his counsel from assisting him and arguing his case. The defendant therefore did not violate his right of defence by refusing to authorise his lawyers to defend him in his absence;

86. Since the applicant's rights of defence had not been infringed by the defendant, as had just been shown, he could not validly maintain that Article 3 of the UDHR and Article 7 of the Constitution relating to freedom and legal security had been infringed;

XI ON REPARATION OF THE ALLEGED PREJUDICES SUFFERED

87. The Court notes that the applicant is seeking damages in the sum of two hundred billion (200,000,000,000) CFA francs as compensation for the harm he has allegedly suffered (A);

88. The defendant, for its part, by way of a counterclaim for damages for abusive and vexatious proceedings, claims the sum of one billion one hundred million (1,100,000,000) CFA francs (B);

A- *ON THE APPLICATION FOR DAMAGES IN THE TUNE OF TWO HUNDRED BILLION CFA FRANCS*

89. The applicant submits that while the Indictments Chamber of the Dakar Court of Appeal and the Criminal Chamber of the Dakar Supreme Court ruled that there were no grounds to proceed against him on the charge of misuse of corporate assets of which he was accused by his co-shareholders and that he thought that the case was closed, the Third Chamber of the Dakar **Tribunal de Grande Instance Hors Classe** (TGIHCD) sentenced him to two years' imprisonment, six months of which he must be held in confinement, with five billion (5,000,000,000) CFA francs in damages and a fine of ten million (10,000,000) CFA francs for the same acts;

90. The applicant argues that these sentences, which violate the *non bis in idem* principle, damage his image, which has thus been tarnished internationally, as

attested to by the Francophone Magazine "***Jeune Afrique***" in one of its publications, and causes him definite prejudice that must be repaired;

91. The applicant assesses the prejudice he believes he has suffered at the sum of two hundred billion (200,000,000,000) CFA francs, which he asks the Court to order the defendant to pay;

92. The Respondent asserts that the Applicant's claim for damages is fanciful because it is not based on proof of any liability that might be attributed to it or any definite harm that it might have caused;

93. The respondent solicits that may it please the Honourable Court to dismiss all claims made by the Applicant as unfounded;

LEGAL ANALYSIS BY THE COURT

94. The Court recalls that its jurisdiction in respect of violations of human rights enables it not only to find such violations but also to order that they be remedied where appropriate;

95. Nevertheless, the Court points out that damages are awarded to the victim of an injury only to make good the loss which the victim has actually suffered as a result of the fault of the tortfeasor;

96. It follows that the victim must justify his status as a victim and prove the loss for which he is seeking compensation;

97. In the present case, the Court concludes at the end of its analysis that the defendant had not violated the applicant's right to a fair trial. Consequently, it can only declare that the applicant's claim for damages is ill-founded;

B ON THE COUNTERCLAIM FOR DAMAGES FOR VEXATIOUS AND ABUSIVE AND PROCEDURE

98. The defendant made a counterclaim for damages for abusive and vexatious procedure, explaining that the applicant had participated in all the judicial investigation proceedings which had resulted in both a decision to dismiss the case and a conviction based on different charges;

99. The Respondent states that the Applicant failed to appear in the second proceedings and appealed against the conviction. He submitted that, in arguing that his right to a fair trial had been violated, the applicant had made statements which constituted extremely serious accusations against it;

100. The respondent further points out that the applicant applied to the ECOWAS Court of Justice, even though he knows that the latter is not a second degree court, to claim the sum of 200,000,000,000 CFA francs on the spurious pretext that he was exposed to a sentence of five billion (5,000,000,000) CFA francs. Furthermore, the Respondent claims that the Applicant brought the case before the ECOWAS Court of Justice while he was exercising his rights of recourse at

the domestic level, thereby obliging it to appear before the Community Court to defend its reputation and its Community commitments and forcing it to incur lawyers' fees and expenses to defend itself. Accordingly, the Respondent concludes that the applicant's action before the ECOWAS Court of Justice is manifestly an abuse of court process;

101. The defendant claims compensation for non-material damage in the sum of one billion (1,000,000,000) CFA francs and one hundred million (100,000,000) CFA francs for legal costs incurred;

102. The applicant maintains, on the contrary, that the defendant's counterclaim is unjustified because it merely exercised a right conferred on it by Article 10 of the Protocol relating to the Court, as amended. He pointed out that the only argument put forward by the Respondent to justify his counterclaim was based on the fact that although the applicant had availed himself of domestic remedies, he had referred the matter to the ECOWAS Court of Justice, which was not a Tribunal of second instance;

103. The applicant argues that the exercise of a remedy did not constitute an obstacle to referral to the ECOWAS Court, which had jurisdiction in matters of human rights protection and was not a second-tier court against decisions handed down by the national courts. He asserts that, having analysed the respondent's reply, the respondent has made referral to the ECOWAS Court of Justice conditional on the exhaustion of domestic remedies;

104. The applicant stated that, as he had already maintained, he had not appealed against the decision handed down by the national court but that he was seeking a

finding of all the numerous violations of which he had been the victim during the criminal proceedings and compensation for the damage suffered;

105. The applicant concludes that, far from constituting an abuse, the action he has initiated is well-founded because it seeks to ensure that his rights under international legal instruments for the protection of human rights are respected. He asked the Court to dismiss the defendant's counterclaim as unfounded;

LEGAL ANALYSIS BY THE COURT

106. The Court agrees with the applicant that his referral is a legal remedy available to the applicant insofar as the procedural rules enshrined in the Protocol relating to the Court, as amended, and the Court's Rules of Procedure do not make the exercise of its jurisdiction or the admissibility of applications submitted to it subject to the exhaustion of domestic remedies. Indeed, the ECOWAS Court of Justice is not a court of second instance set up for the review of disputes for which all remedies have not yet been exhausted in the State party;

107. The Court has consistently held that it does not interfere in the normal functioning of national courts and that it is not for it to set itself up as a court of appeal or cassation against decisions of national courts. It cannot therefore be argued that the applicant, in bringing the case before the Court, abused any court process;

108. Moreover, it is perfectly normal for allegations of human rights violations to be made against ECOWAS Member States in human rights protection

proceedings before the Court. Such accusations, which form the very essence of such proceedings, cannot, as the respondent claims, be characterised as 'extremely serious accusations damaging to the reputation of a Member State';

The Court therefore holds that the defendant's counterclaim is unfounded and dismisses it.

XII. COSTS

109. Under Article 66(2) of the Rules of Procedure, the unsuccessful party is ordered to pay the costs if the other party so requests. The Court notes that in the present case the applicants have so requested. Accordingly, the Court rules that all the parties having been unsuccessful, shall bear their own costs.

FOR THESE REASONS

The Court

Sitting in a public hearing, and having heard the Applicants

On jurisdiction

- Declares that it has jurisdiction over the present litigation;

On admissibility

- Declares that the initiating Application is admissible;

On the merits of the case

- Holds that the defendant did not violate the applicant's right to a fair trial, in particular the principle of *res judicata* and the rights of the defence;

- Declares that the applicant's claim for damages is unfounded;

- Dismisses the claim made by the Applicant as reparation;

- Holds that the proceedings initiated by the plaintiff are neither abusive nor vexatious;

- Declares the defendant's counterclaim for damages unfounded;

- Dismisses the counterclaim made by the Respondent as to damages;

ON COSTS

- Declares that each party shall bear its own costs.

Thus made and adjudged on the day, month and year as stated above.

And the following have appended their signatures:

Hon. Judge Ricardo Claúdio Monteiro GONÇALVES Presiding.....

Hon. Juge Gberi-Bè OUATTARA Juge Rapporteur/ Member.....

Hon. Juge Edward Amoako ASANTE Member.....

ASSISTED BY: Me. Aboubakar Djibo Diakite