

COMMUNITY COURT OF JUSTICE,
ECOWAS

COUR DE JUSTICE DE LA COMMUNATE,
CEDEAO

TRIBUNAL DE JUSTICA DA COMUNIDADE,
CEDEAO



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**IN THE COMMUNITY COURT OF JUSTICE, ECOWAS, HOLDEN IN ABUJA ON
TUESDAY THE 10TH DAY OF JUNE 2014.**

CASE NO. ECW/CCJ/APP/30/11

1. DEYDA HYDARA JR.

2. ISMAILA HYDARA

3. INTERNATIONAL FEDERATION OF JOURNALISTS-AFRICA-----Plaintiffs

V.

REPUBLIC OF THE GAMBIA-----Defendant



BEFORE THEIR LORDSHIPS:

HON. JUSTICE HANSINE N. DONLI

PRESIDING

HON. JUSTICE AWA NANA DABOYA

MEMBER

HON. JUSTICE ANTHONY A. BENIN

MEMBER

ASSISTED BY: TONY ANENE-MAIDOH

CHIEF REGISTRAR

REPRESENTATION:

Olujoke Aliu (Mrs.) & D. D. Killi Esq. for the Plaintiffs

Messrs. B.V.P.Mahoney & S .A. Abi for the Defendant

JUDGMENT

Parties and Representation

The first and second plaintiffs are nationals of the Republic of The Gambia who now live in exile in the United Kingdom and the USA respectively as political refugees, following the death of their father, the late Deyda Hydera, Sr. The third plaintiff is Africa chapter of the International Federation of Journalists, an NGO. The Defendant is a Member State of the Economic Community of West African States (ECOWAS). The plaintiffs were represented by Olujoke Aliu (Mrs.) and D. D. Killi Esq. whilst the Defendant was represented by Messrs Basiru V. P. Mahoney and Simeon Ateh Abi both of the office of the Attorney-General of The Gambia.

The Application

The basis for this case is neatly summed up in the originating application filed in this court on 23rd November 2011. It provides that 'this case concerns the continued failure by the state authorities to conduct an effective investigation into the killing of Mr. Deyda Heydara in Banjul in December 2004, in violation of the right to life, freedom of expression and press freedom guaranteed by Articles 1, 4 and 9 of the African Charter on Human and Peoples' Rights and Article 66 of the Revised Community Treaty.

The argument is made on the following grounds:

A. Failure to effectively investigate the murder of Deyda Hydera. The state is required to conduct a thorough, rigorous, and independent investigation into the violent death of Mr Deyda Hydera that is capable of ascertaining the circumstances of the murder, as well as of identifying and punishing the intellectual and material perpetrators of the act.

B Tolerance of a climate of impunity. The state contributed to Mr. Deyda Hydera's death by tolerating and causing a climate of impunity in the country as a result of its systematic failure to condemn, effectively investigate, and secure conviction.

C Violation of freedom of expression.

D Failure to provide redress.

Facts of the case

The late Deyda Hydara was the co-founder, publisher and editor of The Point newspaper in The Gambia. He was a reputable journalist. According to the plaintiffs the deceased devoted his life to protecting media freedom in The Gambia. The plaintiffs averred that in the weeks preceding his death the deceased received several death threats in connection with his journalistic work. They contended that on the day of his demise a person suspected to be an operative of the state security service placed the deceased under constant surveillance. He was murdered in a drive by shooting on the night of 16th December 2004 whilst in the company of two employees of The Point newspaper.

It is the plaintiffs' case that the defendant failed to carry out effective investigation into the murder of Deyda Hydara Sr; they also averred that the Serious Crimes Unit of The Gambia police as well as the National Intelligence Agency (NIA) did not do any thorough investigations. They claimed that these investigative organs of state failed to investigate eye-witness evidence; crime scene evidence; ballistic evidence; death threats to Mr. Hydara; apparent Government surveillance of Mr. Hydara on the day of the incident; potential suspects as well as any motive other than personal revenge. The plaintiffs claimed that no public scrutiny of the investigations was allowed. And the government was quick to prosecute seven journalists for sedition when they spoke out against the failure to investigate the murder. Likewise the family of the deceased was not involved in the investigations.

On the claim founded on a climate of impunity, the plaintiffs averred that the defendant tolerated attacks against journalists, among others. They cited specific instances of such abuse which the State did not care to investigate and prosecute the perpetrators. According to the plaintiffs by failing to effectively investigate multiple attacks against the media stretching for several years prior to the Hydara assassination, the Gambian authorities created and tolerated a climate of complete impunity that did nothing to deter and inevitably contributed to the attack on Mr. Hydara's life.

On violation of freedom of expression, the plaintiffs' case was that the failure to investigate the murder of Deyda Hydera and the tolerance of the culture of impunity has profound effect on freedom of expression, affecting all journalists in The Gambia.

The final leg of the claim is based on a failure to provide redress. We repeat the material averments here: 'International law requires that there are legal remedies for violations of rights. However, both the legal system and the failure by the authorities to effectively investigate Mr. Hydera's murder have prevented his family from effectively bringing civil proceedings for compensation for his death.....The Gambia has failed to provide any compensation or redress to the first two applicants for the murder of their father and violation of his right to freedom of expression, and has not provided them with any opportunity to claim such compensation. Furthermore, the failure to effectively investigate the murder and to identify the perpetrators has prevented the applicants from claiming compensation from any third party, if a private actor was indeed responsible for the murder.'

Reliefs and orders sought by the plaintiffs.

1. A declaration that the Defendant's failure to effectively investigate, and hold accountable those responsible for the 16 December 2004 assassination of Deyda Hydera...is in violation of his right to life as guaranteed by Articles 1 and 4 of the African Charter.
2. A declaration that the defendant is in contravention of Articles 1 and 4 of the African Charter, by virtue of creating and tolerating a state of systemic impunity in The Gambia for violent attacks against media practitioners and other government critics.
3. A declaration that the defendant's failure to effectively investigate the unlawful killing of Mr. Hydera is in violation of his rights to freedom of expression and the press guaranteed by Article 9 of the African Charter and Article 66 of the Revised Community Treaty.
4. General and special damages for pecuniary and non-pecuniary loss to be paid to the first two applicants, and other heirs to Mr. Hydera, as

compensation for the violation of their father's human rights to life and freedom of expression to be quantified at the appropriate stage in the proceedings.

5. An order that the defendant pay the applicants' costs of this action, in accordance with Article 66 of the Court's Rules of Procedure.

The defence

In a statement of defence filed on 18th September 2012, the Defendant rejected the entire claim by the plaintiffs. In particular the Defendant made the following material averments. That they carried out effective and diligent investigations into the murder of Deyda Hydera. That the deceased did not make any disclosure to the State about any threats to his life, let alone to seek protection from the State. The Defendant denied contributing in any way to the death of Hydera, for contrary to what the plaintiffs averred, the Defendant did not tolerate any culture or climate of impunity in the country. The killers are still at large and they are still unknown. The State owes no obligation to provide redress to the plaintiffs for the murder of Deyda Hydera, the defence averred.

Consideration by the court

The pleadings as well as both counsels' addresses have been taken into account in the ensuing consideration of the case by the court.

The application is based on the ACHPR, in large measure, Articles 1, 4 and 9 thereof. These read:

1 The Member Statesparties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

4 Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life.

9 (i) Every individual shall have the right to receive information.

(ii) Every individual shall have the right to express and disseminate his opinion within the law.

The plaintiffs also relied on Article 66 of the Revised Treaty of ECOWAS. It provides:

1. In order to involve more closely the citizens of the Community in the regional integration process, Member States agree to co-operate in the area of information.
2. To this end they undertake as follows:
 - a) to maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources,
 - b) to facilitate exchange of information between their press organs, to promote and foster effective dissemination of information within the Community;
 - c) to ensure respect for the rights of journalists;
 - d) to take measures to encourage investment capital, both public and private, in the communication industries in Member States;
 - e) to modernize the media by introducing training facilities for new information techniques; and
 - f) to promote and encourage dissemination of information in indigenous languages, strengthening co-operation between national press agencies and developing linkages between them.

These provisions guarantee the right to life and also freedom of expression. The right to life imposes an obligation on States to investigate all acts of crime and bring perpetrators to book. A State will be neglecting its obligation under international law and treaty if it does not carry out effective investigations into crimes committed on its territory. 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. Article 2(3)(a) of International Covenant on Civil and Political

Rights is equally applicable to the Defendant to ensure effective investigations into the murder.

The plaintiffs claim the Defendant has violated both the right to life and the freedom of expression as provided for in the ACHPR and the Revised Treaty. We propose to examine the issues now in the same way that they were set out in the application.

To begin with, the plaintiffs claim the Defendant did not conduct diligent and effective investigations into the murder of Deyda Hydera Senior. It is a question of fact whether or not the Defendant conducted effective investigations. We must point out that there are no hard and fast rules as to what constitute proper, effective or diligent investigations, or by whatever name one may choose to call it. However, from an objective standpoint and given the circumstances of each case, one should be able to say that the investigative agencies have performed their duty as required. Subjective analysis will not be proper.

In this case the State Police was the first to commence the investigations. Subsequently the NIA took over the investigations and issued a report on or about 21 February 2005, some two months after the murder. Since then no other investigations have been carried out. But one striking feature of the investigation which is baffling is the fact that the investigations carried out no ballistic tests on the bullets on the victims' body and on the weapons recovered from one of the suspects Wally Hakim who was invited for interrogation. Here is a murder committed with a gun so common sense will dictate that every gun recovered will be examined vis-a-vis the bullets recovered from the victim to see whether the bullets could have been fired from the gun recovered. Without a ballistic examination one could not conclude that a proper investigation had been carried out. In the circumstances of this case every gun recovered from every suspect was bound to be subjected to thorough and critical examination to assure the victims' family and the general public that the investigations were not seeking to protect anybody.

Besides when the two eye witnesses were on admission in hospital the report indicates there was an attempt to interrogate them by persons who bore or

carried no identification; they also asked for the passports of these victims; for what purpose one does not know. There was yet another attempt to interrogate the victims at the hospital in Banjul which failed because the police officers refused the request by the hospital authorities for a formal request. This request by the hospital authorities was reasonable having regard to the fact that the victims were the target of assassination and having regard to the fact that some unidentified persons had attempted to see the victims without disclosing their identity. Why would security go on duty without identification, especially given the fact that these victims had been the target of assassination just a few days ago. It is common knowledge that security personnel on mission have to identify themselves if requested by the appropriate persons, in this case the medical authorities, if only to prevent impersonation. If the motive was really to interrogate the eye witnesses why would they refuse to disclose their identity and show some form of identification? Why would they refuse a harmless request by the hospital authorities for official communication to them? It seems to us these events must have scared the eye witnesses to flee the country and it was reasonable and a wise precaution to take in the circumstances. With the eye witnesses out of the way no effective and conclusive investigations could be conducted into the murder. Notwithstanding the fact that eventually they gave statement to the Police in Dakar, Senegal, that was the end of the investigations, for the NIA did not get back to them let alone to investigate the details of their statements especially the threats the deceased recounted to them.

It is also to be noted that the two surviving victims of the shooting incident had expressed their fears to the police about the involvement of the NIA in threats to their own lives. Ida Jagne told the police that some personnel from the NIA had followed them even to Senegal in order to eliminate her. So there was no way they would ever return to The Gambia, she made it clear to the Police. And yet this was the same body NIA that was given the task to take over the investigations from the police. Who could blame the eye witnesses for refusing to return to the country? Be that as it may justice would not seem to be done in this case as the very body which was accused of complicity was the very one charged with the responsibility to investigate. The NIA was not an impartial body in the

circumstances. The duty to conduct investigations imposed on a State involves the duty to be impartial, fair and just. One cannot be a judge in his own cause, so too can one not investigate a crime when it is itself the accused.

We are satisfied that any investigations that did not take into account a critical examination of weapons found on any of the suspects for a possible conclusion as the murder weapon was no investigation; it was a fluke. One need not even talk about the conduct of the officers who went to the hospital which in our view genuinely scarred the eye witnesses off. The NIA was not an impartial body to conduct these investigations in view of the concerns raised by the victims of the shooting. This claim is sufficiently established on the facts so we uphold it.

The next claim based on what the plaintiffs called the climate of impunity in the defendant territory. This will be dealt with together with the third issue which is the alleged attack on freedom of expression in the country. This is also a question of fact and the burden of producing evidence rested with the plaintiffs. On the threat to freedom of expression in the country the plaintiffs cited specific instances in the country among them were cases involving Chief Ebrimah Manneh v. Republic of The Gambia (2004-2009) CCJELR 181 and Musah Saidykhon v. Republic of The Gambia, decided on 16 December 2010. Both plaintiffs sued the Defendant before this court with success. Those cases involved journalists who suffered at the hands of State operatives in the course of performing their legitimate functions.

Impunity is defined in Black's Law Dictionary, 9th edition, page 826 to mean 'exemption from punishment, immunity from the detrimental effects of one's actions...'

The plaintiffs cited specific instances where state operatives have been involved in misdeeds against journalists but no action was taken against them. At least this court's previous decisions in two such cases support what the plaintiffs had claimed. The Defendant was thus bound to lead evidence in rebuttal, but this was not forthcoming. Article 66 of the ECOWAS Revised Treaty imposes an obligation on Member States to assure a safe and conducive atmosphere in the practice of journalism. And in the situation where attacks by state operatives against

journalists are not investigated, let alone to prosecute the suspects, the State will be in breach of its obligation under the Treaty and also the ACHPR, as such impunity has the effect of denying the journalists the right to function and thus stifling freedom of expression. These two claims also succeed on the facts.

The last issue is the failure to provide redress. The plaintiffs claim the Defendant has not provided the deceased's family with any redress or compensation for his death and the violation of his freedom of expression; and that the failure to effectively investigate his death and identify the perpetrators has prevented them from seeking compensation themselves.

Since February 2005 no attempt has been made to conduct any meaningful investigations into the murder of the deceased. The eyewitnesses spoke about threats to the deceased which the deceased recounted to them in his lifetime. The NIA did not contact these witnesses for any details as to those threats. The personal safety of these witnesses who genuinely feared for their lives was not guaranteed to enable them assist in the enquiries. The NIA was quick to put the docket away knowing full well that the eyewitnesses had been scared off. However, we have failed to find a direct linkage of the Defendant to the murder of the deceased. The Defendant is held responsible for the apparent lack of effective investigations into the murder. The linkage of the climate of impunity and abuse of freedom of expression to the murder is also difficult to conclude as there is no iota of evidence as to who carried out the murder. A list of suspects was thrown up most of who are private persons with no connection to the Defendant. So whatever award that will be made will only take into account the Defendant's failure to conduct effective and impartial investigations into the murder.

Decision

For reasons already explained this court upholds the claims by the plaintiffs and grants all reliefs and orders sought except special damages for none was proven in evidence. The court accordingly enters judgment for the plaintiffs against the Defendant. The plaintiffs are awarded compensation in the sum of fifty thousand U.S. dollars (US\$50,000.00) for the prejudice suffered as a result of the

Defendant's failure to investigate the assassination of Deyda Hydera Sr. Costs of ten thousand U.S dollars (US\$10,000.00) is awarded in favour of the plaintiffs against the Defendant.

This judgment has been read at a public sitting at the seat of court in Abuja before Their Lordships:

Hon. Justice Hansine N. Donli

Presiding



Hon. Justice Awa Nana Daboya

Member



Hon. Justice Anthony A. Benin

Member



Assisted by

Mr. Tony Anene-Maidoh

Chief Registrar

