

UGANDA / JUDGMENT

# Kone and Another v Republic of Mali (Ruling) (Application No. 004/2024) [2024] AfCHPR 36 (20 November 2024) [2024] AfCHPR 36

## COURT

African Court on Human and Peoples Rights

## BEFORE

Aboud P, Adjei J, Anukam J, Ben Achour J,  
Bensaoula J, Chizumila J, Gaswaga J, Mengue J,  
Ntsebeza J, Tchikaya J

## CASE / FILE NUMBER

Application No. 004/2024

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## THE MATTER OF

CHEICK MOHAMED CHERIF KONE AND DRAMANE DIARRA

V.

REPUBLIC OF MALI

APPLICATION NO. 004/2024

## RULING

(PROVISIONAL MEASURES)

20 NOVEMBER 2024



**The Court composed of:** Imani D. Aboud, President; Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Dennis D. ADJEI and Duncan GASWAGA - Judges; and Robert ENO, Registrar.

Pursuant to Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Modibo SACKO, Vice President of the Court, a national of Mali, did not hear the Application.

In the Matter of:

Cheick Mohamed Chérif KONE and Dramane DIARRA

**\*Represented by\***

- i. Barrister Mariam DIAWARA, Advocate of the Malian Bar;
- ii. Barrister Boubacar DIARRA, Advocate of the Malian Bar

**Versus**

**REPUBLIC OF MALI**

\*Represented by\* the Director General of State Litigation

\*After deliberation,\*

\*Renders the following Ruling:\*

**I. THE PARTIES**

1. Cheick Mohamed Chérif KONE (hereinafter referred to as the "First Applicant") and Dramane DIARRA (hereinafter referred to as the "Second Applicant"), are

nationals of Mali. They allege violation of their rights in connection with their dismissal from the Judicial Council.

2. The Application is filed against the Republic of Mali (hereinafter referred to as "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 20 June 2000. On 19 February 2010, the Respondent State also deposited the Declaration provided for in Article 34(6) of the Protocol (hereinafter "the Declaration"), by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations with observer status before the African Commission on Human and Peoples' Rights.

## II. SUBJECT MATTER OF THE REQUEST

- 3. The Applicants allege that governance in the Respondent State is characterized by violation of the fundamental rights of citizens, in particular arbitrary arrests, abductions and kidnappings of political figures, such as former Prime Minister Soumeylou Maiga, who died in detention, and the former Minister of the Economy and Finance, Madam Bouare Fily Sissoko.
- 4. The First Applicant avers that when he was the Senior Advocate General of the Supreme Court, out of concern with respect for legality, he denounced the treatment meted out to the persons mentioned in the preceding paragraph and requested that they be given due process. This led to his dismissal as Advocate General, by a decree of 8 September 2021, without the opinion of the High Judicial Council (HJC), thereby violating Article 68 of the Organic Law on the Supreme Court.
- 5. The Applicants further contend that as President and Vice President of the Magistrates Trade Union (REFSYMA), they participated in drafting the Transition Charter and, since 2022, always reminded the transition authorities of their obligation to comply with the Transition Charter and with republican and democratic principles and values.
- 6. They emphasise that, as trade unionists, they initiated various proceedings before the Administrative Division of the Supreme Court challenging certain illegal decisions taken by the transitional government, namely, the petition of 21 October 2022 against Order 2022-3547/C/MJDH of 11 August 2022 laying down the voting modalities for the election of members of the HJC, and Decision 2022/MJDH of 7 October 2022 on the final list of candidates vying for election to the HJC and the Promotions Committee of the Ministry of Justice, the petition of 9 January 2023 challenging Decree N0. 0807/PT-RM of 30 December 2022 pertaining to the list of HJC members, the AMPP/REFSYMA petition of 10 June 2023 for abuse of power challenging Decree No. 0275 PTRM of 3 May 2023 laying down the contract regime for public sector works, supplies and services not subject to the established public procurement regime.
- 7. The Applicants assert that despite their warnings and those of the majority of citizens, the transitional authorities, in disregard of the Transition Charter and their commitment to limit the military transition to eighteen (18) months, declared their intention to extend the military transition by twenty-four (24) months. To this end, they adopted a new Constitution by referendum on 22 July 2023, an action taken against the opinion of a vast majority of the population, as is evidenced by the low turnout in the said referendum, at only 30%.
- 8. The Applicants affirm that the new Constitution reverses democratic gains and republican values, while undermining the impartiality and independence of the judiciary by radically changing the composition of the HJC, insofar as it opens half of its membership to persons from outside the judiciary.

- 9. They aver that as reprisal for their intervention, the transitional authorities tried to dissolve their union. They further claim to have been the target of defamatory statements, in particular in a press briefing broadcast on ORTM, the national television channel. In this respect, they initiated various criminal proceedings against the director of the said television channel, the Minister of Justice and the President of the Transition, which proceedings are pending before the courts of the Respondent State.
- 10. The Applicants aver that, in the wake of this press briefing, which announced that they would be prosecuted for opposing legitimate authority and failing to comply with the obligation of reserve, disciplinary proceedings which they describe as unlawful were initiated against them before an illegal HJC. By Decisions Nos. 001 and 002/2023/CSM-CD-P of 29 August 2023 and Nos 001 and 002/CSM-CD-P of 19 September 2023, HJC decided to dismiss them from the judiciary . They appealed against these decisions before the Administrative Division of the Supreme Court on grounds of *\*ultra vires\**.
- 11. They further state that without awaiting the outcome of these appeals, the President of the Transition issued Decrees No. 2023-0578/PT-RM of 3 October 2023 and No. 2023-0623/PT-RM of 16 October 2023, dismissing them from the Judiciary. On 2 May 2024, they lodged appeals against these decrees with the Administrative Division of the Supreme Court.

### III. ALLEGED VIOLATIONS

12. The Applicants allege violation of the following rights:
- i. The right to work and to job security, protected by Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
  - ii. The right to occupational safety, protected by Article 7(1) of the ICESCR;
  - iii. The right to the maximum attainable standard of physical and mental health, protected by Article 16(1) of the ICESCR;
  - iv. The right to be tried by a competent court established by law, protected by Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR);
  - v. The right to hold opinions without interference, and the violation of the right to freedom of expression protected by Article 19(1) and 19(2) of the ICCPR;
  - vi. The right to freedom of association and to protection of the right to organize, protected by the International Labour Organisation's Freedom of Association and Protection of the Right to Organise Trade Unions, (1948 ILO Convention No. 87); and
  - vii. Incompatibility of Articles 19 and 20 of the Code of Ethics, amending Law No. 02-054 of 16 December 2002 on the status of judicial officers with Article 19 (1) (2) of the ICCPR.

#### IV. PRAYERS OF THE PARTIES

- 13. The Applicants make the following prayers to the Court:
- i. Annul Decisions N0. 001 and 002/2023-CSM-P of 29 August and No. 001 and 002/2023-CSM-CD-P of 19 September 2023 of the High Judicial Council dismissing the Applicants from the judicial service in Mali as well as the decrees precipitously dismissing them and blocking their salaries;
- ii. Reinstate them in their former grades and duties with all financial benefits pertaining thereto;
- iii. Make Articles 19 and 20 of the Code of Ethics annexed to Law N0. 02- 054 of 16 December 2022 on the status of Magistrates consistent with Article 19 (1) (2) of the ICCPR;
- iv. Pay immediately to each Applicant the sum of One Hundred Million CFA Francs as arrears in respect of delayed salary, various costs and damages in respect of all compensation and reparation, failing which it shall pay Five Million (5 000.000) CFA Francs per day and per Applicant;
- v. Award each Applicant the sum of One Hundred Million CFA Francs for all harm suffered, (either one or the other of the above prayers.);
- vi. Order the Respondent State to report to the Court on the implementation of the Court's decision Set within three (3) months of notification;
- vii. Order the Respondent State to bear costs.
- 14. For its part, the Respondent State prays the Court to:

#### Mainly,

- i. Declare the Application inadmissible;

#### In the alternative

- ii. Dismiss the Application for lack of merit;
- iii. Order the Applicants to bear costs.

#### V. SUMMARY OF THE PROCEDURE BEFORE THE COURT

- 15. On 24 April and 28 May 2024, the Applicants filed the Application and a request for provisional measures, respectively. They were served on the Respondent State on 26 June 2024 for its Responses within ninety (90) days and fifteen (15) days, respectively.
- 16. The Respondent State did not file the Response to the request for provisional measures.

## VI. \*PRIMA FACIE\* JURISDICTION

17. 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.

- 18. Under Rule 49(1) of the Rules "The Court shall ascertain its jurisdiction ...". However, as regards provisional measures, the Court does not have to ensure that it has jurisdiction over the merits of the case, but only that it has \*prima facie\* jurisdiction. [1](#page-7-0)
- 19. In the present case, the rights whose violation the Applicants allege are protected by the ICCPR, a human rights instrument ratified by the Respondent State. [2](#page-7-1) The Court further recalls that the Respondent State has ratified the Protocol and deposited the Declaration.

</span><sup>1</sup> \*Komi Koutche v. Republic of Benin\*, (provisional measures) (2 December 2019) 3 AfCLR 725, § 14.

</span><sup>2</sup> The Respondent State also became a party to the ICCPR on 23 March 1976.

20. Accordingly, the Court holds that it has \*prima facie\* jurisdiction to hear the request for provisional measures.

## VII. PROVISIONAL MEASURES REQUESTED

- 21. The Applicants pray the Court to:
- i. Order the stay of the implementation of decisions No. 001/2023-CSM-CD-P of 29 August 2023 on procedural incidents and No. 002/2023- CSM-CD-P of 29 August 2023 on the merits of the case taken by the HJC, by which the First Applicant was removed from the organic framework of the Judiciary.
- ii. Order a stay of the implementation of decisions No. 001/2023-CSM-CD-P of 19 September 2023 on procedural incidents and No. 002/2023- CSM-CD-P of 19 September 2023 on the merits of the case taken by the HJC by which the second Applicant was removed from the organic framework of the Judiciary.
- iii. Order a stay of the implementation of Decrees No. 2023-0578/PT-RM of 3 October 2023 and No. 2023-0623/PT-RM of 16 October 2023, issued by the President of the Transition, by which they were dismissed from the Judiciary.
- iv. Order the Respondent State to report to the Court, within 15 days of receipt of this ruling, on the measures taken to implement it.

- 22. In support of their request, the Applicants submit that in granting provisional measures, the Court decides whether the requirements of extreme gravity, urgency and prevention of irreparable harm laid down in Article 27(2) of the Protocol, are met.
- 23. They contend that extreme gravity implies that there is a "real and imminent risk of irreparable harm before the Court reaches its final decision", [3](#page-9-0) and that there is urgency whenever acts likely to cause harm may occur at any time before the Court reaches its final decision on the main Application.
- 24. The Applicants submit that the impugned decisions to strike them off the list and the dismissal decrees in question constitute a flagrant violation of their human dignity, since they were unjustly deprived of their salary, and that they now live in precarious conditions, relying exclusively on family solidarity and goodwill. In their view, this situation is likely to compromise the moral stability of their school-going children.
- 25. More specifically, the First Applicant states that he is no longer able to meet the costs of treatment and care for the serious chronic illnesses he suffers from, such that his vital prognosis is at risk.
- 26. For his part, the Second Applicant asserts that since October 2023, he is no longer able to pay the monthly instalments on his bank loan and that he is at risk of the family property given as collateral being seized and subsequently sold off.
- 27. They therefore consider that the requirements of Article 27(2) of the Protocol are met, thus justifying the measures requested.
- 28. The Respondent State did not file a Response.

<span id="page-9-0"></span><sup>3</sup> \*Houngue Éric Noudehouenou v. Republic of Benin\*, AfCHPR, Application No. 04/2020, Order of 15 August 2022 (provisional measures); \*Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin\*, AfCHPR, Application No. 062/2019, Order of 17 April 2020 (provisional measures) (2020) 4 AfCLR 123, § 61.

29. The Court notes that 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.

- 30. In light of the foregoing, the Court may order provisional measures only in cases of extreme gravity or urgency and in order to prevent irreparable harm to persons.
- 31. The Court recalls that urgency, which is consubstantial with extreme gravity, means that "an irreparable and imminent risk is caused before the Court renders its decision". [4] (#page-10-0) The risk in question must be real, which precludes supposed or hypothetical risk. It must be a serious risk that requires immediate remedial action. [5](#page-10-1)

- 32. The Court notes that, as regards irreparable harm, there must be a "reasonable likelihood of its occurrence" having regard to the context and personal circumstances of the Applicant(s)". [6](#page-10-2)
- 33. The Court underscores that it is for the Applicant seeking provisional measures to state them clearly and to provide evidence of urgency or extreme gravity and of the irreparable nature of the harm.[7](#page-10-3)
- 34. The Court recalls that the Applicants seek the suspension of the following decisions : (i) Decisions No. 001/2023-CSM-CD-P of 29 August 2023 on procedural incidents and No. 002/2023-CSM-CD-P of 29 August 2023 on the

<sup>4</sup> Ibid. *\*Ajavon v. Benin\**, § 61.

<sup>5</sup> *\*Ibid\**, § 62\*.\*

<sup>6</sup> *\*Ibid\**, § 63.

<sup>7</sup> *\*Romaric Jesukpego Zinsou and others\**, AfCHPR, Application No. 008/2021, Order of 10 April 2021 (provisional measures) (2021) 5 AfCLR 181 § 20.

merits of the case taken by the HJC removing the First Applicant from the organic framework the Judiciary ; (ii) Decisions No. 001/2023-CSM-CD-P of 19 September 2023 on procedural incidents and No. 002/2023-CSM-CD-P of 19 September 2023 on the merits of the case taken by the HJC removing the second Applicant from the organic framework of the Judiciary, as well as (iii) that of decrees No. 2023-0578/PT-RM of 3 October 2023 and No. 2023- 0623/PT-RM of 16 October 2023, issued by the President of the Transition, dismissing them from the Judiciary.

- 35. The Court notes that it emerges from the above-mentioned acts that the Applicants were dismissed from the judiciary without suspension of their pension.
- 36. The Court emphasises that, although it has indicated the conditions laid down in Article 27(2) of the Protocol as enshrined in the Court's jurisprudence, the Applicants fail to demonstrate that those conditions pertain in relation to the facts and to the measures requested.
- 37. The Court notes, in fact, that in support of his argument with regard to serious life-threatening illnesses, the Applicant tendered a medical certificate dated 19 February 2024 as Exhibit 32 of the file. The Court however notes that this does not prove the existence of a causal link between this exhibit and the facts alleged.
- 38. As regards the second Applicant's allegation regarding his failure to repay a bank loan which could lead to the loss of family property, the Court notes that for the period indicated by the Applicant, that is, October 2023, he sought and obtained a three-month moratorium, that is, from November 2023 to January 2024. The Court notes that the second Applicant fails to prove that the alleged loss of the family property is imminent.

- 39. Furthermore, the Court notes that it emerges from the record that the Applicants challenged the decree dismissing them before the Administrative Chamber of the Respondent State's Supreme Court on grounds of abuse of power. A decree of the Supreme Court upholding the Applicants' challenge on grounds of abuse of power would have the same effects as this Court granting the measures sought, in which case the Court would be prejudging the merits of the case.
- 40. Be that as it may, the fact that the Applicants, in their prayers for reparation on the merits of the case, request to be reinstated in their respective grades and duties with financial benefits is proof that the alleged prejudice is not irreparable.
- 41. The Court thus finds that the Applicants fail to demonstrate urgency, extreme gravity and irreparable harm warranting the measures sought.
- 42. Accordingly, the Court dismisses the request for provisional measures.
- 43. For the avoidance of doubt, the Court reiterates that this Ruling is provisional in nature and in no way prejudices the Court's findings on jurisdiction, admissibility or the merits of the Application.

## VIII. OPERATIVE PART

44. For these reasons,

## THE COURT

\*By a majority of eight against two, Judges Rafaâ BEN ACHOUR and Chafika BENSAOULA dissenting\*

- i. \*Dismisses\* the request for provisional measures.

Signed:

Imani D. Aboud, President;

And Robert ENO, Registrar.



In accordance with Article 28(7) of the Protocol and Rule 70(3) of the Rules of Court, the Declaration of Judge Rafaâ BEN ACHOUR is appended to his Ruling

Done at Arusha, this Twentieth Day of November in the year Two Thousand and Twenty-Four, in English and in French, the French text being authoritative.



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