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| الاتحاد الأفريقي | | UNIÃO AFRICANA |
| AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS<br>COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES | | |

# THE MATTER OF

# HAROUNA DICKO AND OTHERS

# V.

# BURKINA FASO

# APPLICATION NO. 037/2020

# RULING

**13 NOVEMBER 2024**

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

In the Matter of:

Harouna DICKO, Aristide OUEDRAOGO, Bagnomboé BAKIONO, Lookmann Mahamoud SAWADOGO and Apsadou DIALLO

*Represented by* Mr. Harouna DICKO

Versus

BURKINA FASO

*Represented by* The State Judicial Officer

After deliberation,

*Renders this Ruling:*

## I. THE PARTIES

1. Messrs Harouna DICKO, Aristide OUEDRAOGO, Bagnomboé BAKIONO, Lookmann Mahamoud SAWADOGO and Ms. Apsatou DIALLO (hereinafter referred to as “the Applicants”) are nationals of Burkina Faso. They allege violation of the right of the people of Burkina Faso to participate in the combined legislative and presidential elections of 22 November 2020.

2. The Application is filed against Burkina Faso (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 on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 28 July 1998. The Protocol entered into force on 25 January 2004. Furthermore, on 28 July 1998, the Respondent State deposited the Declaration provided in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), by virtue of which it accepts the jurisdiction of the Court to receive Applications from individuals and Non-Governmental Organizations having observer status before the African Commission on Human and Peoples' Rights. However, the Declaration did not take effect until the entry into force of the Protocol on 25 January 2004.

## II. SUBJECT OF THE APPLICATION

### A. Facts of the matter

3. It emerges from the Application that in July 2019, the President of the Respondent State signed a decree pertaining to a national dialogue in preparation for elections scheduled to be held in 2020. According to the Applicants, the dialogue, which took place from 5 to 22 July 2019, culminated in a report.[1]

4. The Applicants aver that on 23 January 2020, the Government tabled before the National Assembly a draft bill to amend the Electoral Code based on the dialogue report. They further aver that the said amendment of the Electoral Code was undertaken while people in several regions of the Respondent State had fled their homes and sought refuge in the regions bordering neighbouring countries due to the insecurity that prevailed in the Respondent State. According to the Applicants, several mayors had also left their towns for the same reason. It is the Applicants contention that,

[1] It emerges from the said report that the Independent National Electoral Commission did not have access to certain parts of the Respondent State's territory severely impacted by insecurity.

despite these circumstances, on 5 February 2020, the Government finalised the electoral roll and set the election date for 22 November 2020.

5. The Applicants aver that, in response to this decision, various political actors met to discuss the issue and released a report calling for the elections to be postponed. In light of this report, the Government tabled a bill before the National Assembly introducing new amendments seeking to remove the legal impediments to holding the elections on the date initially scheduled. The said bill was subsequently withdrawn on 13 July 2020 in order to foster political dialogue.

6. The Applicants further aver that on 20 July 2020, however, without holding a new political dialogue, and after consultations held with only a few members of the National Dialogue Monitoring Committee, the Government again tabled the amendment bill before the National Assembly.

7. The Applicants allege that on 10 August 2020, they tried unsuccessfully to have the bill rejected, after which it was finally adopted on 25 August 2020[2] and promulgated into law by the President of the Respondent State on 28 August 2020. Pursuant to the changes that were introduced through the law, the Government was empowered to invoke force majeure or exceptional circumstances to hold the elections despite the concerns raised by the Applicants.

8. On 16 September 2020, the Applicants petitioned the Constitutional Council challenging the constitutionality of the amendments to the Electoral Code. On 16 October 2020, the Constitutional Council dismissed the said petition for being brought against a law that had already been enacted.

[2] See Law No. 034-2020/AN of 25 August 2020 amending Law No. 014-2001/AN of 3 July 2001 on the Electoral Code.

### B. Alleged violations

9. The Applicants allege violation of the right of the Burkinabè to participate in elections, protected jointly by Article 13(1) of the Charter, Article 4(2) of the African Charter on Democracy, Elections and Governance (hereinafter "ACDEG"), Article 25 of the International Covenant on Civil and Political Rights (hereinafter "the ICCPR") and Article 2(1) of the ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance (hereinafter "the ECOWAS Democracy Protocol").

## III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

10. The Application was filed on 5 November 2020 together with a request for provisional measures.

11. On 10 November 2020, the Registry acknowledged receipt of the Application. On the same date, the Registry served the Application on the Respondent State asking it to file its Response to the request for provisional measures within three days, submit the names of its representatives within 30 days and file its Response to the main Application within 90 days of receipt.

12. On expiry of the time limit set for it to respond to the request for provisional measures, the Respondent State did not file any submission.

13. On 20 November 2020, the Court issued a Ruling dismissing the request for provisional measures, which was notified to the Parties on the same day.

14. On 21 January 2021, the Registry received a correspondence from the Respondent State appointing its representatives. However, the latter did not file a Response to the main Application despite a reminder sent to that effect on 30 June 2022 informing it that, in accordance with Rule 63(1) of the Rules, the Court would render a judgment by default if the Respondent State

failed to file its response to the Application within 45 days of receipt. At the expiry of that time-limit, the Respondent State did not file its Response to the Application.

15. Pleadings were closed on 30 July 2024 and the Parties were duly notified.

## IV. PRAYERS OF THE PARTIES

16. In their Application, the Applicants pray the Court to declare Law No. 034-2020/AN of 25 August 2020 amending Law No. 014-2001/AN of 3 July 2001 on the Electoral Code null and void, on the grounds that the provisions of Articles 148(2) and 155(2) thereof violate Article 13 of the Charter read jointly with Article 4(2) of the CADEG, Article 25 of the ICCPR and Article 2(1) of the ECOWAS Democracy Protocol.

17. The Respondent State did not file any submissions.

## V. ON THE DEFAULT OF THE RESPONDENT STATE

18. Article 63(1) of the Rules provides that:

> Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.

19. The Court notes that Rule 63(1) mentioned herein above sets out three requirements for a judgment in default, namely, i) notification of the defaulting party; ii) default by one of the Parties; and iii) Application by the other party or the Court on its own motion.

20. With regard to notification of the Application and related pleadings to the defaulting party, the Court recalls that, in the present case, the Application was served on the Respondent State on 10 November 2020 with a request to file its observations within 90 days. The Court, therefore, finds that the Respondent State was duly notified.

21. The Court further notes that the Respondent State did not file its Response to the Application despite the reminder sent to it on 30 June 2022 advising that the Court would proceed and give judgment in default should the required submissions not be filed within the prescribed time. The Court thus finds that the Respondent State failed to defend its case.

22. Finally, the Court notes that the Rules empower it to issue a judgment in default either *suo motu* or at the request of one of the parties. As the Applicants have not requested for a default judgment, the Court issues this judgment *suo motu* for the proper administration of justice.[3]

23. Accordingly, the Court renders the present Ruling in default.

## VI. JURISDICTION

24. The Court notes that Article 3 of the Protocol provides that:

> 1. 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.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

[3] *African Commission on Human and Peoples' Rights v. Libya* (merits) (2016) 1 AfCLR 153, §§ 38 to 42; *Fidèle Mulindahabi v. Republic of Rwanda*, ACtHPR, Application No. 010/2017, Judgment of 26 June 2020 (jurisdiction and admissibility), § 30; *Yusuph Saïd v. United Republic of Tanzania*, ACtHPR, Application No. 011/2019, Judgment of 21 September 2021 (jurisdiction and admissibility), § 17; *Robert Richard v. United Republic of Tanzania*, ACtHPR, Application No. 035/2016, Judgment of 2 December 2021 (merits and reparations), §§ 17 to 18.

25. Under Rule 49(1) of the Rules,[4] "The Court shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules".

26. Based on the above-cited provisions, the Court must, in every Application, preliminarily ascertain its jurisdiction and rule on objections thereto, if any.

27. The Court recalls that the Respondent State did not file any submissions. Nevertheless, in accordance with Article 49(1) of the Rules, it must ensure that all aspects of its jurisdiction are established. In this regard, the Court notes that it has:

    i. Material jurisdiction, insofar as the Applicants allege violation of human rights protected by the Charter, to which the Respondent State is a party.
    ii. Personal jurisdiction, insofar as, as indicated earlier in this Ruling, the Respondent State deposited the Declaration on 28 July 1998. .
    iii. Temporal jurisdiction, insofar as the alleged violations were committed after the entry into force of the Protocol in relation to the Respondent State.
    iv. Territorial jurisdiction, insofar as the facts of the case occurred in the Respondent State's territory.

28. Accordingly, the Court declares that it has jurisdiction to entertain the instant Application.

## VII. ADMISSIBILITY

29. Article 6(2) of the Protocol provides that:

[4] Rule 39(1) of the Rules of 2 June 2010.

> The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter.

30. Rule 50 (1) of the Rules provides as follows:[5]

> The Court shall ascertain the admissibility of an Application [...] in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules.

31. Rule 50(2), which restates Article 56 of the Charter, provides that:

> Applications filed before the Court shall comply with all of the following conditions:
>
> a. Indicate their authors even if the latter request anonymity;
> b. Are compatible with the Constitutive Act of the African Union and with the Charter;
> c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
> d. Are not be based exclusively on news disseminated through the mass media;
> e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
> f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter;
> g. Do not deal with cases which have been settled in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.

32. As indicated above, the Respondent State did not file any submissions. Nonetheless, the Court must examine whether or not the requirements of the above-mentioned provisions are met.

[5]Rule 39 of the Rules of 2 June 2010.

33. It emerges from the Application that the Applicants were clearly identified by name, pursuant to Rule 50 (2) of the Rules.

34. The Court further notes that the Applicants' prayers are aimed at protecting rights guaranteed under the Charter. It notes that one of the objectives of the Constitutive Act of the African Union as enshrined in Article 3 (h) is the promotion and protection of human and peoples' rights. Furthermore, there is no information in the file which is incompatible with the Constitutive Act of the African Union. The Court therefore considers that the Application meets the requirements of Rule 50 (2) of the Rules.

35. The Court further notes that the Application is not written in disparaging or insulting language towards the Respondent State, its institutions or the African Union. It is therefore consistent with Rule 50 (2) of the Rules.

36. The Court also notes that the Application is not based exclusively on information collected through the mass media but through legal documents from domestic courts of the Respondent State. The Court therefore holds that the Application is consistent with Rule 50 of the Rules.

37. With regard to the requirement of prior exhaustion of local remedies under Rule 50(2)(e) of the Rules, the Court notes that on 15 September 2020 the Applicants filed an Application before the Respondent State's Constitutional Council seeking a declaration that the following provisions of the impugned law are unconstitutional: Articles 50, 122/2, 148; 155 and 236 of Law No.034-2020/AN of 25 August 2020 amending Law No.014-2001 of 3 July 2001 on the Electoral Code.

38. On 16 October 2020, by Decision No. 2020-024/CC, the Constitutional Council dismissed the petition on the following grounds:

> Pursuant to Article 157, paragraph 2, of the Constitution, a citizen may only seize the Constitutional Council to challenge a law that has already been promulgated through a constitutional challenge brought before a court in a

case concerning him, either directly by himself or by the diligence of that court;

The Applicants brought an action before the Constitutional Council against a law that had already been enacted, in the absence of any proceedings pending before a court.

39. The Court notes that the Applicants underscored that they exhausted all local remedies to prevent the adoption and implementation of Law No. 034-2020/AN of 25 August 2020.

40. In support of this claim, the Applicants state that they addressed a petition co-signed by other political actors to Members of Parliament requesting that the bill be rejected for being illegal in its form and substance. They further aver that on 16 September 2020, they lodged a petition with the Constitutional Council challenging Law No. 034-2020/AN of 25 August 2020. Finally, the Applicants maintain that they exhausted the remedies insofar as they held a press conference on 29 September 2020 to inform the national and international public opinion of their citizen initiative.

41. The Court notes that, in accordance with Article 56(5) of the Charter and Rule 50(2) (e) of the Rules, Applications must be filed after exhaustion of local remedies if any, unless it is clear that the proceedings in respect of such remedies are unduly prolonged.[6]

42. The Court recalls, in line with its consistent case-law, that the local remedies to be exhausted must be available, effective and satisfactory. Moreover, the mere fact that a remedy exists does not satisfy the rule of exhaustion of remedies since an Applicant is only required to exhaust a remedy insofar as it offers prospects of success.[7]

[6] *Andrew Ambrose Cheusi v. Republic of Tanzania* (merits and reparations) (26 June 2020) 4 AfCLR 219, §52.
[7] *Norbert Zongo and Others v. Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 68; *Lohé Issa Konaté v. Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, §§ 92 and 108; *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin* (merits and reparations) (4 December 2020) 4 AfCLR 133, § 99.

43. The Court further recalls that exhaustion of local remedies is assessed as at the time the Application is filed before it and compliance with this requirement entails that Applicants must await the outcome of pending domestic proceedings before seizing the Court.[8] The only exception to this rule is where proceedings in respect of the applicable remedy are unduly prolonged.

44. The Court notes that, under Articles 152[9] and 175(2) of the Respondent State's Constitution (hereinafter referred to as "the Constitution"), in force at the time the present Application was filed, individuals are entitled to undertake constitutional review of laws prior to their enactment.

45. The Court observes that in dismissing the Applicants' constitutional petition in respect of Law No. 034-2020/AN of 25 August 2020, the Respondent State's Constitutional Council held that:

> a citizen may only seize the Constitutional Council to challenge the constitutionality of a law that has already been promulgated through a review procedure brought before a court in a case concerning him, either directly by himself or by the diligence of that court; the Applicants brought an action before the Constitutional Council against a law that had already been enacted, in the absence of any proceedings pending before a court.

46. It follows from the foregoing that the Applicants should have seized the ordinary courts and not the Constitutional Council to take action against a law which has already been enacted.

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[8] *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 51; *Moussa Kante and Others v. Republic of Mali*, ACtHPR, Application No. 006/2019, Judgment of 25 June 2021 (admissibility), §§ 36-40.

[9] Article 152 provides as follows: "The Constitutional Council is the institution having jurisdiction over constitutional and electoral matters. It is responsible for ruling on the constitutionality of laws, ordinances and the compliance of international treaties and agreements with the Constitution. It interprets the provisions of the Constitution. It controls the legality, transparency and sincerity of referendums, presidential and legislative elections, and rules on electoral disputes. It proclaims the final results of presidential, legislative and local elections.
The control of the legality and transparency of local elections falls within the jurisdiction of the administrative courts. The Council of State is responsible for declaring the final results of these elections.

47. The Court finds that, having followed a different procedure, the Applicants did not exhaust local remedies.

48. The Court reiterates that as the admissibility requirements are cumulative, the Application is inadmissible if one of them is not met. In the present case, as the requirement of exhaustion of local remedies is not met, the Court considers that there is no need to rule on the other admissibility requirements in line with Rules 50(2)(f) and 50(2)(g) of the rules.

49. Accordingly, the Court declares the Application inadmissible.

## VIII. COSTS

50. The Court notes that the Applicants did not make any submission on costs.

51. Pursuant to Rule 32 (2) of the Rules, except otherwise stated by the Court, each party shall bear its own costs.

52. The Court finds that in the instant case there is no reason to depart from this provision, accordingly, orders that each party shall bear its own costs.

## IX. OPERATIVE PART

53. For these reasons:

THE COURT

*Unanimously*

*On Jurisdiction*

i. *Declares that* it has jurisdiction.

*On Admissibility*

*By a majority of ten votes for and one against,*

ii. *Declare*s the Application inadmissible for non-exhaustion of local remedies.

*Costs*

iii. *Orders that* each Party shall bear its own costs.

**Signed:**

Imani D. ABOUD, President;

Modibo SACKO, Vice President;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

Duncan GASWAGA, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rule 70(1) and (2) of the Rules of Court, the Declaration of Judge Chafika BENSAOULA is appended to this Ruling.

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