

**JUDGMENT
T NO.
001/2020
FROM 12 FEBRUARY
2020**

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

**COURT OF JUSTICE OF THE WEST
AFRICAN ECONOMIC AND
MONETARY UNION (WAEMU)**

PUBLIC HEARING ON 12 FEBRUARY 2020

The Court of Justice of the WAEMU, meeting in ordinary public session on the twelfth day of February in the year two thousand and twenty, in which were seated :

*Actions for annulment and
compensation*

Mr Elie SANDWIDI C/

The Commission of the West
African Economic and
Monetary Union (WAEMU)

Mr Daniel Amagoïn TESSOUGUE, Chairman ;
Mr Salifou SAMPINBOGO, Judge; Mr Mahawa
Sémou DIOUF, Judge-Rapporteur; Mr Euloge
AKPO, Judge; Mr Augusto MENDES, Judge; in the
presence of
Mr Bawa Yaya ABDOULAYE, First Advocate
General ;

with the assistance of Mr Boubakar TAWEYE
MAIDANDA, Registrar;

has rendered the following judgment:

BETWEEN :

Mr Elie SANDWIDI, acting through his counsel, the
Société Civile Professionnelle d'Avocats (SCPA
LEGALIS), represented by Maître Matibié BENAÛ,
Avocat à la Cour, Secteur n°6, P.480 Rue Kon Weleg
Rogom, Immeuble des Lumières, 01 BP 6617
Ouagadougou 01, Tel : 25 34 67 10 - Email :
contact@scpa-legalis.com ;

Applicant, on the one hand ;

AND

The Commission of the West African Economic
and Monetary Union (UEMOA), represented by
Maître Harouna SAWADOGO, Avocat à la Cour, 01
BP 4090 Ouagadougou 01;

Defendant, on the other hand ;

Composition of the Court :

- Mr Daniel Amagoïn
TESSOUGUE, Chairman ;
- Mr Salifou SAMPINBOGO, Judge;
- Mr Mahawa Sémou DIOUF,
Judge-Rapporteur ;
- Mr Euloge AKPO, Judge,
- Mr Augusto MENDES, Judge ;
- Mr Bawa Yaya ABDOULAYE,
First Advocate General ;

- Me Boubakar TAWEYE
MAIDANDA, Registrar.

THE COURT

HAVING REGARD TO the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;

HAVING REGARD TO Additional Protocol No. 1 on the supervisory bodies of the WAEMU ;

HAVING REGARD TO Additional Act No. 10/96 of 10 May 1996 on the Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO Regulation No. 01/96/CM of 05 July 1996 on the Rules of Procedure of the WAEMU Court of Justice;

HAVING REGARD TO Regulation n°07/2010/CM/UEMOA of 1^{er} October 2010 on the Staff Regulations of UEMOA ;

VU Minutes No. 2019-08/AI/02 of 28 May 2019 on the appointment of the President of the Court and the distribution of functions within the Court;

VU Minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;

HAVING REGARD to Order N°022/2019/CJ on the composition of the plenary session to sit in ordinary public hearing on 18 December 2019;

HAVING REGARD to Order N°007/2020/CJ of 04 February 2020 on the composition of the plenary session to sit in ordinary public hearing on 12 February 2020;

HAVING REGARD TO the summonses of the parties ;

HAVING REGARD TO request N°18R002 of 04 May 2018;

HEARD the Judge-Rapporteur in his report;

HEARD the oral observations of counsel for Mr Elie Sandwidi ;

HAVING heard the oral observations of the Council of the Commission of the West African Economic and Monetary Union (WAEMU);

HEARD the First Advocate General in his Opinion;

Having deliberated in accordance with Community law :

I- FACTS AND PROCEDURE

Considering that the Commission of the West African Economic and Monetary Union (WAEMU) has, following a call for applications open to nationals of WAEMU Member States, recruited Mr Elie Sandwidi, Magistrate, as a Professional Auditor on behalf of the Court of Justice, by decision n°481/2016/PCOM/UEMOA of 30 December 2016;

That at the end of the probationary period, the President of the Commission took Decision No. 429/2017/PCOM/WAEMU of 8 December 2017 terminating, without notice and without compensation, the duties of Mr. Elie Sandwidi, for non-tenure;

Mr Sandwidi felt aggrieved by this measure and referred the matter to the Joint Consultative Committee by letter dated 14 December 2017;

Since he was unsuccessful, he lodged an appeal with the Court of Appeal for the purpose of :

- to annul decision n°429/2017/PCOM/UEMOA of the President of the Commission concerning non-tenure,
- order the Commission to pay him 10 million in compensation for non-material damage, 20 million for mental suffering, 3 million for loss of salary, 707,200,000 CFA francs in full compensation for the damage suffered and a lump sum of 200 million to take account of promotion during his career;

II- THE PLEAS IN LAW OF THE PARTIES

Considering that, in support of his action, the applicant alleges the illegality and abusive nature of Decision No 429/2017/PCOM/UEMOA of 8 December 2017 not to grant him tenure;

He submits that the reason given for terminating his duties as an Auditor, namely that he had not been granted tenure, is manifestly lacking in seriousness in that whether or not he was granted tenure is, in law, not a fault but the consequence or one of the sanctions of the probationary period;

He argues that the absence of a reason for the decision does not allow him to defend himself and prevents the Court from reviewing its relevance;

He also pointed out that the reason for his dismissal was abusive, since at no time had he been notified of any reproaches or shortcomings that would have made it impossible for him to become a permanent employee;

He adds that the contested decision was taken in total disregard of the provisions of the Staff Regulations, which provide, in Chapters 2 and 3 of Title 3 and Title 4, relating respectively to recruitment conditions and procedures (Articles 23 et seq.), assessment, promotion and decoration (Articles 32 et seq.), for transparent, adversarial and objective procedures guaranteeing the rights of defence of the staff member concerned;

It therefore considers that the contested decision violates the provisions of the Staff Regulations relating to transparency, adversarial procedure and objectivity;

He also points to the absolute disregard of his fundamental rights, in particular his right to a defence, in that Article 3 of the Union Treaty prescribes respect for the fundamental rights recognised by the 1948 Universal Declaration of Human Rights and by the 1981 African Charter on Human and Peoples' Rights;

Finally, as regards the legality of the contested decision, the applicant contests the contested decision on the grounds that it is based on paragraph 3 of Article 35 of the Regulations, whereas his situation cannot be confused with that of a clearly unfit official, who may be dismissed before the end of his probationary period without right or compensation;

As regards compensation for the damage he claims to have suffered, the applicant emphasises that he was expelled from the service under humiliating and vexatious conditions, given the strict conditions of recruitment;

He is therefore claiming payment of various sums from the Commission:

- 10,000,000 CFA francs as compensation for non-material damage;
- 20,000,000 CFA francs for moral suffering resulting from his dismissal

for a spurious reason;

- 3,000,000 CFA francs for deprivation of his December 2017 salary;
- 3,200,000 CFA francs as holiday pay;
- 707,200,000 CFA francs for full compensation for the damage suffered;
- 200,000,000 CFA francs to take account of promotion during his career;

Considering that, in his reply, the applicant submits that the question arises whether the Commission has considered which court has jurisdiction to hear his action, in the event that the Court of Justice does not have jurisdiction to hear it;

He added that, as a result, the right to a judge or to justice was a fundamental human right and that, having been recruited by WAEMU, he benefited from a minimum of legal protection as a worker, even during his probationary period;

That the defendant wilfully fails to state how the provisions of the Staff Regulations applicable to the Sacko and Dieng cases were different from those of the 2010 Regulations applicable in the present case;

He points out that, in those judgments, the Court expressly ruled on its jurisdiction and to hold otherwise is tantamount to removing from its jurisdiction an entire section of the Commission's acts relating to recruitment;

Mr Sandwidi also argues that his action is directed against Article 140 of the Staff Regulations and Articles 15-4 and 26 of the Rules of Procedure and that there has never been any question of an action to assess the legality of Community acts;

Thus, in his view, the Court, which has jurisdiction to rule on the annulment of an act, naturally has jurisdiction to rule on compensation for the damage caused by the annulled decision;

He also points out that he was never informed of the decision of 29 January 2018 of the President of the Commission and that the defendant has not produced any acknowledgement of receipt attesting to this;

That he has therefore drawn the consequences of the Administration's silence, which is equivalent to an implicit rejection decision, in order to lodge his appeal;

Let him further argue that there is no confusion of remedies as in the Agokla case;

Whereas the Commission, in its statement in response, argued that the Court of Justice of the WAEMU did not have jurisdiction, that the action was inadmissible on the ground of foreclosure and that the action was inadmissible on the ground that the subject-matter of the administrative complaint did not correspond to the subject-matter of the action;

That it contends, as to the merits, that Decision No 429/2017/PCCOM/UEMOA of 8 December 2017 not granting tenure to a civil servant is well-founded;

As regards the lack of jurisdiction of the WAEMU Court of Justice, the Commission points out that the applicant's status as a civil servant without tenure does not entitle him to be brought before the WAEMU Court of Justice, since Article 140 of the WAEMU Staff Regulations provides that the Court has jurisdiction only in disputes between the Union and one of its staff members;

It adds that it follows from the combination of Articles 1^{er} and 134 of the UEMOA Staff Regulations that the jurisdiction of the UEMOA Court of Justice to hear any dispute with a staff member presupposes the fulfilment of two conditions:

- the existence of a dispute,
- a dispute between the Union and a member of staff defined as an official recruited and established in one of the permanent posts open in the services of the Union's bodies;

It argued first of all that the applicant's allegations and arguments, based on the Sacko Abdourahmane and Dieng Ababacar judgments handed down by the Court of Appeal in 1998, could not defeat the plea of lack of jurisdiction;

Secondly, that these rulings did not assess the disputes on the basis of the provisions of the Staff Regulations enshrined in Regulation No. 07/2010/CM/WAEMU, which came into force in 2010, i.e. two years after the rulings relied on by Mr Sandwidi;

It points out, in passing, that the question of lack of jurisdiction based on the fact that the person was not a civil servant with tenure was not raised during the examination of these cases;

The Commission also submits that the Court of Justice does not have jurisdiction to rule simultaneously on the legality of a Community measure and an action for damages;

It points out that these two actions are independent of each other, as enshrined in Articles 15(2) and (4) of Regulation No 01/96/CM laying down the Rules of Procedure of the Court of Justice;

As regards the inadmissibility of the action on the ground of foreclosure, the Commission submits that the present action is inadmissible on the ground of foreclosure, on the grounds that the applicant lodged his application on 4 May 2018, whereas he was aware of the contested decision on 29 January 2018 and therefore had until 29 March 2018 to refer the matter to the WAEMU Court of Justice;

As regards the inadmissibility of the appeal on the grounds that the subject-matter of the administrative complaint and the subject-matter of the appeal do not coincide, the Commission emphasises that it is a rule of public policy that appeals by civil servants must have the same subject-matter as those set out in the prior administrative complaint and contain heads of complaint based on the same grounds as those of the complaint;

Accordingly, in its view, in accordance with the case-law arising from the case of Mr Kossi Mawali Agokla against the Commission, the present action is inadmissible for failure to state the same cause of action and the same pleas in law;

That on the legality of decision n°429/2017/PCCOM/UEMOA of 8 December 2017 not to grant tenure to an official, the Commission specifies that the decision not to grant tenure to the applicant was made in accordance with Article 35 of the Regulation on the Staff Regulations of UEMOA;

It adds that the appointing authority based itself on Mr Sandwidi's performance assessment form, drawn up in accordance with Implementing Regulation No 005/2011/COM/WAEMU laying down the length of the probationary period for WAEMU officials;

She argues that this form, which is included in the file, is not subject to any adversarial debate and reflects an effective and reasonable assessment of her professional activity, in particular her attendance and punctuality, professional knowledge, sense of organisation and responsibility, dress and behaviour;

Whereas, in its rejoinder, the Commission reiterated the earlier points made in its defence;

III- OF THE DISCUSSION

Considering that it follows from the general provisions of Regulation n°07/2010/CM/UEMOA on the Staff Regulations of the West African Economic and Monetary Union that its staff is made up of all agents in service in the Organs, w h e t h e r civil servants or contractual;

That the same regulatory provisions specify that an official is a person recruited and established in one of the permanent posts open in the services of the Bodies of the Union, whereas a contract staff member is a person recruited on a fixed-term contract by the Union;

Considering that the final provisions of the aforementioned Regulation have thereby established two categories of staff by assimilating those recruited by the Union, in application of the provisions of Regulation No. 02/95/CM of 1^{er} August 1995, to civil servants and all other staff to contract staff as from the entry into force of Regulation No. 07 of 2010;

Considering that the Court of Appeal, in its judgements Sakho Abdourahmane (No. 02/98) and Dieng Ababacar (No. 03/98) delivered on 29 May 1998, retained jurisdiction to hear the case of a staff member not appointed at the end of a probationary period, as is the case here;

Considering that by having ruled in this way, the high court - in any case a judge of the Community civil service - recognises the existence of a category not included in the classification of the aforementioned Regulation No. 07 of 2010 that should benefit from legal protection for having performed salaried work in the services of the Bodies of the Union, without being either civil servants or contractual employees within the meaning of the law;

Considering that such a position finds its formal source in the provisions of article 03, title 1^{er} of the Treaty of the West African Economic and Monetary Union as follows: "the Union shall respect in its action, the fundamental rights set out in the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981";

Considering that it is necessary to agree that by excluding this category of agents from its field of competence, the latter would be deprived of any right to bring their case before another Judge, which would be at odds with the protection of their right that these international instruments were intended to guarantee;

Whereas the aforementioned regulatory provisions should therefore be read in the light of a body of law comprising the general principles thus laid down by these instruments and which guide the action of all Community bodies;

Considering that, in the present case, it cannot be accepted that Mr Elie Sandwidi was able to benefit from his monthly salary as well as a right to annual leave without having been in an employment relationship, or even a link of employment with the Union through one of its Organs;

Considering that Elie Sandwidi claimed in his pleadings, which were duly placed in the case file, payment of the sum of FCFA 3,200,000 for undue deprivation of his salary for the month of December 2017.

Considering that the principle of allocating a monthly salary to Mr Sandwidi was not discussed by the Commission, which also declared that it had paid all the sums due to the person concerned in this respect;

Considering that the WAEMU Commission, which bears the burden of proof as employer, has not established that it paid the said missing salary;

That the Commission be ordered to pay the sum of FCFA 3,200,000 to Mr Sandwidi in respect of his salary for December 2017;

Considering that, under the terms of Regulation n°07/2010/CM/UEMOA of 1st October 2010, on the Staff Regulations of the West African Economic and Monetary Union, in particular Article 72 paragraphs 2 and 3 :

"An official working in the State of which he is a national shall be entitled to paid leave at the rate of two working days per month.

Entitlement to leave is acquired pro rata temporis, for each annual period after an actual period of service of ten months".

That Decision No. 1258/2017/DSAF/DRH of 30 October 2017 grants him annual leave, which he has not taken, that there is reason to compensate him, in accordance with the provisions of Article 73 of the said regulations as follows: "The leave salary is equal to the monthly remuneration of the month preceding that of the leave departure".

That the Commission should also be ordered to pay him the leave he did not receive.

P A R C E S M O T I F S

In a case concerning the Community civil service, the Court of First Instance, after hearing an application from both parties, has given judgment in the affirmative at first and last instance;

In form :

- **Declares itself**

competent; Merits :

- **Declares legal and well-founded the decision not to grant tenure to Mr Elie Sandwidi;**
- **Declares that the Commission owes Mr Elie Sandwidi the sum of CFAF 3,200,000, representing his salary for the month of December 2017, and orders it to pay it to him;**

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- Order the Commission to pay him the amount corresponding to his paid leave;
- Dismisses the remainder of Elie Sandwidi's claims;
- Orders that the costs, in accordance with Article 61 of Regulation No. 01/96/CM/UEMOA on the Rules of Procedure of the Court, shall be borne by the Commission.

Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above.

And signed by the Chairman and the Registrar

**RECTIFIED IN ACCORDANCE WITH DECREE NO. 002/2020
OF 04 MARCH 2020 AS FOLLOWS:**

**JUDGMENT
NO.
002/2020
FROM 04 MARCH 2020**

**EXTRACT FROM THE MINUTES OF THE
REGISTRY**

**COURT OF JUSTICE OF THE WEST
AFRICAN ECONOMIC AND
MONETARY UNION (WAEMU)**

COUNCIL CHAMBER OF 04 MARCH 2020

The Court of Justice of the WAEMU, meeting in chambers on four March two thousand and twenty, in which were present :

*rectification of a material error
or omission in
the minutes of judgment no.
001/2020 of 12 February
2020*
**PARTIES TO THE MAIN
PROCEEDINGS**

Mr Elie SANDWIDI C/

**The Commission of the West
African Economic and Monetary
Union (WAEMU)**

**Mr Daniel Amagoin TESSOUGUE, Chairman ;
Mr Salifou SAMPINBOGO, Judge; Mr Augusto
MENDES, Judge; in the presence of Mr Bawa
Yaya ABDOULAYE, First Advocate General;**

**with the assistance of Mr Boubakar TAWEYE
MAIDANDA, Registrar;**

delivered the following judgment:

rectification of a material error or omission in the minutes of Judgment No 001/2020 of 12 February 2020

Composition of the Court :

- Mr Daniel Amagoin TESSOUGUE, Chairman ;
- Mr Salifou SAMPINBOGO, Judge ;
- Mr Augusto MENDES, Judge ;
- M. Bawa Yaya ABDOULAYE, First Advocate General ;
- Me Boubakar TAWEYE MAIDANDA, Registrar.

THE COURT

VU the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;

HAVING REGARD TO Additional Protocol No. 1 on the supervisory bodies of the WAEMU ;

HAVING REGARD TO Additional Act No. 10/96 of 10 May 1996 on the

Statutes of the Court of Justice of the WAEMU ;

HAVING REGARD TO Regulation No. 01/96/CM of 05 July 1996 on the Rules of Procedure of the Court of Justice of the WAEMU;

VU Regulation n°07/2010/CM/UEMOA of 1^{er} October 2010 on the Staff Regulations of UEMOA;

VU Minutes No. 2019-08/AI/02 of 28 May 2019 on the appointment of the President of the Court and the allocation of functions within the Court. Court ;

VU Minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;

HAVING REGARD TO Judgment No 001/2020 dated 12 February 2020 of the WAEMU Court of Justice;

HAVING REGARD TO Order N°017/2020/CJ on the composition of the panel to sit in chambers on 03 March 2020;

HAVING REGARD TO the letter dated 28 February 2020 from the First Advocate

HEARD the First Advocate General in his Opinion;

Having deliberated in accordance with Community law :

IV- FACTS AND PROCEDURE

By judgment n°001/2020 of 12 February 2020, in the case of Mr Elie SANDWIDI against the WAEMU Commission, the Court rendered the following decision: "***Ruling publicly and adversarially at first and last instance in matters of Community civil service;***

In form :

- ***Declares itself competent; Merits :***

- ***Declares legal and well-founded the decision not to grant tenure to Mr Elie Sandwidi;***
- ***Declares that the Commission owes Mr Elie Sandwidi the sum of CFAF 3,200,000, representing his salary for the month of December 2017, and orders it to pay it to him;***
- ***Order the Commission to pay him the amount corresponding to his paid leave;***
- ***Dismisses the remainder of Mr Elie Sandwidi's claims;***
- ***Orders that the costs, in accordance with Article 61 of Regulation No. 01/96/CM/UEMOA on the Rules of Procedure of the Court, shall be borne by the Commission.***

Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above;

The parties were notified of the said judgment on 12 February 2020.

By letter no. 002-2020 dated 28 February 2020, the First Advocate General informed the President of the Court that there had been a material omission in the minutes of the judgment referred to above.

By letter no. 2020-084 of 03 March 2020, the President of the Court instructed the Registrar to open a file for rectification of a material error or omission and to forward it to the First Advocate General for his conclusions;

V- REASONS FOR THE DECISION

Considering that in the minutes of the judgment n°001/2020 of 12 February 2020 rendered by the UEMOA Court of Justice, there are no grounds for the part of the operative part of the judgment by which the Court "declares legal and well-founded the decision not to grant tenure to Mr Elie Sandwidi";

Considering that it is clear from the documents in the file, in particular from the drafts of the judgment at the end of the part relating to the discussion, the following paragraphs: "*Considering that Mr Elie Sandwidi has requested other sums of money linked to his non-appointment, which, according to him, was based on an erroneous and manifestly illegal basis;*

Considering that the defendant WAEMU Commission stated that it based its decision not to establish the official on the performance assessment form drawn up in accordance with Implementing Regulation No 05/2011/COM/WAEMU laying down the length of the probationary period for officials;

Considering that it is settled case law that the Judge cannot extend his review to the statements in a staff member's appraisal form, which falls within the discretionary power of the appointing authority;

Considering that it follows precisely from the provisions of Article 35, paragraphs 2 and 3 of Regulation No. 07/2010/CM/WAEMU on the Staff Regulations of the West African Economic and Monetary Union that "on expiry of the probationary period, the appointing authority shall decide whether or not to grant the person permanent status as a civil servant and shall notify the person of its decision in writing. In the event of manifest unfitness, the employment relationship shall be terminated without notice or compensation";

That the non-appointment of Mr Elie Sandwidi should be declared legal and well-founded and that, in application of the said regulations, all the applicant's other pecuniary claims should be rejected";

Whereas these paragraphs were omitted from the minutes of the judgment;

Considering that it follows from the foregoing that it is clearly as a result of a material omission of seizure that these paragraphs could not appear in the minutes of the judgment;

Whereas Article 58 of the Court's Rules of Procedure provides that "*Without prejudice to the provisions relating to the interpretation of*

In its judgments, the Court may rectify clerical, arithmetical or material errors, either of its own motion or at the request of a party. The Court decides in chambers, after hearing the Advocate General;

Consequently, pursuant to Article 58 of the Rules of Procedure, the application for rectification of a material error or omission should be granted and the minutes of Judgment No 001/2020 of 12 February 2020 should be rectified.

P A R C E S M O T I F S

Acting in accordance with Community law and in chambers :

- **Receives the application to rectify a material error or omission and declares it well-founded;**
- **Notes that the minutes of Judgment No. 001/2020 of 12 February 2020 contain a material omission in the discussion part;**
- **Orders the rectification of the material omission in the minutes of Judgment No. 01/2020 of 12 February 2020 by adding the following paragraphs after the last paragraph of the discussion part:**

"Considering that Mr Elie Sandwidi has requested other sums of money linked to his non-appointment, which, according to him, was based on an erroneous and manifestly illegal basis;

Considering that the defendant WAEMU Commission stated that it based its decision not to establish the official on the performance assessment form drawn up in accordance with Implementing Regulation No 05/2011/COM/WAEMU laying down the length of the probationary period for officials;

Considering that it is settled case law that the Judge cannot extend his review to the statements in a staff member's appraisal form, which falls within the discretionary power of the appointing authority;

Considering that it follows precisely from the provisions of Article 35, paragraphs 2 and 3 of Regulation No. 07/2010/CM/WAEMU on the Staff Regulations of the West African Economic and Monetary Union that "on expiry of the probationary period, the appointing authority shall decide whether or not to grant the person permanent status as a civil servant and shall notify the person of its decision in writing. In the event of manifest unfitness, the employment relationship shall be terminated without notice or compensation";

That the non-appointment of Mr Elie Sandwidi should be declared legal and well-founded and that, in application of the said regulations, all the applicant's other pecuniary claims should be rejected;

- **Orders that this decision shall be entered at the foot of the minutes of Judgment No. 001/2020 and on any copies thereof;**
- **Orders that the costs, in accordance with Article 61 of Regulation n°001/96/CM/UEMOA on the Rules of Procedure of the Court, shall be borne by the Commission.**

Thus made, judged and delivered in chambers in Ouagadougou on the day, month and year above.

And signed by the Chairman and the Registrar.