

Kemboge v Tanzania (merits) (2018) 2 AfCLR 369

Application 002/2016, *George Maili Kemboge v United Republic Tanzania*
Judgment, 11 May 2018. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSOUOLA

The Applicant was convicted and sentenced to 30 year imprisonment for the rape of a minor. He brought this action alleging a violation of his right to equal protection before the law as well as the right to enjoy the best attainable state of health. The Court held that there was no violation of the African Charter.

Jurisdiction (not an appellate court, 19)

Admissibility (exhaustion of local remedies, extraordinary remedy, 33)

Equal protection of the law (allegations require substantiation, 51, 52)

I. The Parties

1. The Application is filed by Mr George Maili Kemboge (hereinafter referred to as “the Applicant”), a citizen of the United Republic of Tanzania, who is currently serving a thirty (30) years prison sentence at the Butimba Central Prison in Mwanza, for the crime of rape of a minor.

2. The Respondent State, the United Republic of Tanzania, 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 10 February 2006. Furthermore, the Respondent State deposited the declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. Subject of the Application

A. Facts of the matter

3. The records indicate that on 14 August 2006, in Criminal Case No. 110/2006 before the District Court of Tarime, the Applicant was convicted and sentenced to thirty (30) years’ imprisonment, twelve strokes of the cane and payment of a fine of Tanzania Shillings Five Hundred Thousand (TZS 500,000) for having committed the crime of rape of a girl of 15

years of age, an offence punishable under Section 130(1) and (2)(e) and Section 131(1) of the Tanzania Penal Code Cap. 16, as revised in 2002 (hereinafter referred to as the “Penal Code”).

4. The Applicant filed Criminal Appeal No. 85/2012 before the High Court of Tanzania sitting at Mwanza (hereinafter referred to as the “High Court”); and Criminal Appeal No. 327/2013 before the Court of Appeal of Tanzania sitting at Mwanza (hereinafter referred to as the “Court of Appeal”). The High Court upheld the Applicant’s sentence on 13 September 2013 and this was affirmed by the Court of Appeal on 30 October 2014.

B. Alleged violations

5. The Applicant alleges that the following rights have been violated:
 - i. the right to equal protection of the law, provided under Article 3(2) of the Charter;
 - ii. the right to enjoy the best attainable state of physical and mental health, provided under Article 16 of the Charter.”

III. Summary of procedure before the court

6. The Application was filed at the Registry on 4 January 2016 and served on the Respondent State by a notice dated 25 January 2016, inviting the latter to file the list of its representatives within thirty (30) days, and its Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2)(a) and 35(4)(a) of the Rules of Court (hereinafter referred to as “the Rules”).

7. By a letter dated 11 March 2016 and received at the Registry on 22 March 2016, the Applicant filed an additional written submission and this was served on the Respondent State by a notice dated 29 March 2016.

8. By a notice dated 12 April 2016, the Application was transmitted to the Executive Council of the African Union and, through the Chairperson of the Commission, to all the other State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

9. By a letter dated 20 January 2017, received at the Registry on 6 February 2017, the Respondent State submitted its Response to the Application justifying that the delay was caused by the need to gather information from all the entities concerned. The Court considered and accepted the Response in the interests of justice.

10. By a letter dated 9 February 2017, the Registry transmitted the Respondent State’s Response to the Applicant.

11. By a letter dated 29 March 2017, received at the Registry on 5

April 2017, the Applicant filed his Reply to the Response and this was served on the Respondent State by a notice dated 11 April 2017.

12. The Court decided to close written pleadings with effect from 14 June 2017, pursuant to Rule 59(1) of the Rules.

13. By a letter dated 6 April 2018, the Parties were informed that the Court will make a determination on the matter on the basis of the written pleadings and materials on file without holding a public hearing.

IV. Prayers of the Parties

14. The Applicant prays the Court to:

- “i. restore justice by quashing the conviction and sentence imposed on him, and order his release;
- ii. grant him reparations for the violation of his rights; and
- iii. order such other measures or remedies as the Court may deem fit.”

15. The Respondent State prays the Court to:

- “i. declare that it has no jurisdiction to hear the matter and that the Application has not met the admissibility conditions;
- ii. find that “it has not violated Articles 3 and 7(1)(c) of the Charter”;
- iii. rule that the Applicant is not entitled to reparations;
- iv. dismiss the Application for being unfounded;
- v. Order that the Applicant pays the costs. “

V. Jurisdiction

16. In accordance with Rule 39(1) of its Rules “[t]he Court shall conduct preliminary examination of its jurisdiction...”

A. Objections to material jurisdiction

17. The Respondent State raises objection to the jurisdiction of the Court, claiming that by asking this Court to re-examine the evidence adduced and examined by its courts, the Applicant is requesting the Court to sit as an appellate court, for which this Court has no jurisdiction. In this regard, the Respondent State cites the Court’s decision in Application No. 001/2013 *Ernest Francis Mtingwi v Republic of Malawi*.

18. The Applicant, challenging the Respondent State’s claim, asserts that the Court has jurisdiction whenever there is a violation of the provisions of the Charter and other relevant human rights instruments, to review the judgment passed by the domestic courts, re-

examine the evidence, quash the sentence and acquit him. To this end, the Applicant cites the Court's Judgment in Application No. 005/2013 - *Alex Thomas v United Republic of Tanzania*.

19. This Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*¹ that it is not an appeal court with respect to decisions rendered by national courts. However, as it underscored in its Judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania*, this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.²

20. In the instant case, the Applicant alleges violations of his rights protected by the Charter. This Court, accordingly, has jurisdiction to determine whether the domestic courts' proceedings that form the basis of his Application before this Court had been conducted in accordance with international standards set out in the Charter.

21. In view of the forgoing, the Court dismisses the Respondent State's objection that the Court is acting as an appellate court and finds that it has material jurisdiction to hear the matter.

B. Other aspects of jurisdiction

22. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent State; and nothing in the pleadings indicates that the Court does not have jurisdiction. The Court thus holds that:

- "i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the required declaration under Article 34(6) thereof, which enables the Applicant to directly access the Court in terms of Article 5(3) of the Protocol;
- ii. it has temporal jurisdiction on the basis that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process;
- iii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the

1 Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi*, para 14.

2 Application No.005/2013, Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania* (*Alex Thomas v Tanzania* Judgment), para 130 and Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania* (*Mohamed Abubakari v Tanzania* Judgment), para 29.

Protocol, that is, the Respondent State.”

23. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

24. In terms of Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

25. Pursuant to Rule 39(1) of its Rules, the “Court shall conduct preliminary examination of ... the admissibility of the application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules.”

26. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

“Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

- (1) disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
- (2) comply with the Constitutive Act of the Union and the Charter;
- (3) not contain any disparaging or insulting language;
- (4) not be based exclusively on news disseminated through the mass media;
- (5) be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
- (6) be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
- (7) not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.”

27. The Court notes that the Respondent State raises only one objection to the admissibility of the Application, that is, objection in relation to the requirement of exhaustion of local remedies.

A. Condition of admissibility in contention between the Parties: the objection based on the non-exhaustion of local remedies

28. The Respondent State contends that the Applicant has not

exhausted local remedies with regard to the alleged violation of the right to equal protection of the law and the right to legal assistance. According to the Respondent State, these alleged violations are being raised before this Court for the first time.

29. The Respondent further contends that the right to equal protection of the law is provided under Article 13(1) of the Tanzanian Constitution of 1977, and as such, the alleged violation could have been challenged through a Constitutional Petition in accordance with the Basic Rights and Duties Enforcement Act.

30. In support of its claim, the Respondent State relies on the Commission's jurisprudence in *Communication Article 19 v Eritrea* and the Court's own jurisprudence in Applications No. 003/2012 - *Peter Joseph Chacha v United Republic of Tanzania* and No. 003/2011 – *Urban Mkandawire v Republic of Malawi*.

31. In his Reply, the Applicant reiterates that he has exhausted all local remedies. He claims that, with respect to the constitutional petition, the Judge of the High Court could never make a ruling which would be at variance with the judgment rendered by a bench of judges of the Court of Appeal. With regard to the Respondent State's allegation on legal aid, the Applicant submits that the legal aid sought is that provided for in Rule 31 of the Rules.

32. The Court notes that the Applicant filed an Appeal and had access to the highest court of the Respondent State, namely, the Court of Appeal, with the prayer to adjudicate on the various allegations, especially those regarding violations of the right to a fair trial.

33. Concerning the possibility of filing a constitutional petition, the Court has previously stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust.³

34. Regarding the objection of the Respondent State that the issue of legal aid was being raised in this Court for the first time, the Court holds that the said objection is no longer an issue because, according to the Applicant, the legal assistance he referred to in his Application was not in relation to the domestic proceedings, but rather a request to this Court to grant him legal aid in accordance with Rule 31 of the Rules.

35. Accordingly, the Court finds that the Applicant exhausted local remedies as envisaged under Rule 40(5) of the Rules. The Court, therefore, dismisses this preliminary objection to the admissibility of the Application.

3 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 62; *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 66 – 70; Application No. 011/2015, Judgment of 28/9/2017, *Christopher Jonas v United Republic of Tanzania*, para 44.

B. Conditions of admissibility that are not in contention between the Parties

36. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, the filing of the Application within a reasonable time and the principle that an Application must not raise any matter already determined in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (sub-Rules 1, 2, 3, 4, 6 and 7 of Rule 40 of the Rules) are not in contention between the Parties.

37. For its part, the Court notes that nothing on the record suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements are fulfilled.

38. In light of the foregoing, the Court finds that the instant Application fulfills all admissibility conditions set out in Rule 40 of the Rules, and accordingly, declares the same admissible.

VII. The merits

A. Alleged violation of the right to equal protection of the law

39. The Applicant states that the judgment of the Court of Appeal was obtained "by overlooking the court records and prejudiced [his] defence." The Applicant alleges further that two of his three grounds of appeal were not considered by the Court of Appeal because that court found that the Applicant did not raise them in his appeal before the High Court.

40. The Applicant claims that by overlooking the grounds in question, the Court of Appeal has confined itself only to procedural matters, rather than considering the interests of justice. Accordingly, the Applicant alleges that his right to equal protection of the law provided under Article 3(2) of the Charter has been violated.

41. In his Reply, the Applicant refutes the contention of the Respondent State that he confessed to having committed the crime, and insists that he has always pleaded not guilty. He also claims that, before the domestic courts, the issue should have been about the marriage between him and the victim rather than the crime of rape since he was living with the victim in a marital relationship.

42. In this regard, the Applicant states that there is a contradiction

regarding the age of the victim: on the one hand, the public prosecutor claims that the victim was fifteen (15) years old, whereas the mother, on the other hand, says she was sixteen (16) years old; on her part, before living together with the Applicant, the victim had told the Applicant that she was 18 years old.

43. The Applicant avers that in the community to which they belong, it is common practice for a man and woman to live together under the same roof before formalizing the traditional marriage. He claims that he had offered the victim's mother a dowry that was higher than the one offered by another individual who wanted to marry the victim.

44. The Applicant also claims that even if the victim was under 18, the mother had given her consent for them to live together; otherwise, she would never have kept silent for two weeks without saying anything to her neighbours, only to show up at the Applicant's home after all that time demanding to have her daughter and reporting the case to the police.

45. The Respondent State refutes the Applicant's arguments that the Court of Appeal did not examine his contention regarding the victim's age and the mother's consent. It submits that the Court of Appeal did not take the contentions into consideration because it never considered them relevant for the reason that the Applicant had himself admitted having had sexual intercourse with a minor and that the said arguments have not been raised before the High Court.

46. The Respondent State also submits that the issue requiring determination is the age of the victim. Having been proven that the victim was 16 years old, it remained to be ascertained whether during the time she lived with the Applicant they had intercourse. According to the Respondent State, however, the Applicant himself confessed and confirmed the victim's statement that they had sexual intercourse at least once during the time they lived together in the Applicant's home.

47. The Respondent State alleges that, not only did the Applicant confess to sexual intercourse with the victim, but also that, during cross-examination, the Applicant did not interrogate the victim on the issue of her age and the alleged sexual intercourse. According to the Respondent State, this silence amounts to tacit acceptance of the veracity of the victim's testimony.

48. The Applicant alleges violation of Article 3(2) of the Charter which guarantees the right to equal protection of the law. However, it appears from the record and the content of the allegations that the relevant provision is rather Article 3(1) of the Charter, which states that "Every individual shall be equal before the law."

49. In a previous case, this Court has stated that the right to equality before the law requires that "all persons shall be equal before the courts

and tribunals”.⁴ In the instant case, the Court notes that, in his appeal before the Court of Appeal, the Applicant presented three arguments, namely: (i) the absence of documentary proof that the victim is a minor (birth certificate); (ii) the fact that the absence of parental consent has not been established; and (iii) the fact that the court did not determine the case on the merits after evaluation of all the evidence on record.

50. The Court notes that, according to the records, the Court of Appeal declared itself as lacking the jurisdiction to hear allegations which had not been raised before, nor settled by, the first appellate court.⁵ It held, however, that the victim was sixteen (16) years old at the time of the crime and upheld the Applicant’s conviction.

51. The Court notes that the Applicant has not demonstrated how the Court of Appeal’s refusal to consider two of his three allegations violated his right to equal protection before the law. This Court has, in the past, held that “General statements to the effect that [a] right has been violated are not enough. More substantiation is required.”⁶

52. Moreover, the documents in file demonstrate that the Court of Appeal justified the dismissal of the Applicant’s two arguments on the grounds that they relate to issues that were not previously raised before the lower courts. In this regard, this Court has not found that the Applicant was treated unfairly or subjected to discriminatory treatment in the course of the domestic proceedings⁷.

53. In view of the forgoing, the Court dismisses the Applicant’s allegation that his rights under Article 3(1) of the Charter have been violated.

B. The alleged violation of the right to enjoy the best attainable state of physical and mental health

54. In his Reply, the Applicant alleges the violation of his right to enjoy the best attainable state of physical and mental health guaranteed under Article 16 of the Charter, on the grounds that he was not recognized as married to the victim.

55. The respondent State has not made submissions on this

4 *Kijiji Isiaga v Tanzania* Judgment, *op cit*, para 85.

5 “In the event and on the basis of the settled legal position demonstrated by the Court, grounds 2 and 3 having been raised for the first time in a second appeal are not legally before us for determination and there lack merit.”

6 *Alex Thomas v Tanzania* Judgment, *op cit*, para 140. See also: *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania* Judgment, *op cit*, paras 150 – 153.

7 Application No. 032/2015. Judgment 21/03/2018 2018, *Kijiji Isiaga v United Republic of Tanzania*, para 85.

allegation.

56. Article 16 of the Charter provides that:

- “1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

57. The Court notes that the Applicant alleges the violation of his right to enjoy the best attainable state of physical and mental health on the grounds that he was not recognized as married to the victim.

58. The Court is of the view that the Applicant has not demonstrated how the Respondent State’s refusal to recognize his alleged marriage with the victim has violated his right to enjoy the best attainable state of physical and mental health.

59. In view of the forgoing, the Applicant’s allegation lacks merit and, therefore, the Court dismisses this allegation.

VIII. Remedies sought

60. In the Application, the Court is requested to order the restitution of the Applicant’s rights; the quashing of the conviction and setting aside of the sentence; order his release and reparations to remedy all violations of his fundamental rights.

61. In its Response, the Respondent State prays the Court to dismiss the Application in its entirety as unfounded and, thereby declare that the Applicant is not entitled to any reparation.

62. Article 27(1) of the Protocol stipulates that “If the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

63. In this respect, Rule 63 of the Rules provides that: “The Court shall rule on the request for the reparation ... by the same decision establishing the violation of a human and peoples’ right or, if the circumstances so require, by a separate decision.”

64. The Court notes in the instant case that as no violation has been established, the issue of remedies sought does not arise, and therefore dismisses the Applicant’s prayer for reparation.

IX. Costs

65. The Respondent prays the Court to rule that the cost of the proceedings be borne by the Applicant.

66. The Applicant has made no specific submission on this matter.

67. The Court notes that Rule 30 of its Rules provides that: “Unless

otherwise decided by the Court, each party shall bear its own costs.”

68. The Court holds that in the circumstances of this case, there is no reason for it to decide otherwise and, consequently, rules that each Party shall bear its own costs.

X. Operative part

69. For these reasons,
The Court,
Unanimously,

On jurisdiction

- i. *Dismisses* the objection to its material jurisdiction;
- ii. *Declares* that it has jurisdiction.

On admissibility

- iii. *Dismisses* the objection on the admissibility of the Application;
- iv. *Declares* the Application admissible.

On the merits

- v. *Declares* that the Respondent State has not violated the Applicant's right to equality before the law, provided for under Article 3(1) of the Charter;
- vi. *Declares* that the Respondent State has not violated the Applicant's right to enjoy the best attainable state of physical and mental health, provided for under Article 16 of the Charter;
- vii. *Holds* that the issue of reparations does not arise and dismisses the claim for remedies;
- viii. *Rules* that each Party shall bear its own costs.