

Mugesera v Rwanda (provisional measures) (2017) 2 AfCLR 149

Application 021/2017, *Léon Mugesera v Republic of Rwanda*

Order, 28 September 2017. Done in English and French, French being the authoritative text.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, CHIZUMILA and BENSOUULA

Recused under Article 22: MUKAMULISA

An Application for provisional measures by a detainee was granted by the Court which ordered that he be allowed to access his lawyers, to be visited and communicate with family members, and to have access to medical care.

Provisional measures (only need for *prima facie* jurisdiction, 17-20; extreme urgency, irreparable harm, 28)

I. Subject of the Application

1. The Court received, on 28 February 2017, an Application by Léon Mugesera (hereinafter referred to as “the Applicant”), instituting proceedings against the Republic of Rwanda (hereinafter referred to as “the Respondent”), for alleged violations of human rights.

2. The Applicant, is a Rwandan national, currently held in custody at Nyanza Prison (Mpanga), Nyanza, Republic of Rwanda.

3. The Respondent became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and the Protocol on 25 January 2004. On 6 February 2013, the Respondent made the Declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental organisations.¹

4. The Application is based on the alleged injustice the Applicant claims to have suffered during the entire procedure before the High Court Chamber for International Crimes² and before the Supreme Court of Rwanda between 2012 and 2016. He alleged that he has been detained under deplorable conditions, undergone all forms of torture and had only limited access to his family, without medical or

1 It should be noted that the Respondent withdrew its declaration on 29 February 2016. For the decision of the Court in this regard, see paragraph 20 of this Order.

2 A Chamber within the High Court of the Republic of Rwanda, specialised in “international crimes”, which will judge in particular genocide suspects extradited from third countries or by the International Criminal Tribunal for Rwanda (ICTR).

appropriate treatment and without access to counsel.

5. The Applicant alleges further that his right to a fair trial provided for under Article 7 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa has been violated, through in particular:

- "a. the refusal by the High Court Chamber for International Crimes to provide a remedy for the violations that occurred during the proceedings in violation of Article 7(1)(a) of the Charter;
- b. the impossibility to reply to the pleadings and allegations made against him by the Public Prosecutor's Office during proceedings before the High Court Chamber for International Crimes and the Supreme Court of Rwanda, in violation of Article 7(1)(c) of the Charter;
- c. lack of access to legal aid on grounds that he was not considered as indigent, notwithstanding his social and personal condition, the complexity of the case, the seriousness of the charges and the potential sentence he faces if convicted, and the wrongful conviction of his Rwandan lawyer leading to a fine of 400,000 CFA (Euros 610€), in violation of Article 7(1)(c) of the Charter;
- d. refusal to allow the Applicant to call his witnesses and other expert witnesses to testify, and refusal to allow him to make submissions in his own defence, in violation of Article 7(1)(c) of the Charter;
- e. refusal to translate into French, one of the official languages of the country, when the proceedings were being conducted only in Kinyarwanda, a language that his lawyers do not understand, in violation of Article 7(1)(c) of the Charter;
- f. lack of access to the case file, which was later provided in the form of a flash disk, but, as it turned out, was unreadable, in violation of Article 7(1) (c) of the Charter; and
- g. lack of fairness and independence of the Court, following the replacement of a Judge who had led the proceedings for more than two years and heard a number of witnesses, in violation of Articles 7(1)(d) and 26 of the Charter."

6. The Applicant claims to have been a victim of cruel, inhuman and degrading treatment, in violation of Article 5 of the Charter, due, in particular, to:

- “a. an “... atmosphere of fear and intimidation ...” that was created by the systematic iteration in the media of his 1992 speech;
- b. his inclusion on the list of people to be executed;
- c. constant death threats by security agents, police and prison wardens, a conduct that is in violation of Article 5 of the Charter; and
- d. refusal to provide him with sufficient food.”

7. The Applicant submits that there has been an attack against his physical and mental integrity, in violation of Article 4 of the Charter notably by:

- “a. being deprived of contact with his family and lawyer;
- b. cancellation of medical consultations and at times being treated by a warder reconverted as a nurse and without certification;
- c. refusal to provide adequate lighting in his cell and lack of provision of an orthopaedic pillow;
- d. failure to respect the ophthalmological prescription regarding the lighting in his cell and thus exposing him to the risk of becoming blind as a result of cataracts that he has on both eyes;
- e. deprivation of access to a psychiatrist to assess the mental effects of the lack of sleep and trauma from the progressive loss of vision;
- f. failure to properly maintain his prescriptions which disappeared from his medical file, or being administered poor treatment;
- g. failure to respect his dietary needs composed of fruits, as well as refusal to provide him with anti-cholesterol diet such as brown bread, whereas other detainees of the same prison are given special bread to meet their dietary needs;
- h. exposure to difficult detention conditions which led to an increase in his blood pressure to 10/5, a level which is very dangerous for his health; and
- i. failure to respect the diplomatic assurances given to Canada according to which he would be given a diet and medical treatment consistent with international standards.”

8. The Applicant alleges that his right to communicate with his family has been violated, as has his right of access to information,

provided for under Articles 18(1) and 9(1) of the Charter, respectively, given that, despite having obtained authorisation to that effect, practical obstacles have been put in his way, such as the lack of access to, or delayed provision of a telephone and in instances where he has been able to communicate, he became aware that the telephone line had been tapped.

9. The Applicant claims further that he was transferred to another prison, his family did not know his whereabouts for several days and that the lack of information regarding his fate and the several obstacles he faced were a violation of Articles 6 and 7 of the Charter.

II. Procedure before the Court

10. The Application was received at the Registry on 28 February 2017.

11. By a letter dated 3 April 2017, the Registry served the Application on the Respondent, and requested her to submit, the names and addresses of her representatives within thirty (30) days, the comments on the request for Provisional Measures within twenty one (21) days and the Response to the Application within sixty (60) days.

12. The deadline for submission of comments on the request for Provisional Measures elapsed on 27 May 2017.

13. On 12 May 2017, the Registry received a letter from the Respondent reminding the Court of her withdrawal of the Declaration made under Article 34(6) of the Protocol and informing the Court that she will not take part in any proceedings before the Court and consequently, requesting the Court to desist from transmitting any information on cases concerning Rwanda until she reviews the Declaration and communicates its position to the Court.

14. The Court notes that in the abovementioned letter, the Respondent State has not made observations on the Application for provisional measures.

15. By a letter dated 22 June 2017, the Court responded to the letter of Respondent referred above, noting that “by virtue of the Court being a judicial institution and pursuant to the Protocol and Rules of Court, the Court is required to exchange all procedural documents with the Parties concerned. Consequently, and in line with these requirements, all pleadings on matters to which Rwanda is a party before this Court shall be transmitted to you until the formal conclusion of the same”.

III. Jurisdiction

16. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case.

17. However, in ordering Provisional Measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.³

18. Article 3(1) of the Protocol provides that “the Court has jurisdiction to examine all cases submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant instrument on Human Rights ratified by the State concerned”.

19. As indicated the paragraph 3 of this Order, the Respondent became a Party to the Charter and to the Protocol and made the Declaration accepting the jurisdiction of the Court to receive applications filed by individuals and non-governmental organisations.⁴

20. The Court recalls that, in its decision in *Ingabire Victoire Umuhoza v Republic of Rwanda*, the withdrawal of the Declaration filed by the Respondent in terms of Article 34(6) of the Protocol only took effect from 1 March, 2017.⁵ However, given that the Application was filed on 28 February, 2017, the Court’s temporal jurisdiction is established.

21. The rights alleged by the Applicant to have been violated are guaranteed under the provisions of Articles 4, 5,6,7,9 and 18 of the Charter.

22. In light of the foregoing, the Court has satisfied itself that it has *prima facie* jurisdiction to deal with the Application.

IV. On the provisional measures requested

23. The Applicant, considering the extreme urgency which, failing, may lead to irreparable harm,

“... submits that the Court must order the Respondent to take interim measures in order to prevent or stop the perpetration of serious and irreparable damage that he suffers. Such serious irreparable damage has arisen from the many violations by the Respondent of the rights guaranteed by the African Charter on Human and Peoples’ Rights. The said violations have been described in this Application. Four of them call for an urgent situation that must be changed as soon as possible. First, the violation of his Counsel’s right of access. Secondly, the inhuman and degrading treatment perpetrated against the Applicant. Thirdly, the violation of the right of access to adequate medical treatment. Fourthly, the violation of his

3 See Application 002/2013 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures) (15 March 2013) and Application 006/2012 *African Commission on Human and Peoples’ Rights v Kenya* (Order for Provisional Measures) (15 March 2013); Application 004/2011 *African Commission on Human and Peoples’ Rights v Libya* (Order for Provisional Measures) (25 March 2011).

4 It should be noted that the Respondent withdrew its declaration on 29 February 2016. For the decision of the Court in this regard, see paragraph 19 of this Order.

5 *Ingabire Victoire Umuhoza v Republic of Rwanda* Application No. 003/2014 (Ruling on Jurisdiction of 3 June 2016) Paragraph 69, iii..

right of access to his relatives.”

24. Pursuant to Article 27(2) of the Protocol, “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.” This provision is reiterated in Rule 51(1) of the Rules which provides that “Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the Parties any interim measure which it deems necessary to adopt in the interest of the Parties or of justice.”

25. The Court notes that the letters from the Applicant’s Lawyer of 4 May 2016 to the *Procureur General* of Rwanda, and of 28 December 2016 to the President of the National Council for Nurses and Midwives of Rwanda, demonstrate that the Applicant has been facing serious difficulties in accessing medical care.

26. The Court notes further from the Application that the requested Provisional Measures relating to the allegation of inhuman and degrading treatment against the Applicant is mainly linked to the alleged lack of access to medical care.

27. The Court also notes that from his letter of 21 February 2017 to the Director of the Nyanza Prison, the Applicant was requesting for authorisation to communicate with the lawyers representing him before this Court.

28. The Court finds that the situation described above is of extreme urgency and requires Provisional Measures to be issued to avoid irreparable harm being inflicted on the Applicant.

29. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and merits of the Application.

30. For these reasons,

The Court,

Unanimously,

Orders the Respondent State:

- i. To allow the Applicant access to his lawyers;
- ii. To allow the Applicant to be visited by his family members and to communicate with them, without any impediment;
- iii. To allow the Applicant access to all medical care required, and to refrain from any action that may affect his physical and mental integrity as well as his health;
- iv. To report to the Court within fifteen (15) days from the date of receipt of this Order, on the measures taken to implement this Order.