Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470

Application 015/2015, *Godfred Anthony and Ifunda Kisite v United Republic of Tanzania*

Judgment, 26 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicants were convicted of armed robbery and sentenced to thirty (30) years imprisonment. They alleged that the sentence passed on them was excessive and illegal and that their right to free legal assistance had been violated. The Court dismissed the Application on the ground that the Applicants did not justify why it took them over five (5) years to file their case before the Court. The Application was, therefore, adjudged to have not been filed within reasonable time.

Jurisdiction (material jurisdiction, 21, 22)

Admissibility (submission within reasonable time, 44-52)

I. The Parties

1. Messrs Godfred Anthony and Mr Ifunda Kisite, (hereinafter referred to as "the Applicants") are nationals of the United Republic of Tanzania, each currently serving thirty (30) years' prison sentence following their conviction of conspiracy to commit a felony and for armed robbery.

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 on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration required under Article 34 (6) of the Protocol, by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the file that the Applicants were charged before the Songea District Court on 7 May 1999 in Zanzibar Street, Songea Municipality, with one count of conspiracy to commit a crime and one count of armed robbery for threatening the cashier named Sophie Mwalango with a pistol, before snatching a box containing Tanzanian shillings twenty thousand (TZS 20,000) and 5 receipt booklets belonging to Steven Martin. The crimes are provided for and punishable under Articles 384 and 285 as read together with 286 of the Penal Code of the Respondent State respectively.

4. The District Court found the first Applicant guilty and sentenced him to three (3) years' imprisonment for conspiracy to commit a crime and fifteen (15) years' imprisonment for armed robbery, to be served concurrently. The second Applicant was acquitted on the ground that the evidence against him was mere suspicion.

5. The first Applicant appealed against his conviction and the fifteen (15) year sentence, while the Prosecution appealed against the acquittal of the second Applicant to the High Court of Tanzania at Songea. By a single Judgement rendered on 19 May 2003, the first Applicant's appeal was dismissed and his sentence was instead increased from fifteen (15) to thirty (30) years in accordance with the amended Minimum Sentences Act of 1972. In respect of the second Applicant, the Judge granted the Prosecution's appeal and sentenced him to thirty (30) years for armed robbery, a sentence to be served concurrently with the three (3) years' imprisonment for conspiracy to commit a crime.

6. Dissatisfied with the decision of the High Court, the Second Applicant appealed to the Court of Appeal of Tanzania sitting at Mbeya. On 21 May 2004, the Court of Appeal upheld the decision of the High Court. Although it found that the consolidation of the cases by the High Court at the judgment stage after they were heard separately was procedurally wrong, it noted, that this error did not prejudice the Applicants' rights.

B. Alleged violations

7. The Applicants allege that the Respondent State violated their rights under the Respondent State's Constitution and the Charter

as follows:

a. The conviction and the sentence imposed on them were non-existent and unconstitutional and therefore contravene Article 13(b), (c) of the Constitution of the United Republic of Tanzania.

b. The Respondent State violated their right under Article 7(1) of the Charter as they did not benefit from free legal assistance.

c. They were not equally protected of the law by the Respondent State and this violates Article 3 of the Charter.

d. The Respondent State inflicted upon them mental and physical suffering by imposing on them a sentence which is excessive and illegal thereby violating the Charter.

III. Summary of procedure before the Court

8. The Application was filed on 13 July 2015 and was served on the Respondent State on 29 October 2015.

9. The Parties filed their pleadings within the time limits stipulated by the Court and these were duly exchanged.

10. On 25 March 2019, the Parties were notified that written pleadings were closed.

IV. Prayers of the Parties

11. The Applicants pray the Court to:

"i. Make a declaration that the Respondent State violated their rights as guaranteed under Articles 1, 2, 3, 4, 5, 6 and 7(1) (c) and (2) of the Charter.

ii. Issue an order compelling the Respondent State to release them from prison.

iii. Order reparations should the Court find merit in the Application.

iv. Supervise implementation of the Court`s orders and any other decisions that the Court may make in their favour."

12. With regard to jurisdiction and admissibility, the Respondent State prays the Court to grant the following orders:

"1. That the Application has not invoked the jurisdiction of the Honourable African Court on Human and Peoples' Rights

2. That the application has not met the admissibility requirements stipulated under Rule 40(5) and (6) of the Rules of Court, be declared inadmissible and duly dismissed.

3. That the costs of this Application be borne by the Applicants."

13. With regard to merits, the Respondent State prays the Court to find that it has not violated Articles 1, 2, 3, 6, 7(1) (c) and 7(2) of the Charter. Moreover, it prays that the Court should deny the Applicants' prayer for reparations and order them to pay costs.

V. Jurisdiction

14. Pursuant to Article 3(1) of the Protocol, the jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned". In terms of Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction…".

15. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

16. The Respondent State asserts that Article 3(1) of the Protocol and Rule 26 of the Rules only affords the Court jurisdiction to "deal with cases or disputes concerning the application and interpretation of the Charter, the Protocol and any other human rights instruments ratified by the concerned State".

17. Accordingly, the Respondent State submits that "the Court is not afforded unlimited jurisdiction to sit as a court of first instance or an appellate court and reanalyse the evidence already analysed by the highest domestic court".

18. The Applicants contend that their Application is in conformity with Article 3 of the Protocol and Rule 26 of the Rules concerning the interpretation and application of the Charter, the Protocol and any relevant human rights instruments ratified by the Respondent State. The Applicants argue therefore, that, the Court should exercise its jurisdiction and consider the Application.

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19. The Court has held that Article 3 of the Protocol gives it the power to examine an Application submitted before it as long as the subject matter of the Application involves alleged violations of rights protected by the Charter, the Protocol or any other international human rights instruments ratified by a Respondent

State.[1]

20. The Court reiterates its well established jurisprudence that it is not an appellate body with respect to decisions of national courts.[2] However, the Court also emphasised, that, "[t]his does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned".[3]

21. The Court notes that the instant Application raises allegations of human rights violations protected under Articles 2, 3 and 7 of the Charter and by considering them in light of international instruments, it does not arrogate to itself the status of an appellate court or court of first instance. Accordingly, the Respondent State's objection in this regard is dismissed. The court will not discuss the limits of its jurisdiction here contrary to the Respondent State's submission. The terms of Article 3 of the Protocol, reproduced by Rule 26 of the Rules, amply explain the extent of the Court's jurisdiction.

22. In light of the foregoing, the Court holds that it has material jurisdiction.

B. Other aspects of jurisdiction

23. The Court notes that the personal, temporal and territorial aspects of its jurisdiction are not disputed by the Respondent State and

1 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania*, para 114; Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania, (*hereinafter referred to as *"Alex Thomas v Tanzania* (Merits)*"*), para 45; Application 053/2016**.** Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic Tanzania* (hereinafter "*Oscar Josiah v United Republic of Tanzania* (Merits)"), para 24.

2 Application 001/2013. Decision of 15 March 2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, para 14; Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania* (hereinafter referred to as "*Kenedy Ivan v Tanzania* (Merits and Reparations)") para 26; Application 024/2015. Judgment of 7 November 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* para 33; Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, para 35.

3 *Alex Thomas v Tanzania* (Merits), para 130. See also Application 011/2015. Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania (*hereinafter referred to as *"Christopher Jonas v Tanzania* (Merits)*"*), para 28; Application 003/2014. Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza v Republic of Rwanda (*hereinafter referred to as *"Ingabire Umuhoza v Rwanda* (Merits)"), para 52; Application 007/2013. Judgment of 03 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, (hereinafter referred to as "*Mohamed Abubakari v Tanzania* (Merits)"), para 29.

that nothing on the record indicates that the Court lacks such jurisdiction. The Court accordingly holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the Declaration prescribed under Article 34(6) of the Protocol, which enabled the Applicants to file this Application directly before this Court, pursuant to Article 5(3) of the Protocol;

ii. that it has temporal jurisdiction on the basis that the alleged violations are continuous in nature, in that the Applicants remain convicted and are serving a sentence of thirty (30) years' imprisonment on grounds which they consider are wrong and indefensible.[4]

iii. It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

24. In light of the foregoing, the Court holds that it has jurisdiction to consider the Application.

VI. Admissibility

25. Pursuant to 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". In addition Rule 39(1) of the Rules provides that "the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the application in accordance with articles 50 and 56 of the Charter and Rule 40 of these Rules".

26. Under Rule 40 of the Rules, which in essence restates the provisions of Article 56 of the Charter, Applications filed before the Court shall be admissible if they fulfil 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 this 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

4 See Application 013/2011. Ruling of 21 June 2013 (Preliminary Objections), *Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Abiasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso*, (hereinafter referred to as, "Zongo and others judgment (Preliminary Objections)"), paras 71-77.

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 Respondent State raises two objections to the admissibility of the Application; the first one relates to the requirement of exhaustion of local remedies and second, the filing of the Application within a reasonable time under sub-Rules 40(5) and (6), of the Rules, respectively.

A. Objection based on the non-exhaustion of local remedies

28. The Respondent State contends that the Applicants should have sought redress at the High Court of Tanzania for their alleged human rights violations by filing a constitutional petition in accordance with its Constitution and its Basic Rights and Duties Enforcement Act.[5]

29. The Respondent State also asserts that the first Applicant, Mr Godfred Anthony, never appealed against the decision of the High Court even though he had the opportunity to seize the Court of Appeal. The Respondent State further argues that the second Applicant, Mr Ifunda Kisite, could have applied for a review of the decision of the Court of Appeal as provided by law. It therefore concludes that the Applicants filed the Application before this Court without exhausting the available local remedies.

30. The Applicants aver that the first Applicant appealed against his conviction and sentence to the High Court, while the Prosecutor also appealed against the second Applicant's acquittal to the same court; with both appeals going in favour of the Prosecutor. Subsequently, the second Applicant filed an appeal before the Court of Appeal which while dismissing it, the Court of Appeal referred to the first Applicant as well. Therefore, the Applicants concluded that they exhausted local remedies.

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31. The Court notes that pursuant to Article 56 (5) of the Charter and

5 Chapter 3 of the laws of Tanzania.

Rule 40(5) of the Rules, in order for an application before the Court to be admissible, local remedies must have been exhausted, unless the procedure to pursue them is unduly prolonged**.**

32. In its jurisprudence, the Court has underscored that an applicant is only required to exhaust ordinary judicial remedies.[6] In relation to applications against the Respondent State, the Court has determined that the constitutional petition procedure in the High Court and the use of the review procedure at the Court of Appeal are extraordinary remedies in the Tanzanian judicial system, which are not required to be exhausted prior to filing an application before this Court.[7]

33. In the instant case, the Court notes from the record that the second Applicant, Mr Ifunda Kisite appealed to the highest court in the Respondent State, that is, the Court of Appeal, which upheld his conviction and sentence.

34. The first Applicant, Mr Godfred Anthony appealed only to the High Court following his conviction by the District Court. However, while considering the appeal of the second Applicant, the Court of Appeal observed that all the three co-accused persons, including the two Applicants, committed the crimes in concert and deserved the same sentence.

35. Consequently, the Court is of the view that, despite the fact that the first Applicant did not appeal to the Court of Appeal, his matter was addressed by the Court of Appeal, albeit incidentally, and any appeal he could have filed would have been unlikely to result in a different outcome.

36. In this regard, the Court recalls its position in *African Commission on Human and Peoples' Rights v Kenya*, where it held that for purpose of ascertaining exhaustion of local remedies, the most pertinent issue that should be considered is whether a State against which an application is filed, has been accorded the opportunity to rectify alleged human rights violations prior to the

6 *Alex Thomas* v *Tanzania* (Merits), para 64. See also Application 006/2013. Judgment 18 March2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 95; *Oscar Josiah v United Republic of Tanzania* (Merits), para 38; Application 016/2016. Judgment of 7/12/2018 (Merits and Reparations), *Diocles William v United Republic of Tanzania*, para 42.

7 *Alex Thomas v Tanzania* (Merits), paras 63-65.

filing of an application before the Court.[8]

37. Accordingly, the Court dismisses the Respondent State's objection that the Applicants did not exhaust local remedies.

B. Objection based on failure to file the Application within a reasonable time

38. The Respondent State argues that the Application was not filed within a reasonable time after local remedies were exhausted because the first Applicant's case at the High Court was concluded on 19 May 2003 and the second Applicant's case in the Court of Appeal was concluded on 27 February 2006.

39. The Respondent State avers that despite the fact that it deposited the Declaration required under Article 34 (6) of the Protocol in 2010, it took the Applicant five (5) years to seize the Court, that is, in 2015.

40. It further submits that even though Rule 40(6) of the Rules does not prescribe a time limit for filing an application before the Court, international human rights jurisprudence has established six (6) months as a reasonable time-limit after domestic remedies are exhausted for filing such applications. The Respondent State contends that the Applicants failed to seize the Court within six (6) months without having been hindered from doing so.

41. The Applicants did not address this objection specifically but submit that their Application meets the admissibility requirement specified under Article 56 of the Charter, and Rule 40 of the Rules.

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42. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply mentions "…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

8 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 94.

which it shall be seized with the matter".

43. In the matter of *Norbert Zongo and others v Burkina Faso*, the Court held that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[9] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance[10], indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[11] and the use of extra-ordinary remedies.[12]

44. In the instant Application, the Court observes that the judgment of the Court of Appeal in Criminal Appeal 47 of 2003 was delivered on 21 May 2004. However, the Applicants were able to file their Application before this Court only after 29 March 2010, the date that the Respondent State deposited the Declaration required under Article 36(4) of the Protocol for individuals to have direct access to the Court. Nearly five (5) years and four (4) months elapsed between 29 March 2010 and 13 July 2015 when the Applicants filed their Application before this Court. The issue for determination is whether the five (5) years and four (4) months that the Applicants took to file their Application before the Court is reasonable.

45. The Court recalls its jurisprudence in the matter of the *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and mouvement burkinabe des droit de l'homme* where it held that the purpose of Rule 40(6) of the Rules is to guarantee "[j]udicial security by avoiding a situation where authorities and other concerned persons are kept in a situation of uncertainty for a long time".[13] Also, "to provide the Applicant with sufficient time for reflection to enable him appreciate the

9 *Norbert Zongo and others* (Preliminary Objections), para 92. See also Application 023/2015. Judgment of 23 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania*, (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)"), para 56.

10 *Alex Thomas v Tanzania* (Merits), para 73, *Christopher Jonas v Tanzania* (Merits), para 54, Application 010/2015. Judgment of 11 May 2018 (Merits), *Amiri Ramadhani v United Republic of Tanzania*, para 83.

11 Application 046/2016. Judgment of 11 May 2018 (Merits), *Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes* v Republic of Mali, para 54.

12 *Armand Guehi v Tanzania* (Merits and Reparations), para 56; Application 024/2015. Judgment of 7 December 2018, *Werema Wangoko v United Republic of Tanzania* (Merits and Reparations), para 49; Application 001/2017. Judgment of 28 June 2019, *Alfred Agbes Woyome v Republic of Ghana* (Merits and Reparations), paras 83-86.

13 *Norbert Zongo* v *Burkina Faso*, *op cit*, para 107.

opportunity of bringing a matter to court if necessary" and finally, "to enable the Court to establish the relevant facts relating to the matter".[14]

46. Further in *Amiri Ramadhani v Tanzania*[15] and *Christopher Jonas v Tanzania,*[16] the Court decided that the period of five (5) years and one month was reasonable owing to the circumstances of the Applicants. In these two cases the Court took into consideration the fact that the Applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not have assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court.

47. Moreover in *Werema Wangoko and another v United Republic of Tanzania,*[17] the Court decided that the Applicants having used the review procedure, were entitled to wait for the review judgment to be delivered and that this justified the filing of their Application five (5) years, five (5) months after exhaustion of local remedies.

48. In the instant case, the Court notes that although the Applicants are also incarcerated and thus restricted in their movement, they have not asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court. The Applicants have simply described themselves as "indigent".

49. The Court further notes that the Applicants were represented by legal counsel in their trial and appeals at the domestic level but they did not file for review of their final judgments. Overall, while the Court has always considered the personal circumstances of applicants in determining the lapse of reasonable time taken before being seized of a matter, the present Applicants have not provided the Court with any material evidence on the basis of which the Court can conclude that the period of five (5) years and four (4) months was a reasonable period of time taken to file their application before this Court. In the circumstances, the Court finds that the Application does not comply with the requirement under Rule 40(6) of the Rules.

50. In light of the foregoing, the Court holds that the Applicants have failed to comply with Rule 40(6) of the Rules and upholds the

14 *Ibid*.

15 *Amiri Ramadhani v Tanzania* (Merits), para 50.

16 *Christopher Jonas v Tanzania* (Merits), para 54.

17 *Werema Wangoko v Tanzania* (Merits and Reparations), para 49.

Respondent State's objection in this regard.

51. Having concluded that the Application was not filed within a reasonable time, the Court does not have to pronounce itself on whether other conditions of admissibility enumerated in Rule 40 of the Rules have been met, in as much as the conditions of admissibility are cumulative.[18]

52. Based on the above, the Court declares the Application inadmissible.

VII. Costs

53. Rule 30 of the Rules provides that: "Unless otherwise decided by the Court, each party shall bear its own costs".

54. The Applicants have not made any submissions on costs. However, the Respondent State has prayed the Court to order that the Applicants bear the costs of the Application.

55. In the instant case, the Court decides that each Party shall bear its own costs.

VIII. Operative part

56. For these reasons:

The Court,

U*nanimously:*

On *jurisdiction*

i. *Dismisses* the objections to its jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objection to the admissibility of the Application based on the lack of exhaustion of local remedies;

iv. *Declares* that the Application was not filed within a reasonable time;

v. *Declares* that *the* Application is inadmissible.

On costs

vi. *Decides that* each Party shall bear its own costs.

18 See Application 024/2016. Judgment of 21 March 2018 (Admissibility), *Mariam Kouma and Ousmane Diabaté v Republic du Mali,* para 63; Application 022/2015. Judgment of 11 May 2018 (Admissibility), *Rutabingwa Chrysanthe v Republic of Rwanda,* para 48.