Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356

Application 030/2015, *Ramadhani Issa Malengo v United Republic of Tanzania*

Judgment, 4 July 2019. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant alleged that the Respondent State violated his rights by denying him justice in national courts. The Court found that it had jurisdiction, but dismissed the case for lack of exhaustion of local remedies.

Jurisdiction (material jurisdiction, 22, 23)

Admissibility (nature of application 32; exhaustion of local remedies, 41-43)

I. The Parties

1. Ramadhani Issa Malengo (hereinafter referred to as the "Applicant") is a national of the United Republic of Tanzania and a tobacco farmer. He resides in Kigwa village, Tabora region and alleges that the Respondent State violated his rights by denying him justice in the national courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became 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. On 29 March 2010, it also deposited the Declaration under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that in 1996, the Applicant had an oral agreement with DIMON Tanzania Ltd for a loan of one million, three hundred and ninety thousand Tanzanian shillings (TZS 1,390,000) and agricultural inputs in return for him selling his tobacco to DIMON Tanzania. However, he was only advanced the sum of seven hundred thousand Tanzanian Shillings (TZS 700,000) and agricultural inputs.

4. Therefore, the Applicant instituted a suit against DIMON Tanzania Ltd and its successor DIMON Morogoro Tobacco Processors Ltd for *inter alia*[1] a claim of six hundred and seventy five million, six hundred and thirty-five thousand and nine hundred and twenty-one Tanzanian shillings (TZS 675,635,921) being special and general damages for breach of contract. The suit was filed on 26 September 2000 as Civil Case No. 163 of 2000 before the High Court of Tanzania at Dar es Salaam (hereinafter referred to as "the High Court").

5. The High Court dismissed the suit with costs on 19 August 2008 holding that there was no contract between the parties. Nevertheless, upon appealing to the Court of Appeal of Tanzania sitting at Dar es Salaam (hereinafter referred to as "the Court of Appeal") in Civil Appeal No. 108 of 2009, the Applicant partly succeeded because the Court of Appeal held that there was a contract between him and DIMON Tanzania Ltd which was breached and the case was then remitted back to the High Court for assessment of general damages.

6. The High Court awarded the Applicant general damages of six million Tanzanian shillings (TZS 6,000,000) together with 10% interest per annum until the date of full payment. Aggrieved on account of this amount**,** the Applicant filed Civil Appeal No. 76 of 2011 at the Court of Appeal. On 20 December 2011, the Court of Appeal dismissed the appeal with costs.

7. The Applicant further filed an application for taxation of the bill of costs which was struck out by order dated 28 November 2012 on the ground of it being time barred.

8. Subsequently on 23 November 2015, the Applicant filed Application 030 of 2015 before this Court.

B. Alleged violations

9. The Applicant alleges the following violations:

"i. The Courts subordinate to this Honourable Court erred in law by awarding a trivial amount of damages which is contrary to the laws of the Land of Tanzania…

ii. The Courts subordinate to this Honourable Court denied my right by deciding that the Applicant was not defamed…;

iii. The Applicant has not been paid costs incurred in prosecuting the case despite being awarded costs by the High Court…;

iv. The Applicant was confined in Tabora in the RCO's office for the period of 8 hours on 30th April, 1997, without justification;

v. The case before the High Court took 9 years while only three witnesses testified on either side…;

vi. That the Court of Appeal erred in law in not making an assessment [of damages but rather]…remitted the file to the High Court for such assessment…"

III. Summary of the procedure before the Court

10. The Application was filed at the Registry on 23 November 2015 and supplemented by the submissions filed on 12 April 2016 at the request of the Court. These were served on the Respondent State on 9 June 2016.

11. On 24 May 2017, the Registry received the Respondent State's Response and this was transmitted to the Applicant on the same date. The Applicant submitted his Reply to the Respondent State's Response on 5 December 2017.

12. On 5 July 2018, the Registry requested the Parties to submit on reparations. On 2 August 2018, the Registry received the Applicant's submission on reparations and it was transmitted to the Respondent State on 3 August 2018. The Respondent State failed to make its submissions in spite of several reminders.

13. On 26 June 2019, the pleadings were closed and the Parties notified thereof.

IV. Prayers of the Parties

14. The Applicant prays the Court to:

"i. Allow his Application;

ii. Award him General damages to the tune of two billion, five hundred million Tanzanian Shillings (TZS 2, 500,000,000);

iii. Order the Respondent State to issue an apology;

iv. Offer him legal assistance;

v. Order that his bill of costs be settled; and

vi. Order any other relief that the Court deems fit and proper to grant."

15. In respect to reparations, the Applicant prays the Court to:

"i. order the Respondent State to pay him the sum of four billion, two hundred and seventy two million, four hundred and eighty-six thousand and six hundred Tanzanian shillings (TZS 4, 272, 486, 600) as compensation for the material loss arising from the breach of contract and the delay occasioned by the domestic courts;

ii. order the Respondent State to pay him the sum of two billion, four hundred million Tanzanian shillings (TZS 2,400,000,000) as compensation for loss related to prosecuting his case in the domestic courts;"

16. The Respondent State prays the Court to find that:

"i. this Court is not vested with jurisdiction to adjudicate this Application;

ii. the Application is not admissible as it has not met the admissibility requirement under Rule 40(2) of the Rules of the Court (hereinafter referred to as "the Rules"), that is complying with the Constitutive Act of the Union and the Charter;

iii. that the Application is not admissible as it has not met the admissibility requirement under Rule 40(6) of the Rules, that is being filed within a reasonable time after exhausting local remedies;

iv. the Government of the United Republic of Tanzania has not violated the Applicant's human rights;

v. the Government of the United Republic of Tanzania has not violated any procedure laid down by the law;

vi. all aspects of the civil litigations were conducted lawfully;

vii. the Applicant's request for reparations is denied;

viii. the Application is dismissed for lack of merit in accordance with Rule 38 of the Rules of Court;

ix. the costs of this Application be borne by the Applicant".

V. Jurisdiction

17. Pursuant to Article 3(1) of the Protocol, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned." In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction…".

A. Objection to material jurisdiction

18. The Respondent State contends that the jurisdiction of this Court has not been invoked because the Applicant has neither made

reference to nor asked for the interpretation or application of the Charter, the Protocol or any relevant human rights instruments ratified by the Respondent State. Further, it contends that the Applicant has not met any of the other requirements listed in the Rule 26(1) (b-e) of the Rules.

19. The Respondent State avers that the Applicant has merely listed his perceived grievances with the application of the Civil Procedure Act in relation to the originating Civil Case No. 163 of 2000, Civil Appeal No. 108 of 2009 and Civil Appeal No. 76 of 2011. The Respondent State further argues that the Court cannot exercise its jurisdiction by relying on the alleged misuse of the Civil Procedure Act during the hearing of the trial case.

20. The Applicant contends that this Court has jurisdiction to hear and determine this matter. This is because it has the competence to intervene in the event of violations of human rights which is the position he finds himself, his rights having been violated by the domestic courts.

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21. It is clear from the Court's jurisprudence that an Application is properly before it as long as the subject matter of the Application raises alleged violations of rights protected by the Charter or any other international human rights instrument ratified by the Respondent State.[2]

22. In the instant case, the Court notes that the Applicant enumerates various grievances against the application of the Civil Procedure Act as submitted by the Respondent State. Nevertheless, he also

2 See: 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 001/2012. Ruling of 28 March 2014 (Admissibility), *Frank David Omary and others v United Republic of Tanzania (hereinafter referred to as "Frank Omary v Tanzania* (Admissibility)"), para 115; Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (hereinafter referred to as "Peter Chacha v Tanzania* (Admissibility)"), para 114; Application 20/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania (hereinafter referred to as "Anaclet Paulo v Tanzania* (Merits and Reparations)"), para 25; Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania (hereinafter referred to as "Armand Guehi v Tanzania* (Merits and Reparations)*"*), para 31; Application 024/15. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania (hereinafter referred to as "Werema Wangoko v Tanzania* (Merits and Reparations)"), para 29.

alleges that it took nine years in the High Court for his case to be determined even though a total of only three witnesses testified. The Court holds that this alleged violation concerns the field of application of the provisions of Article 7(1)(d) of the Charter in respect of the "right to be tried within a reasonable time by an impartial court or tribunal".

23. Consequently, the Court holds that its material jurisdiction is established and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

24. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that it lacks such jurisdiction. The Court therefore 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) thereof, which enabled the Applicant to file this Application pursuant to Article 5(3) of the Protocol.

ii. it has temporal jurisdiction in view of the fact that by the time of the alleged violations, the Respondent State had already ratified the Charter and therefore bound by it.[3]

iii. it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

25. In light of the foregoing considerations, the Court holds that it has jurisdiction to hear the Application.

VI. Admissibility of the Application

26. 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". Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with Article…56 of the Charter and Rule 40 of the Rules".

27. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, stipulates 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:

3 Application 011/2011. Judgment of 14 June 2013 (Merits), *Reverend Christopher Mtikila v United Republic of Tanzania* (Merits) para 84.

"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 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;
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, Organization of African Unity or the provision of the present Charter."

28. The Respondent State raises two objections, that is; non-compliance of the Application with the Constitutive Act of the African Union and the Charter and also the timeframe for seizure of the Court.

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A. Objection based on non-compliance with the Constitutive Act of the African Union and the Charter

29. The Respondent State avers that the Application does not comply with the Constitutive Act of the African Union as well as the provisions of the Charter as stipulated in Article 6 of the Protocol and Rule 40(2) of the Rules of Court. The Respondent State contends that the Applicant merely concentrates on the technicalities of the civil case against him.

30. The Applicant did not address this issue in his written submissions.

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31. The Court notes that the key objective of the Constitutive Act that relates to its admissibility procedure is "promote and protect human and peoples' rights in accordance with the African Charter

on human and peoples' rights and other relevant human rights instruments".[4]

32. The Court further notes that the Applicant claims violations of his rights guaranteed by the Charter, rather than basing his claim merely on the technicalities of the civil case. The violations alleged in the Application are related to the right to a fair trial which falls within the ambit of the Charter which guarantees such rights. Also, the Respondent State has not demonstrated how the Application is not in conformity with the Constitutive Act of the African Union or the Charter.

33. In light of the foregoing, the Court dismisses the Respondent State's objection.

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

34. The Respondent State avers that the Application has not been filed within a reasonable period as required by Rule 40(6) of the Rules and therefore is not admissible. It alleges that the relevant period of time is that between the decision of the Court of Appeal in Civil Appeal No. 76 of 2011 on 20 December 2011 and 17 June 2016, the date on which the Respondent State received the Application. The Respondent State therefore computes that period to five (5) years and six (6) months and argues that this cannot be considered reasonable time.

35. The Respondent State further contends that developments in international human rights jurisprudence have established a period of six (6) months as reasonable time, and refers to the case of *Majuru v Zimbabwe* (2008), before the African Commission on Human and Peoples' Rights. The Respondent State goes on to aver that the Court was already in existence when the Applicant submitted his appeal to the Court of Appeal and therefore the Applicant could have instituted his application before this Court within a period of six (6) months.

36. Finally, according to the Respondent State, the reasonableness of a time period must be assessed on a case-by-case basis and as the Applicant was neither imprisoned nor indigent, but rather was able to pay and had access to a lawyer and "could be aware of the existence of this Court", the Applicant has let a reasonable

4 Article 3(h) of the Constitutive Act.

time elapse.

37. The Applicant contends that his case at the domestic courts ended on 18 June 2013, referring to the civil procedure of taxation of his bill of costs vide receipt No. 50456103. He points out that the Application before this Court was filed on 23 November 2015 and believes the time lapse was only two (2) years.

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38. The Court notes that the Respondent State contests the admissibility of the Application on the basis of it not having been filed within a reasonable time after exhaustion of local remedies. The Court observes however, that it is incumbent on the Court to first satisfy itself that local remedies have been exhausted before determining the requirement of filing within a reasonable time after exhaustion of the said remedies. This is because an adverse finding as to the exhaustion of local remedies would render the exercise of determining whether the Application was filed within a reasonable time superfluous. Therefore, the Court will decide whether the Applicant exhausted local remedies.

39. The Court recalls its jurisprudence that an Applicant is only required to exhaust ordinary judicial remedies so as to be in compliance with Rule 40(5) of the Rules where such remedies are available and not unduly prolonged.[5] In this regard, the Respondent State has submitted previously to this Court that it has a mechanism where aggrieved parties can challenge violations of human rights. The Respondent State has stated that it enacted the Basic Rights and Duties Act to empower the High Court with jurisdiction over petitions of human rights violations.[6]

40. In the instant Application, the Court notes that the Applicant filed a civil case concerning breach of contract in the High Court in Civil Case 163 0f 2000 on 19 August 2008. The Applicant further filed an appeal against the High Court's decision to the Court of Appeal on 21 September 2010. The case was referred to the High Court for assessment of damages and the High Court, on

5 See *Mtikila v Tanzania* (Merits) para 82.1; *Alex Thomas v Tanzania* (Merits) para 64.

6 *Armand Guehi v Tanzania* (Merits and Reparations) para 44, *Kennedy Ivan v Tanzania* (Merits and Reparations) para 37.

4 April 2011, made an award of six million Tanzanian Shillings (TZS 6,000,000) in favour of the Applicant. Dissatisfied with the amount, the Applicant challenged the High Court's decision in a second appeal to the Court of Appeal, which was dismissed on 20 December 2011. Following these proceedings, the Court observes that the Applicant seized the highest Court of the Respondent State, however, the seizure was concerned only with a contractual dispute.

41. With regard to the alleged delay of the proceedings before the High Court, the Applicant did not provide proof that he tried to exhaust the local judicial remedies; he only states that he petitioned the Chief Justice for him to provide a solution. The Court notes that petitioning the Chief Justice is not a judicial but administrative remedy.[7] Moreover, the Applicant did not aver that the remedies to be exhausted were unavailable, ineffective or insufficient and there is nothing on record to support such a finding.

42. The Court observes that the Applicant also has not shown how he exhausted local remedies with regard to the "false imprisonment" of 30 April 1997. Based on the records, the Court notes that the Applicant raised the issue of "false imprisonment as "malicious prosecution" in line with his submission of defamation in the High Court, that the false imprisonment made "co-villagers consider him fraudulent" and thus it was submitted not as a human rights violation but as a civil law matter.

43. In light of the foregoing, the Court holds that the Applicant has not exhausted local remedies and thus failed to comply with Rule 40(5) of the Rules. Consequently, the Application is inadmissible.

44. In light of the Court's finding that the Application is inadmissible due to failure to exhaust local remedies, the Court finds that the issue as to whether the Application was filed within a reasonable time does not arise, in as much as the conditions of admissibility are cumulative.[8] Similarly, the Court does not need to deal with other conditions of admissibility enumerated in Rule 40 of the Rules.

VII. Costs

7 *Mtikila v Tanzania* (Merits) para 82.3.

8 See Application 042/2016. Ruling of 28 March 2019 (Jurisdiction and Admissibility), *Collectif des anciens travailleurs du laboratoire ALS v Republic of Mali*, para 41; 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.

45. The Court notes that the parties did submit on costs. However, Rule 30 provides that: "Unless otherwise decided by the Court, each party shall bear its own costs".

46. In view of the aforesaid provision, the Court decides that each Party shall bear its own costs.

VIII. Operative Part

47. 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 admissibility based on non-compliance with the Constitutive Act of the African Union and the Charter;

iv. *Declares* that the Applicant failed to exhaust local remedies;

v. *Declares* the Application inadmissible.

On Costs

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