Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378

Application 007/2017, Fidele Mulindahabi v Republic of Rwanda

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

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

Recused under Article 22: MUKAMULISA

The Applicant alleged that his vehicle was unjustly confiscated by police, and later returned to him after more than two months, the police having admitted that the confiscation was illegal. The Applicant was compensated for the illegal confiscation of his vehicle. He alleged that the Presidential Guard subsequently confiscated his vehicle again and charged him with driving under the influence which was later changed to non-presentation of a driver's licence. He further claimed that his efforts to seek remedy from the President and Senate were futile and prayed the Court for reparations for the violations caused including, returning his vehicle to him or compensating him. The Court held that the Applicant had sought administrative and not judicial remedies. Thus, he had not exhausted domestic remedies.

Procedure (default judgment, 19)

Admissibility (exhaustion of local remedies remedies, 34, 38)

Dissenting opinion: BENSAOULA

Procedure (default judgment, 5, 14)

I. The Parties

1. The Applicant, Fidèle Mulindahabi, a national of the Republic of Rwanda (hereinafter referred to as "the Respondent State") residing in Kigali, complains that he has been a victim of violations in connection with the exercise of his urban transport activity.

2. The Respondent State 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 on 25 May 2004. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 11 January 2013, by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations. On 29 February 2016, the Respondent State notified the African Union Commission of its withdrawal of the said Declaration. On 3 January 2016, the Court issued an order indicating that the effective date of the

Respondent State's withdrawal would be 1 March 2017.[1]

II. Subject matter of the Application

A. Facts of the matter

3. The Applicant alleges that his Toyota mini bus vehicle was unjustly impounded by RAWMAGANA police from 28 January 2009 to 7 May 2009. After the end of the period, the police service admitted that the confiscation was illegal and provided him compensation in the amount of thirty-four thousand, two hundred (FRw 34,200) Rwandan Francs.

4. The Applicant submits that on 7 May 2009, immediately after the handover of the impounded bus, he drove it directly to the garage to repair it. On 31 May 2009, the vehicle was again confiscated by soldiers of the presidential guard.

5. He also submits that the police first fabricated an offence of driving under the influence, and then re-adjusted it to the offence of non-presentation of the driver's licence. In the Applicant's view, this contradiction shows that the vehicle was confiscated arbitrarily.

6. He further alleges that, even if one of these two offences was committed, the penalty for the offence would not be the confiscation of the vehicle, in accordance with the provisions of Articles 24, 25 and 26 of Act No. 34/1987 of the Rwandan Traffic Police Act.

7. The Applicant alleges that on 8 May 2010, he made a complaint to the President of the Republic, who was then visiting Kigali. The President ordered the Police Commissioner to follow up on the case. During the investigation, the police noticed the involvement of the presidential guard and the investigation into matter was stopped.

8. The Applicant asserts that on 6 April 2011, his vehicle was sold by auction, a fact confirmed by the Attorney General's letter 1535/D11/A/ONPJ/INSP dated 19 July 2011.

9. The Applicant also stated that by letter No. 0873/SEN/SG/DC/AA/ME/2015 dated 11 June 2015, the Senate wanted to force him to accept the auction value of the vehicle without further compensation. When he expressed dissatisfaction with the contents of the offer in the Senate's letter on 16 June 2015, he was imprisoned for allegedly insulting and defaming the President

1 Application 003/2014. Ruling of 3 June 2016 (Jurisdiction), *Ingabire Victoire Umuhoza v Rwanda*; regarding the withdrawal by the Respondent State of the declaration it made under Article 34(6) of the Protocol.

of the Respondent State.

B. Alleged violations

10. The Applicant claims that the Respondent State:

"i. violated his right to property provided under Article 17(2) of the Universal Declaration of Human Rights and Article 14 of the Charter;

ii. failed in its obligation to provide the requisite remedies pursuant to Article 2(3)(c) of the International Covenant on Civil and Political Rights)."

III. Summary of the procedure before the Court

11. The Application was received at the Registry of the Court on 24 February 2017 and served on the Respondent State on 31 March 2017 with a request to the latter to file within (30) days a list of its representatives, and its response to the Application within sixty (60) days from the date of receipt of the notification pursuant to Rules 35(2)(a) and 35(4)(a) of the Rules.

12. On 9 May 2017, the Registry received a letter from the Respondent State on the withdrawal of the Declaration it made under Article 34(6) of the Protocol and notifying the Registry that it would not participate in any proceedings before the Court. The Respondent State accordingly requested the Court to desist from transmitting to it any information on the cases concerning it.

13. On 22 June 2017, the Court sent a reply to the Respondent State indicating that:

"as a judicial body and in accordance with the Protocol and the Rules, the Court shall communicate all the documents of the proceedings to the parties concerned. Accordingly, all the documents of the proceedings in matters related to Rwanda before this court must be served on the Respondent State, until the final decisions of those cases.»

14. On 30 June 2017, the Application was transmitted to the States Parties to the Protocol and to the Executive Council through the Chairperson of the African Union Commission in accordance with Rule 35(3) of the Rules.

15. On 25 July 2017, the Court initially granted the Respondent State forty-five (45) days extension to submit its Response. On 23 October 2017, the Court granted a second forty-five (45) days extension, indicating that it would proceed with a judgment in default after the expiry of this extension if a Response was not submitted.

16. In accordance with Rule 63 of the Rules, the Court decided at its Forty-Ninth Ordinary Session held from 16 April to 11 May 2018,

to rule on both the merits of the case and on reparations in a single decision. Accordingly, on 12 July 2018, the Applicant was requested to submit his claims on reparations within (30) thirty days, but he did not respond.

17. On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final forty-five (45) days extension and that, after that deadline, it would enter a ruling in default in the interest of justice in accordance with Rule 55 of its Rules. The notification was sent by courier to the Respondent State, which received the same on 16 October 2018.

18. Although the Respondent State received all the notifications, it did not respond to any of them.

19. Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules.[2]

20. On 28 February 2019, the written procedures were closed and the parties were notified accordingly.

IV. Prayers of the Parties

21. The Applicant prays the Court to:

"i. Order the Respondent State to pay damages for the prejudices he suffered;

ii. Order the Respondent State to return his vehicle to him or compensate him with a similar vehicle;

iii. Declare that the State of Rwanda has violated the human rights legal instruments that it has ratified."

22. The Applicant did not make a detailed request for reparations.

23. The Respondent State refused to participate in the proceedings and did not make any prayers.

V. Jurisdiction

24. 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 instrument ratified by the States concerned." Furthermore, in accordance with Rule 39(1) of its Rules, "the Court shall conduct a preliminary

2 Application 003/2014. Judgment of 7 December 2018 (Reparations*), Ingabire Victoire Umuhoza v Rwanda*, paras 14, 15 and 17.

examination of its jurisdiction «.

25. Having conducted a preliminary examination of its jurisdiction, and noting that nothing on file indicates that it does not have jurisdiction, the Court therefore holds that:

i. it has personal jurisdiction as the Respondent State is party to the Protocol and deposited the Declaration prescribed in Article 34(6) of the Protocol which enabled the Applicant to seize the Court in accordance with Article 5(3) of the Protocol. Moreover, the Application was filed within one (1) year from the time set by the Court to give effect to the withdrawal of the Declaration by the Respondent State;

ii. it has material jurisdiction in as much as the Applicant alleges violation of Articles 1 and 14 of the Charter, Article 2(3) (c) of the International Covenant on Civil and Political Rights (ICCPR), Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 17(2) of the Universal Declaration of Human Rights (UDHR). All these instruments have been ratified by the Respondent State and the Court has the power to interpret and apply them by virtue of Article 3 of the Protocol.

iii. it has temporal jurisdiction, since the alleged violations are continuing in nature.

iv. it has territorial jurisdiction given that the facts of the case occurred in the territory of a State party to the Protocol, namely, the Respondent State.

26. Based on the above, the Court concludes that it has jurisdiction to consider this case.

VI. Admissibility

27. According 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».

28. In accordance with rule 39(1) of its Rules, "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 the Rules.»

29. Rule 40 of the Rules, which essentially restates the content of Article 56 of the Charter provides that: "pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, for an Application to be admissible, the following conditions shall be met:

"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
7. not raise any mater 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".

30. The Court notes that the admissibility requirements set forth in Rule 40 of the Rules are not in contention between the parties, the Respondent State having not participated in the proceedings. However, in accordance with Rule 39(1) of the Rules, the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the Application.

31. It is clear from the case file that the Applicant's identity is known as well as his nationality. The Application is not incompatible with the Constitutive Act of the African Union and the Charter. It does not contain disparaging or insulting language, nor is it based exclusively on news disseminated through the mass media.

32. With regard to the exhaustion of local remedies, the Applicant asserts that he contacted the highest political and administrative authorities in the State, including the police, the Public Prosecution, the Ministry of Transport, the Ministry of Internal Security, the Ministry of Justice, the Parliament, the Senate, the President, the National Commission for Human Rights and Civil Society to find a solution to his problem, but all to no avail.

33. The Applicant further submits that:

"seizure of judicial bodies was not contemplated in view of the fact that the presidential guard is supposed to be involved in it and so, has no chance of reaching a judicial outcome. Furthermore, this case is inadmissible today, in view of the timeframes provided under article 339 of Act No. 18/2004 of 20 June 2006, concerning the Code of Civil, Commercial, Social and Administrative Procedure»

34. As it previously held, the Court is of the opinion that: "... the local remedies to be exhausted by applicants are the ordinary judicial remedies",[3] unless it is obvious that these remedies are

3 Application 007/2013. Judgment of 3 June 2016, *Mohamed Abubakari v United Republic of Tanzania,* para 64. See also Application 005/2013. Judgment of 20 November 2015, ***Alex Thomas v Tanzania***, para 64 and Application 006/2013. Judgment of 10 March 2016, *Wilfred Onyango Nganyi & 9 others v United Republic of Tanzania,* para 95.

unavailable, ineffective, insufficient or that the procedures therein are unduly prolonged.[4] It follows, therefore, that the non-judicial remedies exercised by the Applicant in the instant case are irrelevant as regards the exhaustion of local remedies.

35. In the instant case, the Applicant clearly stated that he had not exhausted the domestic remedies, claiming that:

i. Such remedies would not be feasible because a member of the Republican Guard was involved.

ii. The time limit for filing a case before national jurisdictions has elapsed upon the completion of the proceedings before the administrative and political authorities.

36. With regard to the first allegation, the Court holds that the Applicant affirms that the proceedings before the Respondent State's judicial authorities are not feasible, without adducing evidence in support of this allegation. The Court, therefore, dismisses the allegation.[5]

37. With regard to the second allegation, the Court notes that the Applicant did not file his case before the national courts, as he claims to have sought to settle the dispute before the administrative and political authorities. However, there was nothing preventing him from exercising both judicial and non-judicial remedies at the same time, and should therefore have exercised the requisite judicial remedies so as to exhaust the local remedies.

38. In light of the foregoing, the Court holds in conclusion that the Applicant has not exhausted the local remedies available to him in the Respondent State, and his failure to exhaust local remedies does not fall within the exceptions set out in Rule 40(5) of the Rules.

VII. Costs

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

40. In view of the circumstances of this case, the Court decides that each party shall bear its own costs.

4 Application 004/2013. Judgment on 5 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso,* para 77. See also Application 003/2012. Ruling of 28 March 2014 (Admissibility and Jurisdiction), *Peter Chacha v Tanzania*, para 40.

5 *Alex Thomas v Tanzania,* para 140.

VIII. Operative part

41. For these reasons,
The Court:
unanimously
i. *Declares* that it has jurisdiction;
ii. *Holds* that local remedies have not been exhausted;
iii. *Declares* that the Application is inadmissible;
iv. *Rules* that each party shall bear its own costs.

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Dissenting opinion: BENSAOULA

1. I share the opinion of the majority of the Judges regarding the jurisdiction of the Court and the inadmissibility of the Application.

2. On the other hand, I think that the way the Court treated "the default" is at variance with:

- the provisions of Rule 55 of the Rules of Court;
- Article 28(6) of the Protocol;
- its jurisprudence and comparative law.

3. Indeed, Rule 55 of the Rules states in Paragraph 1 that:
"Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, render a judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertaining to the proceedings".

It is clear from the foregoing Paragraph 1 that a decision to render a Judgment in default must meet certain criteria:

- absence of one of the parties or;
- failure to defend its case;
- rendered on the application of the other party;
- service of the application on the defaulting party;
- service of the other documents pertaining to the proceedings.

4. The key element in this paragraph is that the default must be

pronounced “on the application of the other party”.

Therefore, making a decision in default can be a mere issue of form no doubt, but not of procedure that requires a substantive discussion regarding the elements of appreciation and a legal basis.

However, neither the case file nor the Applicant’s application reveals that he prayed the Court to hand down a judgment in default.

5. And that the Court not only inserted its decision to render the Judgment in default in the chapter on Proceedings before the Court, but also did not give any legal basis to this decision to render the Judgment in default without the application of the other party, contenting itself with declaring in paragraph 15 under the Summary of the Procedure before the Court that, “On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45 days extension and that, after that deadline, it would enter a ruling in default in accordance with Rule 55 of its Rules in the interest of justice...” and concluding in paragraph 17 on the same grounds that, “Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules”.

6. No reference to the basis of this “interest of justice” or how rendering a judgment in default was fundamental to the Court, especially since such judgments are not subject to opposition or appeal, and how such a decision taken on the basis of its discretionary power could refer to Rule 55 of the Rules, which does not apply to discretion.

7. Moreover, reference to the *Ingabiré* Judgment is in no way a basis for the decision in default because in that Judgment, at no point in the body of the Judgment or in its operative part is there mention of a judgment in default, as no party had requested for it and the chapter 17 cited in this reference states as follows: “Consequently, in the interest of justice, the Court will examine the instant brief for reparation in the absence of any response from the Respondent State”.

8. To render a judgment in the absence of the respondent is in no way the legal definition of default which, under the provisions of the aforementioned Rule 55, meets conditions which must be controlled by the Court.

9. It is clear and, as mentioned above, that the default judgment must meet certain conditions and that the Court is under the obligation to give reasons for any decision it makes, even more so when it is at variance with the clear provisions of a provision of the Rules.

By ruling in this way, the Court breached the provisions of Article 28(6) of the Protocol which obliges it to give reasons for its judgments.

10. In comparative law, there is a wealth of case law supporting this

reasoning, such as the Judgment of 30 November 1987, *H v Belgium,* where the European Court of Human Rights recognised, for the first time, the right to give reasons in judicial decisions in these terms: "…this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant were not to be regarded as exceptional" (para53) and in the Judgment of 16 December 1992, *Hadjianastassiou v Greece*, the Court noted that "the obligation to state reasons constitutes a minimum guarantee which is limited to the requirement of sufficient clarity of the grounds on which the judges base their decisions". [*Translation by Registry*]

11. It is therefore unquestionable that taking the decision to render a judgment in default requires a clear reasoning and may in no way suffice in one line of the chapter "Procedure before the Court", thus ignoring the conditions required by the aforementioned Rule 55.

12. It is clear from reading the aforementioned Rule that default is not part of the procedure and that it is still a matter of form to which the Court must respond in relation to its jurisdiction, the admissibility and basis of the Applicant's claims.

13. And that even if the Court chooses to use its discretionary power to hear the case *suo motu* and rule by default, it cannot do so by considering this point of law as one of the elements of the procedure and simply base its decision on the interest of justice without specifying and explaining how making a judgment in default is in the interest of justice.

14. In comparative law, many human rights courts treat the default decision as a formal decision that comes well after jurisdiction and admissibility. To quote just one rendered by the Court of Justice of the Economic Community of West Africa States on 16 February 2016, Judgment ECW/CCJ/JUGG/03/16, the Court, in Chapter III: Reasons for the decision: On the form, after dealing with the admissibility of the application and jurisdiction, addressed the issue of default against the Republic of Guinea and later, on the merits, handled the allegations of human rights violations. In its operative part, it stated that "the Court ruling publicly, by default against the Republic of Guinea, in the matter of human rights violations, in the first and last resort'" [*Translation by Registry*]

In adjudicating as it did, the Court delivered a judgment devoid of any legal basis and contrary to the provisions of the aforementioned Rules

and Articles regarding default, especially as this provision of default does not appear in its operative part either.