Luchagula v Tanzania (admissibility) (2020) 4 AfCLR 561

Application 007/2016, *Chananja Luchagula v United Republic of Tanzania*

Ruling (jurisdiction and admissibility) 25 September 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant, who was convicted and sentenced to death for murder but was granted presidential pardon, brought this action alleging that proceedings before the national courts were a violation of his rights. The Court declared the action inadmissible for failure to file the Application within a reasonable time.

Jurisdiction (in relation to matters concluded by national courts, 26, 28; withdrawal of article 34(6) declaration, 32)

Admissibility (exhaustion of local remedies, 45, 47; reasonable time to file, 55, 58, 59)

I. The Parties

1. Mr. Chananja Luchagula (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania who was sentenced to death for murder, on 31 May 2001. As at the time of filing his Application, he was at Butimba Central Prison in Mwanza up until his release following a Presidential Pardon of 9 December 2017.

2. The Application was filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "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 prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration.

The Court decided that the withdrawal of the Declaration would not affect matters pending before it and that the withdrawal would take effect on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that, on 9 February 1989, the Applicant and other individuals abducted five (5) people whom they took to the Ibelambogo forest in the District of Kahama. Claiming that they were forest guards, the Applicant and his accomplices demanded money from their captives and the logging permit, in exchange for their freedom. In response, the captives claimed that they had only Two Thousand Six Hundred and Ninety Tanzanian shillings (TZS 2,690).

4. Throughout the day, the Applicant and his accomplices insisted that the captives give them at least Ten Thousand Tanzanian Shillings (TZS 10,000). In the evening, they tied up four of the captives, the fifth having managed to escape.

5. The next day, that is, on 10 February 1989, the escapee reported the incident to the police who, having visited the scene, found the bullet ridden bodies of the other four captives. Two months later, that is, on 2 April 1989, the escapee recognised the Applicant in a shop and alerted the police who came and arrested him.

6. The Applicant was arraigned in court and eventually convicted of murder of the four captives, in Criminal Case No. 42 of 1989 before the High Court of Tanzania sitting at Tabora. By its judgment of 31 May 2001, the High Court sentenced him to death by hanging.

7. The Applicant filed an appeal before the Court of Appeal of Tanzania sitting at Mwanza which by judgment of 2 July 2003, upheld the sentence handed down by the High Court. Following an initial Presidential pardon, the Applicant's death sentence was commuted to life imprisonment. A second Presidential pardon dated 9 December 2017 resulted in his release.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

B. Alleged violations

8. The Applicant argues that the Court of Appeal erred in the judgment of 2 July 2003 in making a significantly wide evaluation of the evidence presented by the Prosecution.

9. The Applicant further contends that the Respondent State violated his right to freedom from discrimination, right to equality and equal protection of the law, the right to life and integrity of his person, right to dignity and freedom from torture and inhuman and degrading treatments, right to a fair trial and right to equality of people guaranteed under Articles 2, 3(1) and (2), 4, 5, 6, 7(1) and 19 of the Charter, respectively.

III. Summary of the Procedure before the Court

10. The Application was filed before the Court on 14 July 2016 and served on the Respondent State on 18 August 2016 and transmitted to the entities listed in Rule 35(3) and (4) of the Rules on 8 September 2016.

11. The parties filed their pleadings within the timeframe stipulated by the Court and these were duly exchanged.

12. Pleadings were closed on 2 October 2018; and the parties were duly notified.

13. On 13 August 2020, the Registry sent a letter to the Applicant notifying him of the Respondent State's withdrawal of its Declaration under Article 34 (6) of the Protocol. By the same letter, the Registry also notified the Applicant of the decision of the Court of 9 April 2020, that the withdrawal will take effect only after the lapse of twelve (12) months, from the date of deposit thereof, that is, 22 November 2020 and it does not have effect on all pending applications at the time of the withdrawal, including his Application.

IV. Prayers of the Parties

14. The Applicant prays the Court to:

i. restore justice where it has been overlooked;

ii. quash his conviction and sentence and set him at liberty;

iii. award him reparation in order to remedy the violations of his rights by the Respondent State, pursuant to Article 27(1) of the Protocol;

iv. grant such other reliefs as the Court may deem fit.

15. Moreover, he prays the Court to order the Respondent State to take immediate measures to remedy the violations.

16. In its Response, the Respondent State prays the Court to:

i. declare that it has no jurisdiction to examine the Application;

ii. declare that the Application does not meet the conditions of admissibility set out in Rule 40 (5) and (6) of the Rules of Court;

iii. declare that the Respondent State has not violated the Applicant's rights guaranteed in Articles 3(1) and (2), and 7(1) of the Charter;

iv. declare that the Application is inadmissible and baseless and dismiss the same;

v. dismiss the Applicant's prayers in their entirety;

vi. rule that the Applicant is not entitled to reparations.

V. Jurisdiction

17. The Court observes that Article 3 of the Protocol and provides as follows:

1. 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.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

18. In accordance with Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction…".

19. On the basis of the above-cited provisions, the Court must preliminarily, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

20. In the instant case, the Respondent State raises an objection to the Court's material jurisdiction.

A. Objection to material jurisdiction

21. The Respondent State contests the Court's jurisdiction arguing that, contrary to the provisions of Article 3(1) of the Protocol and Rule 26 (1) (a) of the Rules, the present Application seeks to have the Court act as an appellate court to examine issues of evidence and procedure already settled by its Court of Appeal. The Respondent State submits further that, this does not fall within the mandate or the jurisdiction of the Court.

22. The Respondent State cites the Court's jurisprudence in *Ernest Francis Mtingwi v Republic of Malawi* in which the Court examined its own jurisdiction and found that, not being an appellate court, it had no jurisdiction to receive and consider appeals in cases over which the national and/or regional courts have already adjudicated upon. The Respondent State therefore prays the Court to declare

that it has no jurisdiction and to dismiss the Application.[2]

23. Refuting the Respondent State's arguments, the Applicant submits that in *Alex Thomas v United Republic of Tanzania,* the Court affirmed that, though it is not an appellate body with respect to decisions of national courts, this does not preclude it from examining the 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 instrument ratified by the State concerned.[3]

24. The Applicant also relies on the jurisprudence of the Court in *Peter Joseph Chacha v United Republic of Tanzania* to argue that the Court has jurisdiction to examine his Application in so far as it relates to allegations of violations of his fundamental rights.

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25. The Court recalls that, pursuant to the provisions of Article 3(1) of the Protocol and Rule 29(1) (a) of the Rules, it has jurisdiction to hear a case as long as its subject matter relates to allegations of violations of human rights protected by the Charter or any other relevant human rights instrument ratified by the State concerned.

26. The Court has previously concluded that where allegations of human rights violations relate to the way in which the national courts have evaluated evidence, it reserves the power to determine whether the said evaluation is compatible with international human rights standards, in particular, the relevant provisions of the Charter and doing so would not make it an appellate court.

27. In the instant case, the Applicant alleges that procedural irregularities marred the conduct of his trial in the domestic courts and that his case was not given a fair hearing as provided in the Charter as regards the right to a fair trial. The Applicant challenges, in particular, the manner in which the Court of Appeal

2 *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application 020/2015, Judgment of 28 November 2019 (jurisdiction and admissibility), § 24; See also: *Kennedy Ivan v United Republic of Tanzania*, ACtHPR, Application 025/2016, Judgment of 28 March 2019 (merits and reparations), § 20.

3 *Livinus Daudi Manyuka v Tanzania* (jurisdiction and admissibility), § 29; See also: *Werema Wangoko Werema v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 31; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45.

of the Respondent State evaluated the evidence on which it relied to uphold the sentence handed down against him.

28. The Court notes that the Applicant's allegations concerned the violations of his rights guaranteed in Articles 2, 3, 4, 5, 6, 7, 19 of the Charter and guaranteed in other human rights instruments ratified by the Respondent State. Although some of these allegations relate to the manner in which domestic courts have assessed evidence, the Court can still examine whether such assessment is congruent with the Charter. The Court observes that this is within the ambit of its competence and does not render it an appellate court.

29. In view of the aforesaid, the Court holds that it has material jurisdiction to examine the present Application and, therefore, dismisses the objection to jurisdiction raised by the Respondent State.

B. Personal jurisdiction

30. Article 34(6) of the Protocol provides that:

> At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5 (3) of this Protocol. The Court shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration.

31. The Court notes, as it did earlier in paragraph 2 of this Ruling that, the Respondent State is a party to the Protocol and deposited, on 29 March 2010, the Declaration prescribed under Article 34(6) of the said Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental organisations (NGOs).

32. The Court also notes that on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration.

33. The Court recalls its previous judgments[4] where it concluded that the withdrawal of the Declaration deposited in accordance with Article 34(6) of the Protocol has no retroactive effect and no bearing on the matters pending prior to the filing of the withdrawal, as in case with the present Application. The Court also held that withdrawal of the Declaration takes effect twelve (12) months after the filing of the instrument of the withdrawal, therefore for

4 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67; *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

the Respondent State, it takes effect on 22 November 2020.[5]

34. In view of the aforesaid, the Court holds that it has personal jurisdiction to hear the present Application.

C. Other aspects of jurisdiction

35. The Court notes that its temporal and territorial jurisdiction are not disputed by the Respondent State and that nothing on record indicates that the Court lacks such jurisdiction. The Court accordingly holds that:

i. It has temporal jurisdiction given that, at the time the Application was filed, the alleged violations were continuing, the Applicant having been convicted and sentenced on grounds which he considers as irregular;[6]

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

36. Consequently, the Court holds that it has jurisdiction to hear the present Application.

VI. Admissibility

37. 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".

38. Pursuant to Rule 39(1) of its Rules:
the Court shall conduct preliminary examination […]of the admissibility of the application in accordance with articles […] 56 of the Charter and Rule 40 of these Rules.

39. Rule 40 of the Rules, which essentially restates the provisions 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, 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

5 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), § 39.

6 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71 - 77.

media;

5. be filed after exhausting local remedies, if any, unless it is obvious that the procedure in 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.

40. The Court notes that the Respondent State has raised two preliminary objections to the admissibility of the Application; the first, on exhaustion of local remedies; and the second, on filing the Application within a reasonable time after local remedies were exhausted.

A. Objection based on non-exhaustion of local remedies

41. The Respondent State argues that remedies are available at national level which the Applicant could have utilised before filing the Application. According to the Respondent State, the Applicant had the possibility of lodging an Application for review of the judgment of the Court of Appeal, in accordance with Rule 66 of Chapter III. B. of the Tanzania Court of Appeal Rules.[7]

42. The Respondent State contends that the Applicant also had the possibility of filing a constitutional petition under the Basic Rights and Duties Enforcement Act. The Respondent State argues that the condition of exhaustion of local remedies requires that the Applicant take all the necessary measures to exhaust or, at least, attempt to exhaust the internal remedies available in the national judicial system.

43. The Respondent State considers that the referral of the matter to the Court is premature. It concludes that the Application does not meet the requirements of Rule 40(5) of the Rules of Court and must therefore be dismissed for failure to exhaust the domestic remedies.

7 The Court may review its own judgments or orders but, applications for review are admissible only under the following conditions: a) the judgment was based on an error manifest upon reading the file, which resulted in denial of justice; or b) a party has been improperly denied the opportunity to be heard; or c) the judgment of the courts was null and void; or d) the court did not have jurisdiction to examine the case; or e) the judgment was procured unlawfully, by fraud or perjury.

44. The Applicant asserts that he has exhausted all available domestic remedies. He also submits that in the judicial system of the Respondent State, the Court of Appeal is the highest jurisdiction and he filed an appeal before that Court, which was dismissed by the judgment rendered on 2 July 2003, affirming the High Court's decision.

45. The Applicant further submits that the application for review of the Court of Appeal's judgment and the constitutional petition are extraordinary remedies which the national courts are not required to apply. For these reasons, the Applicant requests that the Court take into account his appeals to the Court of Appeal sitting at Mwanza and, rule that he has exhausted domestic remedies and admit his Application.

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46. The Court notes that, in the spirit and letter of Article 56(5) of the Charter and Rule 40(5**)** of the Rules, any Application brought before it must meet the requirement of exhaustion of local remedies unless it is obvious that such remedies are not available, not effective and not sufficient or the procedures to access them are unduly prolonged.[8]

47. In the instant case, the Court notes that after the judgment of the High Court, the Applicant filed an appeal before the Court of Appeal, the highest court in the judicial system of the Respondent State. The Court considers that the Applicant has exhausted the domestic remedies given that that proceedings at the High Court and at the Court of Appeal offered the Respondent State ample opportunities to address the allegations brought by the Applicant before this Court**.**[9]

48. On the application for review and constitutional petition, the Court has previously found that these are extraordinary remedies which the Applicant was not required to exhaust.[10]

8 *Werema Wangoko Werema v Tanzania* (merits), § 40; *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 40.

9 *Alex Thomas v Tanzania* (merits), §§ 60-65.

10 *Livinus Daudi Manyuka v Tanzania* (merits and reparations), § 45; *Kennedy Ivan v Tanzania* (merits and reparations), § 42; *Werema Wangoko Werema vTanzania* (merits), § 40; *Alex Thomas v Tanzania* (merits), § 64.

49. Therefore, pursuant to Article 56(5) of the Charter and Rule 40(5) of the Rules, the Applicant exhausted the local remedies.

50. In conclusion, the Court dismisses the objection based on non-exhaustion of local remedies.

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

51. The Respondent State contends that, even though Rule 40(6) of the Rules does not specify what is meant by reasonable time, international human rights case law, in particular, that of the African Commission on Human and Peoples' Rights in the matter of *Michael Majuru v Zimbabwe*[11] has established that six (6) months is considered a reasonable time.

52. The Respondent State also notes that, in the present case, the Applicant seized the Court on 14 July 2016, that is, five (5) years after they deposited the Declaration prescribed under Article 34(6) of the Protocol which allows referral of cases to the Court by individuals and NGOs. The Respondent State infers from this that, this time frame is unreasonable and that the Application must therefore be declared inadmissible.

53. In his Reply, the Applicant asserts that he does not question the timeframe for the case as presented by the Respondent State, but rather challenges what the latter considers as an unreasonable time through erroneous interpretation of Article 34(6) of the Protocol, without taking into account the circumstances in which he found himself after exhausting the local remedies.

54. He asserts that the Court should take into account his situation as an indigent person, a layman in matters of law, a person without legal assistance, incarcerated and subject to restrictions, to decide that, there are sufficient reasons to justify filing his Application on the date indicated.

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55. Pursuant to Article 56(6) of the Charter as restated in Rule 50(6) of the Rules, in order for an application to be admissible, it must

11 *Michael Majuru v Zimbabwe*, ACHPR, No. 308/2005, 24 November 2008, § 108.

"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". The Court notes that these provisions do not set a time limit within which it must be seized.

56. However, the Court has held that "the reasonableness of the time limit for referral depends on the particular circumstances of each case and must be determined on a case-by-case basis".[12] In this regard, the Court has considered as relevant factors, the fact that an applicant is incarcerated,[13] his indigence, the time taken to utilise the procedures of the application for review at the Court of Appeal, or the time taken to access the documents on file,[14] the recent establishment of the Court, the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.[15]

57. In the present case, the Court notes that Court of Appeal dismissed the Applicant's appeal on 2 July 2003 and the Applicant filed the Application on 14 July 2016. As the judgment of the Court of Appeal was on 2 July 2003, prior to the deposit of the Declaration provided under Article 34(6) of the Protocol, on 29 March 2010, the Applicant was able to file an application only after the latter date. Therefore, the assessment of reasonable time will be from 29 March 2010.

58. In this regard, the Court notes that between the date of deposit of the Declaration on 29 March 2010 and when the Application was filed on 14 July 2016, a period of six (6) years, three (3) months and fifteen (15) days elapsed.

59. The Court previously considered that a period of five (5) years and one (1) month was reasonable having regard to the situation of the applicants.[16] In the said cases, the Court took into account the fact that the Applicants were in prison, restricted in their movement with limited access to information, and the fact that

12 *Beneficiaries of late Norbert Zongo & ors v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 56; *Alex Thomas v Tanzania* (merits), § 73.

13 *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; *Alex Thomas v Tanzania* (merits), § 74.

14 *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61.

15 *Beneficiaries of late Norbert Zongo & ors v Burkina Faso* (preliminary objections), § 122.

16 *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 50, *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54.

they were laymen in matters of law, were indigent and without the assistance of a lawyer during the trials before the domestic courts.

60. Furthermore, the Court has held that failure to file an application within a reasonable time due to indigence and incarceration must be proven and cannot be justified by blanket assertions or assumptions. The Court has accordingly held that applications filed after five (5) years did not meet the requirement of reasonableness where the Applicants, although incarcerated, did not provide proof that they were lay, illiterate or had no knowledge of the existence of the Court.

61. The Court has also considered that where Applicants had filed applications for review before the Court of Appeal and this had either been determined or were pending by the time they filed their Applications before this Court this would be taken as an additional factor justifying the delay by those Applicants in filing their applications before this Court as they had to wait for the outcome of the review procedure.

62. The Court observes that while it emerges from the record that the Applicant was incarcerated at the time of filing the Application, he has not provided evidence to support his claim of indigence and that he was subject to restrictions. The Applicant also did not apply for a review of the judgment of the Court of Appeal of 2 July 2003.

63. In view of the foregoing, the Court finds that the filing of the Application Six (6) years, three (3) months and fifteen (15) days after exhaustion of local remedies is not a reasonable time within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules. The Court therefore upholds the Respondent State's objection in this regard.

64. The conditions listed in Article 56 of the Charter and Rule 40 of the Rules being cumulative, therefore, the Application's non-compliance with Article 56(6) of the Charter and Rule 40(6) of the Rules renders the application inadmissible.

VII. Costs

65. The Court notes that, none of the parties has made submissions on costs.

66. Pursuant to Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs".

67. In view of the above provision, the Court rules that each party shall bear its own costs.

VIII. Operative part

68. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Dismisses* the objection to its jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objection based on non- exhaustion of local remedies;

iv. *Finds* that the Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules;

v. *Declares* that the Application is inadmissible.

On costs

vi. *Orders* each party to bear its own costs.