Lyambaka v Tanzania (admissibility) (2020) 4 AfCLR 574

Application 010/2016, *Hamad Mohamed Lyambaka v United Republic of Tanzania*

Ruling (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 serving separate sentences for armed robbery and rape, brought this action alleging a violation of his rights by the Respondent State on the grounds that the domestic court acted erroneously in its consideration of his case. The Court declared the case inadmissible for failure to file within a reasonable time after exhaustion of local remedies.

Jurisdiction (nature of jurisdiction in cases involving domestic courts, 23-25)

Admissibility (submission within a reasonable time, 46-51)

I. The Parties

1. Mr Hamad Mohamed Lyambaka (hereinafter referred to as "the Applicant") is a Tanzanian national currently incarcerated in Butimba Central Prison in Mwanza, Tanzania, serving a thirty (30) year sentence for the offence of armed robbery. The Applicant is concurrently serving a life sentence for the offence of rape.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent State"), which 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. It also deposited, on 29 March 2010, 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. The Court ruled that the withdrawal of the Declaration does not have any bearing on pending cases and will take effect on 22 November 2020.[1]

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

II. Subject of the Application

A. Facts of the matter

3. The Application arises from the Applicant's conviction, jointly and together with four other defendants, for the offences of armed robbery and gang rape for which the District Court of Musoma sentenced him to thirty (30) years in prison and life imprisonment respectively by a judgment delivered on 16 July 2002 in Criminal Case No 35 of 2001.

4. Aggrieved by the decision of the District Court, the Applicant filed a Criminal Appeal No. 05 of 2003 before the High Court of Tanzania sitting at Mwanza, which in a judgment dated 2 July 2004, dismissed his claims. He further then appealed the judgment of the High Court before the Court of Appeal sitting at Mwanza in Criminal Appeal No. 178 of 2004. On 16 March 2007, the Court of Appeal dismissed the Applicant's appeal.

B. Alleged violations

5. The Applicant alleges that:

i. the judgment of the Court of Appeal was erroneous as the court did not sufficiently evaluate the evidence presented by the prosecution;

ii. the Court of Appeal did not consider all grounds of appeal raised by the Applicant and thus violated his fundamental right to be heard by a court of law; and

iii. his right to legal representation was violated as the Respondent State failed to accord to him legal representation.

III. Summary of the Procedure before the Court

6. The Registry received the Application on 26 February 2016, served it on the Respondent State on 12 April 2016 and transmitted it to the entities listed under Rule 35(3) of the Rules on 22 April 2016.

7. The Parties filed their pleadings on the merits within the time prescribed by the Court and these were duly exchanged.

8. Pleadings on the merits were closed on 6 September 2017 and the Parties were duly notified.

9. On 6 July 2018, the Registry requested the Parties to file their pleadings on reparations.

10. On 13 September 2018, the Applicant filed his pleadings on reparations after being accorded the requested extension of time to do so. The Respondent State similarly filed its response to

the Applicant's submissions on reparations on 22 August 2019. Pleadings on reparations were closed on 3 August 2020 and the Parties were duly notified.

11. On 13 May 2020, the Registry sent a letter to the Applicant notifying him of the Respondent State's withdrawal of its Declaration made 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 any effect on all pending applications at the time of the withdrawal, including his Application.

IV. Prayers of the Parties

12. The Applicant prays the Court to make the following findings with respect to its jurisdiction and the admissibility of the Application:

i. that the Court has jurisdiction to examine the Application; and

ii. that the Application has met the admissibility requirements as stipulated under Article 56 of the Charter, Article 6(2) of the Protocol and Rule 40(6) of the Rules of the Court

13. With respect to the merits of the Application, the Applicant prays the Court to:

i. declare that the Respondent State violated Articles 2, 3(1) and (2) and 7(1)(c) of the Charter;

ii. declare that the Respondent State violated Articles 1 and 107A (2) of its Constitution;

iii. restore justice where it was overlooked and quash both his conviction and the sentence imposed on him;

iv. set him at liberty;

v. grant reparations in his favour;

vi. declare that the costs of the Application be borne by the Respondent State; and

vii. grant any other order(s) or relief(s) as the Court may deem fit.

14. The Respondent State makes the following prayers with respect to the jurisdiction of the Court and admissibility of the Application:

1. That the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this Application;

2. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court or Article 56 and Article 6(2) of the Protocol;

3. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules and Article 6(2) of the Protocol;

4. That the Application be declared inadmissible;
5. That the Application be dismissed in accordance to Rule 38 of the Rules of Court;
6. That the costs of this Application be borne by the Applicant.

15. With respect to the merits of the Application, the Respondent State prays the Court to find that there is no need to pronounce itself. In the alternative, the Respondent State prays the Court to grant the following orders:

1. That the Government of the United Republic of Tanzania did not violate Articles 2, 3(1), 3(2), 7(1) (c) of the African Charter on Human and Peoples' Rights;
2. That the Government of the United Republic of Tanzania did not contravene Article 1 and 107A (2) (b) of the Constitution of the United Republic of Tanzania;
3. That the Application be dismissed for lack of merit;
4. That the Applicant's prayers be dismissed;
5. That the Applicant not be awarded reparations;
6. That the costs of this Application be borne by the Applicant.

V. Jurisdiction

16. The Court observes that Article 3 of the Protocol 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.

17. The Court further observes that pursuant to Rule 39(1) of the Rules "[t]he Court shall conduct preliminary examination of its jurisdiction …".

18. It emerges from the above-mentioned provisions that for all applications, the Court must carry out a preliminary examination of its jurisdiction and examine any objections raised. In the instant matter, the Respondent State raises an objection in relation to jurisdiction first, on the ground that the Court is being called to exercise appellate jurisdiction, and second, on the ground that the Court lacks jurisdiction to quash the conviction and set aside the sentence.

A. Objection to material jurisdiction

19. The Respondent State alleges that this Court does not have jurisdiction to hear this Application as it raises issues of fact and law, which had been finally determined by the Court of Appeal of Tanzania. The Respondent State avers that, through this Application, this Court is being asked to act as an appellate court.

20. Relying on Rule 26 of the Rules and the ruling in the case of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State also avers that this Court lacks jurisdiction to quash the conviction set aside sentences and order the release of the Applicant from prison as these decisions were affirmed by the highest court of the land.

21. The Applicant contends that the failure of the Court of Appeal to properly consider all the grounds he had raised invokes the jurisdiction of this Court to hear the Application. He further argues that the Respondent State's claim that this Court lacks jurisdiction to quash the conviction, set aside the sentences and order his release is not founded.

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22. With respect to the Respondent State's objection that this Court is being called to act as an appellate court, the Court recalls, as it has consistently held, that pursuant to Article 3(1) of the Protocol, it has jurisdiction to consider any Application filed before it provided that the latter alleges the violation of rights guaranteed in the Charter or any other human rights instruments ratified by the Respondent State.[2]

23. The Court further reiterates that, while it does not exercise appellate jurisdiction with respect to decisions of domestic courts, it is empowered by provisions of Article 3(1) of the Protocol to ensure the observance of the obligations undertaken under the Charter and any other human rights instruments ratified by the

2 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application 025/2016, Judgment of 28 March 2019 (merits and reparations), § 26; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; and *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 25.

Respondent State.[3]

24. The Court observes that, in the instant Application, the Applicant seeks an assessment of whether the manner in which the Court of Appeal examined his claims and evidence in support thereof are in conformity with the Charter and other human rights instruments to which the Respondent State is a party. Consequently, the Court finds that the issues raised fall within its material jurisdiction and dismisses the objection.

25. Regarding the objection that this Court lacks jurisdiction to quash the conviction and set aside the sentence, the Court reiterates its position that, while it does not exercise appellate jurisdiction, it is empowered under Article 3(1) of the Protocol, to examine whether proceedings before domestic courts are conducted in accordance with international obligations set out in the Charter and other international instruments to which the Respondent State is a party.[4] Accordingly, the Court dismisses the objection.

26. From the foregoing, the Court finds that it has material jurisdiction to hear the Application.

B. Other aspects of jurisdiction

27. The Court notes that none of the Parties raises any contestation with respect to its personal, temporal and territorial jurisdiction.

28. The Court however notes, with respect to its personal jurisdiction, that on 21 November 2019, the Respondent State deposited an instrument withdrawing the Declaration that it had made under Article 34(6) of the Protocol. In the judgment that it delivered on 26 June 2020 in the matter of *Andrew Ambrose Cheusi v United Republic of Tanzania*, the Court held that the withdrawal does not have any retroactive effect and, therefore, has no bearing on matters pending prior to its filing, as is the case of the present Application.[5] The Court consequently holds that it has personal jurisdiction to hear the present Application.

3 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130; *Mohamed Abubakari v Tanzania* (merits), § 29; *Christopher Jonas v Tanzania* (merits), § 28; and *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165, §§ 53 and 54.

4 *Abubakari v Tanzania* (merits), § 29; *Thomas Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 31; *Werema Wakongo Werema and Waisiri Wakongo Werema v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 31.

5 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39. See also, *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application 018/2018, Judgment of 15 July 2020, § 19.

29. With respect to its temporal and territorial jurisdiction, and noting that there is no information on record suggesting that the Court does not have jurisdiction in these respects, the Court holds that:

i. It has temporal jurisdiction in view of the fact that although the alleged violations commenced in 2004, which is prior to the filing of the Declaration in 2010, they continued thereafter since the Applicant is still serving sentences based on his conviction that he avers constitutes a breach of his right to a fair trial;[6]

ii. It has territorial jurisdiction given that the facts of the matter occurred within the territory of the Respondent State, which is a state party to the Charter.

30. In view of the foregoing, the Court holds that it has jurisdiction to hear the present Application.

VI. Admissibility of the Application

31. Pursuant to Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter". According to Rule 39(1) of the Rules, "[t]he Court shall conduct preliminary examination of … the admissibility of the application in accordance with articles 50 and 56 of the Charter, and Rule 40 of [the] Rules."

32. Rule 40 of the Rules, which in essence 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 media;
5. be filed after exhausting local remedies, if any, unless it is obvious that the 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

6 *Jebra Kambole v Tanzania*, § 24; *Dismas Bunyerere v United Republic of Tanzania*, ACtHPR, Application 031/2015, Judgment of 28 November 2019, § 28(ii); *Norbert Zongo & ors v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 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.

33. While some of the above conditions are not in contention between the Parties, the Respondent State raises two objections to the admissibility of the Application.

A. Conditions of admissibility in contention between the Parties

34. The Respondent State's objections relate, first to the requirement of exhaustion of local remedies, and second, to the filing of the Application within a reasonable time.

i. Objection on non-exhaustion of local remedies

35. The Respondent State alleges that the Application was prematurely filed as the Applicant could have filed a constitutional petition in the High Court to complain of the violations that he alleges occurred in the proceedings before the Court of Appeal under the Basic Rights and Duties Enforcement Act [Cap 3 R.E. 2002].

36. The Respondent State further alleges that the Applicant could have applied for review of the Court of Appeal's judgment in Criminal Appeal No 48 of 2000 in accordance with Part IIIB, Rule 66 of the Tanzanian Court of Appeal Rules, 2009.

37. The Applicant avers that he had explored all available domestic remedies before filing the present Application. He refers to the judgments of the District Court of Musoma, the High Court of Tanzania sitting at Mwanza, and the Court of Appeal whose references are stated in paragraphs 4 and 5 of the present Ruling.

38. According to the Applicant, attempting to use the review procedure before the Court of Appeal would have been a waste of time and the same court would have apparently failed to notice a miscarriage of justice which was intentional.

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39. The Court notes that pursuant to Article 56(5) of the Charter, applications brought before it should be filed after exhausting local

remedies that exist unless it is proved that such remedies have been unduly prolonged. However, as the Court has consistently held, an applicant is not compelled to exhaust remedies that are non-judicial or extraordinary in nature.[7] As such, the remedies which consist of filing an application for review or a constitutional petition for breach of fundamental rights are extraordinary as they operate in the judicial system of the Respondent State.[8]

40. The Court observes that, in the present Application, the Applicant filed an appeal against his conviction and sentencing before the Court of Appeal, which is the highest court of the Respondent State. The Court of Appeal, on 16 March 2007, dismissed the Applicant's appeal. Against these facts, which the Respondent State does not challenge, the Court finds that the Applicant has exhausted all available local remedies within the meaning of Article 56(5) of the Charter and Rule 40(5) of the Rules.

41. For this reason, the Court dismisses the Respondent State's objection that the Application does not meet the requirement of exhaustion of local remedies.

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

42. The Respondent State argues that the Applicant did not file his Application within a reasonable time. He alleges that the Application was filed six (6) years and eight (8) months after exhausting local remedies while international human rights jurisprudence provides for six (6) months as a reasonable to do so. In support of its submission, the Respondent State refers to the finding of the African Commission on Human and Peoples' Rights in the matter of *Michael Majuru v Zimbabwe*.

43. The Respondent State further avers that being in custody is not a justification for not filing the present Application within a reasonable time because the prison authorities actually helped the Applicant lodge the Application.

44. The Applicant contends that he filed the Application within a reasonable time in compliance with Article 56(5) of the Charter. He avers that the time is reasonable because he used the available opportunity to address the Application to the Court in a

7 *Alex Thomas v Tanzania* (merits), § 64; *Wilfred Onyango Nganyi & 9 ors v Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95; *Dismas Bunyerere v Tanzania*, § 36.

8 *Alex Thomas v Tanzania* (merits), § 65; *Mohamed Abubakari v Tanzania* (merits), §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44; *Dismas Bunyerere v Tanzania*, § 36.

timely manner.

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45. The Court notes that Article 56(6) of the Charter, which is restated in Rule 40(6) of the Rules, does not stipulate a specific time frame within which an Application must be filed before it. The provisions of Article 56(6) of the Charter merely prescribe that applications shall 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 of the matter.

46. The Court observes that, the reckoning of time within which to assess reasonableness in filing the Application should have been the date when the Court of Appeal rendered its judgment that is on 16 March 2007. However, in the instant case, the actual starting date for computing the time is 29 March 2010 when the Respondent State filed its Declaration. Given that the Application was filed on 26 February 2016, the said time is five (5) years, eleven (11) months and twenty-seven (27) days. The issue for determination is whether such time is reasonable in the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules.

47. The Court recalls that the reasonableness of the time frame to file an application within the meaning of Article 56(6) of the Charter "depends on the particular circumstances of each case and must be determined on a case-by-case basis".[9] Among the relevant factors, the Court has based its evaluation on the situation of the Applicants, including whether they had attempted to exhaust extraordinary remedies, or if they were lay, indigent, incarcerated persons who had not benefited from free legal assistance.[10]

48. In this respect, the Court has held in particular that failure to file an application within a reasonable time due to indigence and incarceration must be proved and cannot be justified by blanket

9 *Norbert Zongo & ors v Burkina Faso* (preliminary objections), § 121; *Alex Thomas v Tanzania* (merits), §§ 73-74; *Armand Guehi v Tanzania* (merits and reparations), §§ 55-57; *Werema Wangoko Werema & anor v Tanzania* (merits), § 45.

10 *Jibu Amir alias Mussa & anor v United Republic of Tanzania*, ACtHPR, Application 014/2015, Judgment of 28 November 2019, § 50; *Christopher Jonas v Tanzania* (merits), § 53; *Mohamed Abubakari v Tanzania* (merits), § 92; and *Alex Thomas v Tanzania* (merits), §§ 74.

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 justify the delay by proving for instance that they were lay, illiterate or justified the delay.[11]

49. In the instant case, the Applicant does not aver that the delay was owing to him being lay, illiterate, indigent or having pursued an extraordinary remedy. He only submits that he used the available opportunity in a timely manner to file the Application. Conversely, the Respondent State alleges that the delay may not be justified by the Applicant's incarceration because the prison authorities actually helped channel the Application to this Court.

50. Against these submissions, the Court observes that while it emerges from the record that the Applicant was incarcerated, there is no proof that his incarceration constituted an impediment to the timely filing of the Application. As a matter of fact, the Applicant does not aver that an earlier attempt to file the Application through the prison authorities was met with a rejection that would have justified the delay. As such, the Applicant's averment that he seized the available opportunity to file the case is not well founded and he has not attempted to adduce evidence as to why it took him five (5) years, eleven (11) months and twenty-seven (27) days to file the Application. In the absence of clear and compelling justification for the above mentioned lapse of time, the Court finds that the Application was not filed within a reasonable time in the meaning of Article 56(5) of the Charter and Rule 40(6) of the Rules.

51. The Court therefore upholds the Respondent State's objection relating to failure to file the Application within a reasonable time.

52. The Court recalls that the conditions of admissibility under Article 56 of the Charter being cumulative, failure to fulfil any of them renders the Application inadmissible. In the instant matter, given that the Application did not meet the requirement made under Article 56(6) of the Charter, the Court finds the Application is inadmissible.

11 See *Godfred Anthony & anor v United Republic of Tanzania*, ACtHPR, Application 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility), §§ 48-49; *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application 020/2015, Ruling of 28 November 2019 (jurisdiction and admissibility), §§ 51-56.

VII. Costs

53. The Applicant prays the Court to order that the costs of the Application should be borne by the Respondent State.

54. The Respondent State prays the Court to rule that the costs of the Application should be borne by the Applicant.

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

56. In the present Application, the Court rules that each party shall bear its own costs.

VIII. Operative part

57. 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 objections 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* that each party shall bear its own costs.