Said v Tanzania (admissibility) (2021) 5 AfCLR 545

Application 011/2019, *Yusuph Said v United Republic of Tanzania*

Ruling, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIŽUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant was tried, convicted, and sentenced to death for murder by the domestic courts of the Respondent State. He brought this Application alleging that the processes of the domestic courts violated his human rights. In this default ruling, the Court held that the matter was not submitted within a reasonable time and was therefore inadmissible.

Procedure (ruling in default of appearance, 14-17)

Admissibility (submission within a reasonable time, 38-45; admissibility conditions cumulative, 46)

I. The Parties

1. Yusuph Said (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Butimba Prison in the Mwanza region, having being convicted of the offence of murder and sentenced to death.

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. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through 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 held that this withdrawal had no bearing on pending cases and new cases filed before the withdrawal came into effect,

that is, on 22 November 2020.[1]

II. SUBJECT MATTER OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record, that, on 9 October 2003, the Applicant and ten (10) others, were allegedly seen inflicting injuries to one Athumani Dadi in broad daylight "with the aid of iron rods and clubs" which led to his death.

4. On 26 October 2006, the Applicant was jointly charged with ten (10) others with the offence of murder at the Resident Magistrate's Court with Extended Jurisdiction sitting at Kigoma, the case having been transferred by an Order of the High Court sitting at Kigoma and therefore giving the Resident Magistrate, the powers of a High Court judge.[2] The Applicant was subsequently convicted on 20 May 2008 and sentenced to death. On 13 March 2009, the Applicant appealed against his conviction and sentence to the Court of Appeal, which dismissed his appeal on 30 June 2011.

B. Alleged violations

5. The Applicant alleges the violation of the following rights:

i. The right to equality protected under Article 3(1) and (2) of the Charter; and

ii. The right to a fair trial protected under Article 7(1) of the Charter.

III. Summary of the Procedure before the Court

6. The Application was filed on 22 March 2019.

7. On 5 July 2019, the Court granted the Applicant legal aid at his request, given that he was a death row inmate, self-represented and his Application lacked clarity.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

2 This is pursuant to Section 256A of the Criminal Procedure Act of Tanzania which provides: "[t]he High Court may direct that the taking of a plea and the trial of an accused person committed for trial by the High Court, be transferred to, and be conducted by a resident magistrate upon whom extended jurisdiction has been granted under subsection (1) of section 173."
"[…] (3) The provisions of this Act which governs the exercise by the High Court of its original jurisdiction shall mutatis mutandis, and to the extent that they are relevant, govern proceedings before a resident magistrate under this section in the same manner as they govern like proceedings before the High Court."

8. The Application was served on the Respondent State on 30 September 2019.

9. The Respondent State did not file a Response despite having benefited from two extensions of time on 9 July 2020 and 10 February 2021.

10. Pleadings were closed on 6 April 2021 and the parties were notified thereof.

IV. Prayers of the Parties

11. The Applicant prays the Court to:

a. Grant him legal aid;

b. Make an order for his acquittal; and

c. Make an order for reparations.

12. The Respondent State did not appear in these proceedings and therefore, did not make any prayers.

V. On the default of the Respondent State

13. Rule 63(1) of the Rules of Court[3] provides that:

> Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.

14. The Court notes that Rule 63(1) sets out three conditions for a Ruling in default and these are: i) the notification of the defaulting party; ii) the default of one of the Parties; and iii) application by the other party or the Court on its own motion.

15. With regards to the notification of the defaulting party, the Court recalls that the Application was filed on 22 March 2019. The Court further notes that, from 30 September 2019, the date of service of the Application to the Respondent State, to the date of the closure of the pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. The Court concludes thus, that the defaulting party was duly notified.

16. On the default of one of the parties, the Court notes that the Application was served on the Respondent State on 30 September 2019 and it was granted sixty (60) days to file its Response but it failed to do so within the time allocated. The Court then sent

3 Formerly Rule 55 of the Rules of Court, 2 June 2010.

two reminders to the Respondent State on 9 July 2020 and 11 February 2021 granting it ninety (90) days and forty-five (45) days respectively to file its Response but it failed to do so. The Court thus finds that the Respondent State has defaulted in appearing and defending the case.

17. Finally, with respect to the last condition, the Court notes that the Rules, empower it to issue a decision in default either *suo motu* or on request of the other party. In the present case, the Applicant having not requested for a default decision, the Court will proceed to issue the decision *suo motu* for proper administration of justice.[4]

18. The required conditions having thus been fulfilled, the Court concludes that it may rule by default**.**[5]

VI. Jurisdiction

19. 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.

20. The Court further observes that in terms of Rule 49(1) of the Rules "[t]he Court shall conduct preliminarily examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules."

21. The Court notes that, even though nothing on the record indicates that it lacks jurisdiction, it is obliged to determine if it has jurisdiction to consider the Application**.** In this regard, the Court notes that, as earlier stated in this judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration with the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

22. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect

4 *Fidele Mulindahabi v Rwanda*, ACtHPR, Application no. 010/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) §§ 27-32. *Fidele Mulindahabi v Rwanda*, ACtHPR, Application no. 011/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) §§ 20-25.

5 *African Commision on Human and Peoples' Rights v Libya* (merits) (3 June 2016) 1 AfCLR 153 §§ 38-42.

twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[6]

23. In view of the above, the Court finds that it has personal jurisdiction.

24. As regards its material jurisdiction, the Court notes that the Applicant alleges violation of Articles 3(1) and (2) and 7(1) of the Charter to which the Respondent State is a party and therefore its material jurisdiction has been satisfied.

25. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a party to the Charter, the Protocol and had deposited the Declaration prescribed under Article 34(6) of the Protocol. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[7]

26. The Court also notes that it has territorial jurisdiction, given the facts of the case, occurred in the Respondent State's territory.

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

VII. Admissibility

28. 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."

29. Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

30. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
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> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> b. comply with the Constitutive Act of the Union and the Charter;
>
> c. not contain any disparaging or insulting language;

6 *Andrew Ambrose Cheusi v United Republic of Tanzania* (merits and reparations) §§ 37-39.

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

d. not be based exclusively on news disseminated through the mass media;

e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

f. 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

g. 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.

31. The Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the parties, as the Respondent State having decided not to take part in the proceedings did not raise any objections to the admissibility of the Application. However, pursuant to Rule 50(1) of the Rules, the Court is obliged to determine the admissibility of the Application.

32. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

33. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

34. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

35. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment of Rule 50(2)(d) of the Rules.

36. With regard to the exhaustion of local remedies, the Court reiterates as it has established in its case law that "the local remedies that must be exhausted by the Applicants are ordinary judicial remedies",[8] unless they are manifestly unavailable, ineffective

8 *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 64. *See also Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 64;

and insufficient or the proceedings are unduly prolonged.[9]

37. Referring to the facts of the matter, the Court notes that, the Applicant was convicted of murder on 20 May 2008 by the Resident Magistrates' Court with Extended Jurisdiction. He appealed against this decision to the Court of Appeal, the highest judicial organ in the Respondent State, which upheld the judgment of the Resident Magistrates' Court by its judgment of 30 June 2011. The Court, therefore, holds that the Applicant exhausted the available local remedies.

38. With regard to the condition of filing an Application within a reasonable time after exhaustion of local remedies, the Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, only requires an application to 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."

39. In the present matter, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 30 June 2011 and that the Applicant filed this Application on 30 September 2019. Therefore, the Applicant filed the Application, eight (8) years and three (3) months after exhaustion of local remedies. The issue for determination therefore, is whether, in the circumstances of the case, the period of eight (8) years and three (3) months is reasonable.

40. The Court has held that,[10] the period of five (5) years and one (1) month was reasonable owing to the circumstances of the applicants. In these cases, the Court took into consideration the fact that the applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not have the assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court.

and *Wilfred Onyango Nganyi and 9 others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507 *§ 95.*

9 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314 § 77. *See also Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398 § 40.

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

41. Furthermore, the Court decided that,[11] applicants, having used the review procedure, were entitled to wait for the review judgment to be delivered and that this justified the filing of their application five (5) years and five (5) months after exhaustion of local remedies.

42. Moreover, the Court held that a period of eight (8) years and four (4) months, satisfied the provisions of Rule 50(2)(f) of the Rules, given that there were no remedies to exhaust and therefore reasonable time did not arise.[12] Also, the Court held that the alleged violations were continuing in nature and thus renewed themselves every day. Consequently, the applicant in that case, could have seized the Court at any time as long as the alleged violations were not remedied.[13]

43. In contrast, the Court has held[14] that, a period of five (5) years and four (4) months was an unreasonable lapse of time before the filing of an application. The Court reasoned that while the applicants were incarcerated and therefore restricted in their movements, they had not "asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court".[15] Furthermore, the Court concluded that, while it had always considered the personal circumstances of applicants in assessing the reasonableness of the lapse of time before the filing of an application, the applicants had failed to provide it with material on the basis of which it could conclude that the period of five (5) years and four (4) months was reasonable. [16]

44. In the instant case, the Court notes that the Applicant has not given any reasons as to why he could not seize the Court earlier than the eight (8) years and three months (3) it took him to do so. The Court further notes that even though, he is incarcerated, the Applicant did not indicate how his incarceration impeded him in filing his application earlier than he did. Although the Court has previously admitted a case filed after eight (8) years and four (4) months,[17] the present case is distinguishable. To start with, in the present case, local remedies were available and duly exhausted

11 *Werema Wangoko v Tanzania* (merits) (7 December 2018) 2 AfCLR 520 §§ 48-49.

12 *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application no. 018/2018, Judgment of 15 July 2020 (merits and reparations) § 50.

13 *Ibid* at § 52.

14 *Godfred Anthony and another v United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Ruling of 26 September 2019 (admissibility) § 48.

15 *Ibid.*

16 *Ibid* § 49.

17 *Jebra Kambole v Tanzania* (merits and reparations) *supra note* 13 and 14.

by the Applicant and the violations at issue are not continuing.

45. In light of the foregoing, the Court holds that, in the absence of any clear and compelling justification for the lapse of eight (8) years and three (3) months before the filing of the Application, the Application cannot be considered to have been filed within a reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

46. The Court recalls that, the conditions of admissibility of an Application filed before it are cumulative, such that if one condition is not fulfilled then the Application becomes inadmissible.[18] In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter which is restated in Rule 50(2)(f) of the Rules, the Court, therefore, finds that the Application is inadmissible.

VIII. Costs

47. The Parties did not make any submissions on costs.

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48. The Court notes that Rule 32(2) of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs."

49. Consequently, the Court decides that each Party shall bear its own courts.

IX. Operative part

50. For these reasons,

The Court,

Unanimously and in default:

i. *Declares* that it has jurisdiction;

ii. *Declares* the Application inadmissible;

iii. *Orders* each Party to bear its own costs.

18 *Dexter Johnson v Ghana*, ACtHPR, Application No. 016/2017. Ruling of 28 March 2019 (jurisdiction and admissibility) § 57.