

Marwa v Tanzania (ruling) (2022) 6 AfCLR 548

Application 021/2017, *John Martin Marwa v United Republic of Tanzania*
Ruling, 22 September 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSOUULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was serving a 30 year prison term when he filed this Application. He had been tried, convicted and sentenced for the rape of an 18 year old student. The Applicant brought this Application, alleging that the proceedings before the national courts violated some of his Charter protected rights. Upholding one of the objections raised by the Respondent State, the Court held that the Application was not filed within a reasonable time. The Court therefore declared the Application inadmissible.

Procedure (conditions for default ruling, 17-20)

Admissibility (filing within a reasonable time, 34-43)

Dissenting Opinion: BENSOUULA

Admissibility (filing within a reasonable time, 3, 9-11)

I. The Parties

1. John Martin Marwa (hereinafter, “the Applicant”) is a national of Tanzania and a schoolteacher by profession, who, at the time of filing the Application, was incarcerated at Uyui Central Prison, Tabora Region, serving a sentence of thirty (30) years’ imprisonment having been convicted of the offence of rape of an eighteen (18) year-old student. He alleges the violation of his right to a fair trial in the domestic courts.
2. The Application is filed against the United Republic of Tanzania (hereinafter, “the Respondent State”), which 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, the Respondent State, on 29 March 2010, deposited the Declaration provided for under Article 34(6) of the Protocol (hereinafter, “the Declaration”), by virtue of 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 has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one year after its deposit, which is on 22 November 2020.¹

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records before the Court that the Applicant allegedly instructed a secondary school student to accompany him at night in going after a number of students who were outside the school compound. On their way back, the Applicant allegedly attacked the student and started to rape her. The student eventually managed to escape and run back to the school, after which she reported the incident to the police.
4. The Applicant was subsequently arrested and charged before the District Court of Nzega, in Criminal Case No 198/2005, with the offence of rape. He was convicted and sentenced to 30 years' imprisonment on 13 April 2006.
5. The Applicant filed a criminal appeal, No 56/2006, which was dismissed by the Resident Magistrate's Court (Extended Jurisdiction) sitting at Tabora on 14 December 2007.
6. The Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Tabora, being Criminal Appeal No 22/2008. In its judgment of 22 June 2011, the Court of Appeal dismissed the appeal in its entirety and the Applicant was ordered to pay compensation to the victim amounting to five hundred thousand Tanzanian Shillings (TZS 500,000).

B. Alleged violations

7. The Applicant alleges that the Respondent State violated his rights, notably:
 - i. The right not to be discriminated against, protected under Article 2 of the Charter;
 - ii. The right to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter; and

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

- iii. The right to have his cause heard, protected under Article 7(1) of the Charter.

III. Summary of the Procedure before the Court

8. The Application was filed on 4 July 2017 and on 26 July 2017, the Court requested the Applicant to submit a copy of the Judgment in Criminal Appeal No 22 of 2008 of the Court of Appeal of Tanzania sitting at Tabora. After the submission of the copy of the Judgment by the Applicant, the Court served the Application on the Respondent State on 13 August 2018.
9. On 13 August 2018, the Court also requested the Applicant to file his submissions on reparations. The Applicant did not file his submissions on reparations despite several reminders.
10. On 27 September 2018, the Respondent State submitted a list of names and addresses of its legal representatives.
11. The Court sent the Respondent State a reminder on 20 December 2018 to file its response to the Application and *suo moto* granted an extension of 30 days for the Respondent State to file a response.
12. On 21 January 2019, the Respondent State requested the Court for a six-month extension of time to file its Response. On 19 February 2019, the Court granted a last extension of time of four months within which the Respondent State was to file its Response to the Application in accordance with the Rules of Court. The Respondent State's attention was also drawn to the provisions of Rule 55 of the Rules of Court on decisions in default.²
13. Pleadings were closed on 30 September 2021 and the parties were duly notified.

IV. Prayers of the Parties

14. The Applicant prays that this Court restores justice where it was overlooked, quash both the conviction and the sentence of 30 years' imprisonment imposed upon him and order his release from prison. He further prays the Court to grant any other orders that may be appropriate in the circumstances of his case.
15. The Respondent State did not make any prayers.

2 Rule 63 of the Rules of Court, 25 September 2020.

V. On the default of the Respondent State

16. Rule 63(1) of the Rules of Court³ 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 judgment 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.
17. The Court notes that Rule 63(1) sets out three requirements 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.
18. On the first requirement, the Court notes that the Registry notified all the pleadings submitted by the Applicant to the Respondent State.
19. With respect to the second requirement, the Court notes that the Respondent State was granted sixty (60) days to file its Response, however, it failed to do so. The Court also granted two extensions of time within which to file a response, on 20 December 2018 and on 19 February 2019 respectively, and in the notification of the last extension of time, the Court drew the Respondent State's attention to the provisions of Rule 55 of the former Rules of Court on decisions in default.⁴ Despite the said extensions of time, the Respondent State did not file a response. The Court thus finds that the Respondent State has defaulted in appearing and defending the case.
20. Finally, with respect to the last requirement, 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 decision in default, the Court will proceed to issue the decision *suo motu* for the purpose of ensuring proper administration of justice.⁵
21. The requirements having thus been fulfilled, the Court finds that it may rule in default pursuant to Rule 63(1) of the Rules of Court.

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

4 Rule 63 of the Rules of Court, 25 September 2020.

5 *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.

VI. Jurisdiction

22. 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.

23. The Court further observes that pursuant to Rule 49(1) of the Rules, it “shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules.”

24. Having found that its jurisdiction is not in contention, the Court finds that it has:

- i. Material jurisdiction, insofar as the Application alleges violations of Article 2 and 7 of the Charter which the Respondent State has ratified, and the Court has the power to interpret and apply the Charter in accordance with Article 3(1) of the Protocol.
- ii. Personal jurisdiction, given that the Respondent State is a party to the Protocol and had deposited the Declaration under Article 34(6) thereof, which enabled the Applicant to access the Court under Article 5(3) of the Protocol. In reference to paragraph 2 of this ruling, the Court recalls that it has held that the withdrawal of the Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or on new cases filed before the withdrawal takes effect.⁶ This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.
- iii. Temporal jurisdiction given that the alleged violations took place after ratification of the Charter, the Protocol and depositing of the Declaration by the Respondent State. Furthermore, the alleged violations are continuing since the Applicant remains convicted on the basis of what he considers an unfair process.⁷
- iv. Territorial jurisdiction, given that the facts on which the alleged violations are based occurred on the territory of the Respondent State.

⁶ *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

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.

25. From the foregoing considerations, the Court finds that it has jurisdiction to consider the instant Application.

VII. Admissibility

26. Pursuant 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”.
27. In line with Rule 50(1) of the Rules, “the 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.”
28. The Court notes that 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 of the following conditions:
- a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted 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 seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of African Union or the provisions of the Charter.
29. From the records, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.
30. 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 Application also does not contain any claim or prayer that is incompatible with a provision of the Act. 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.

31. 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.
32. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the domestic courts of the Respondent State in fulfilment of Rule 50(2)(d) of the Rules.
33. With regard to the exhaustion of local remedies, the Court notes that the Applicant has had his case determined by three domestic courts, namely the District Court of Nzega on 13 April 2006, the Resident Magistrate's Court (Extended Jurisdiction) sitting at Tabora on 14 December 2007, and the Court of Appeal of Tanzania on 22 June 2011, the latter being the highest judicial authority in the Respondent State. The Court, therefore, holds that the Applicant exhausted the available local remedies.
34. As to whether the instant Application was filed within a reasonable time, the Court notes that Article 56(6) of the Charter and Rule 50(2) (f) of the Rules provide that Applications must be filed "...within 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".
35. The Court in the case of *Norbert Zongo and Others v Burkina Faso* held that "...the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."⁸
36. From the record, the Applicant exhausted local remedies on 22 June 2011, being the date the Court of Appeal delivered its judgment on his appeal. The Applicant then filed the instant Application on 4 July 2017.
37. The Court has to, therefore, assess whether the period running from 22 June 2011 to 4 July 2017 when the Applicant seized this Court, that is, six (6) years and twelve (12) days is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
38. To determine whether an Application has been filed within a reasonable time, the Court has previously taken into consideration the personal circumstances of applicants, including whether they

8 *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) (2013) 1 AfCLR 197 § 121.

are lay, indigent or incarcerated.⁹

39. Importantly, the Court has confirmed that it is not enough for applicants to simply plead that they were incarcerated, are lay or indigent, for example, to justify their failure to file an Application within a reasonable period of time.¹⁰
40. As the Court has previously pointed out, even for lay, incarcerated or indigent litigants there is a duty to demonstrate how their personal situation prevented them from filing their Applications in a more timely manner. It was because of the foregoing that the Court concluded that an Application filed after five (5) years and eleven (11) months was not filed within a reasonable time.¹¹ The Court reached the same conclusion in respect of an Application filed after five (5) years and four (4) months.¹² In yet another case, the Court found that the period of six (6) years, three (3) months and fifteen (15) days was also not a reasonable period of time within the meaning of Article 56(5) of the Charter.¹³
41. In the present case, although the Applicant is incarcerated, he has not adduced evidence on the basis of which the Court could conclude that his personal situation inhibited him from filing the Application in a more timely manner. He simply asserted that the Court should find his Application admissible in accordance with Article 6(2) of the Court's Protocol but provided no justification why it took him six (6) years and twelve (12) days to file the Application.
42. In the absence of any justification by the Applicant for the lapse of six (6) years and twelve (12) days before the filing of the Application, the Court finds that this Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter as restated in Rule 50(2)(f) of the Rules.
43. The Court recalls that, the admissibility requirements of an Application filed before it are cumulative, such that if one condition

9 *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 101 § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (2018) 2 AfCLR 344 § 50.; *Armand Guehi v Tanzania* § 56; *Werema Wangoko v United Republic of Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 520 § 49.

10 *Layford Makene v United Republic of Tanzania*, ACTHPR, Application No 028/2017 Ruling of 2 December 2021 (admissibility), § 48.

11 *Hamad Mohamed Lyambaka v United Republic of Tanzania*, ACTHPR, Application No 010/2016. Ruling of 25 September 2020 (admissibility) § 50.

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

13 *Chananja Luchagula v United Republic of Tanzania*, ACTHPR, Application No 039/2016. Ruling of 25 September 2020 (admissibility) §§ 57-60.

is not fulfilled then the Application becomes inadmissible.¹⁴ 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 and dismisses it.

VIII. Costs

44. The Applicant and the Respondent State did not make any submissions on costs.

45. The Court notes that Rule 32(2) of the Rules of Court provides that: “[u]nless otherwise decided by the Court, each party shall bear its own costs, if any”.¹⁵
46. The Court finds that there is nothing in the instant case warranting it to depart from this provision.
47. Consequently, the Court orders that each Party shall bear its own costs.

IX. Operative part

48. For these reasons,

The Court

On jurisdiction

Unanimously,

- i. *Declares* that it has jurisdiction.

On admissibility

By a majority of Nine (9) for, and One (1) against, Justice Chafika BENSALOULA dissenting,

- ii. *Finds* that the Application was not filed within a reasonable time;
- iii. *Declares* that the Application is inadmissible.

14 *Jean Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 61; *Dexter Eddie Johnson v Republic of Ghana*, ACtHPR, Application No 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility), § 57.

15 Rule 30(2) of the Rules of Court, 2 June 2010.

On costs

Unanimously,

- iv. Orders that each Party shall bear its own costs.

Dissenting Opinion: BENSAOULA

1. I do not agree with the finding of the Court in its judgment referred to above and the grounds for declaring the application inadmissible for having been filed beyond reasonable time.
2. I write this dissenting opinion because I am convinced that the Court should have declared the Application admissible based on the same facts on which it relied to declare it inadmissible and others which it did not raise but which have nevertheless set the precedent.
3. Indeed, in its judgment on preliminary objections in the case of *“Beneficiaries of the late Norbert Zongo and others” v Burkina Faso* rendered on 21 June 2013, the Court, with regard to the reasonable time for seizure, expressly stated that “the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis”.
4. This “case-by-case” principle with respect to reasonable time has been applied by the Court in numerous cases, including:
 - The judgment of 2 December 2021 in *Sadik Marwa Kisase v United Republic of Tanzania*, in which the Court dismissed the objection raised by the Respondent State regarding reasonable time on the ground that the Applicant, who was in detention, had no legal representation in the domestic courts or before this Court (paragraphs 51 and 52) and consequently considered 16 months as reasonable.
 - The *Christopher Jonas v United Republic of Tanzania* judgment of 28 September 2017 and *Amiri Ramadhani v United Republic of Tanzania*, in which the Court, having taken into account the fact that the Applicants were in prison, restricted in their movement, layman in law, indigent, did not have access to information, were not assisted by a lawyer during the trial, were illiterate and were not acquainted with the existence of the Court, held that 5 years and one month was reasonable time.
 - Finally, in its judgment in Application No 013/2016, *Stephen John*

Rutakikirwa v United Republic of Tanzania of 24 March 2022, delivered on the same day, the Court reiterated this principle in paragraphs 45 and 48 when it declared the Application filed within 4 years and 4 months reasonable, on the ground that the Applicant was incarcerated, restricted in his movements with limited access to information and was not provided legal assistance!

5. In the judgment which is the subject of this opinion, it is clear from the facts, which no one disputes, especially as the judgment was delivered by default in respect of the Respondent State, that the Applicant, who had been in prison custody well before his conviction, was sentenced to 30 years' imprisonment on 13 April 2006. His conviction was confirmed by judgment of 14 December 2007. The Applicant appealed the judgment of 14 December 2007 before the Appeal Court which dismissed the said appeal 22 June 2011.
6. It is clear from the decisions handed down by domestic courts that the Applicant was not represented throughout the proceedings until the final confirmation of his conviction and, incidentally, not even before the Appeal Court. The Court has held in many judgments that these particulars in themselves constitute a violation, and given the gravity of the facts and the length of the sentence, the Applicant had the right to be provided a lawyer (judgments in *Diocles William v United Republic of Tanzania* of 21 September 2018, *Kennedy Owino Onyachi and others v United Republic of Tanzania* of 28 September 2009 and *Alex Thomas v United Republic of Tanzania* of 28 September 2017).
7. There is a contradiction on the part of the Court which, in certain judgments, considered that "the personal situation of the applicants", in particular, the fact that they are lay people in law, indigent and incarcerated, are sufficient grounds to grant rather long time limits (4 years 8 months and 4 days in the case of *Thobias Mango v Republic of Tanzania*, judgment of 11 May 2018, 5 years 1 month and 12 days in the case of *Christopher Jonas v United Republic of Tanzania*, judgment of 28 September 2017 and 5 years 1 month 1 week and 6 days in the case of *Amiri Ramadhani v United Republic of Tanzania*, judgment of 11 May, 2018). However, in the instant judgment and others, the Court has ruled to the contrary, having declared, despite the presence of the aforementioned facts, that the applicants are required to show how their "personal situation" prevented them from filing their application within a shorter period of time! These judgments include the case of *Hamad Mohamed Lyambaka v Republic of Tanzania*, judgment of 25 September 2020 (5 years

and 11 months) the case of *Godfred Anthony and others v United Republic of Tanzania*, judgment of 26 September 2019 (5 years and 4 months), the case of *Chananja Luchagula v Republic of Tanzania*, judgment of 25 September 2020 (6 years 3 months and 15 days).

8. At no point in these previous judgments did the Court demonstrate what more it expected from a detained Applicant in relation to “the personal situation”, which led to contradictory grounds in judgments in respect of the same Respondent State in relation to Applications filed on more or less similar dates against decisions rendered on similar dates!
9. Although the absence of a defence counsel is an essential fact that the Court should always take into consideration, especially for Applicants who are in custody and sentenced to long prison terms, the Court, in assigning reasonable time as a ground, should also take into account whether or not the Applicant was acquainted with the existence of the Court.
10. Indeed, while in some of its judgments, the Court took into consideration this particular and declared that the incarcerated Applicant was restricted in his movements and did not have access to information so that he was unaware of the existence of the Court (*Thobias Mango* and, *Amiri Ramadanani* judgments cited above and the *Christopher Jonas* judgment rendered on 28 September 2017), in other judgments and against the same Respondent State, for applicants in prison, it did not take this particular into account, as in the case of the instant judgment.
11. The Court also considered in many judgments the length of time between the deposition of the Declaration and the filing of the Application and the delivery of the last domestic decision to assess reasonable time, considering it as “an element which proves that the Applicant was not acquainted with the Court, since the Court was in its early stages of activity”.
12. In the *Thobias Mango* and *Amiri Ramadanani* judgments, among others, the Court clearly stated that between the date of depositing the Declaration in 2010 and the last decision rendered by the domestic courts in 2013, the Court was still in its formative stage and that it could not take into consideration the said period, insisting that it was in the phase of completing its harmonization process, so that it would have taken time for the applicant to be apprised of the existence of the Court and its rules of procedure (*Thobias* judgment of 11 May 2018, para 55) *Ramadanani* judgment of 11 May 2015, para 50).
13. In the present case the Appeal Court rendered its decision in June 2011, which makes the aforementioned precedent

applicable, especially since the Respondent State is the same and that therefore the Declaration was made in 2010. It follows that between 2010 and 2013, the Applicant could not have known the Court, hence the need to reduce by 3 years the time taken by the Applicant to initiate his action in July 2017, which would reduce the time of his referral to 4 years.

14. In the *Marwa Kisase* case cited above against the same Respondent State (paragraph 52 of the said judgment), the Court did state that “[...] the Applicant has been incarcerated, did not have legal representation during the proceedings before domestic courts and is self-represented before this Court. Most notably, the facts of the case occurred between 2007 and 2013, which is in the early years of the Court’s operation when members of the general public, let alone persons in the situation of the Applicant in the present case, could not necessarily be presumed to have sufficient awareness of requirements governing proceedings before this Court. Finally, the Respondent State filed its Declaration in 2010. In such circumstances, this Court considers that the period of time that it took the Applicant to file the case should be considered reasonable”.
15. Applying this finding in the *Marwa* judgment to the judgment which is the subject of this dissenting opinion would not only have been fair and logical but would also have led to the Application being declared admissible, since it would have been based on the same facts and particulars.
16. It is my case, in view of this state of affairs, that the Court should, especially in relation to the same Respondent State and Applicants who are incarcerated and sentenced to heavy penalties, take into account all the particulars that would determine whether or not an application is admissible, instead of cherry-picking. It is my view, without exaggerating, that this would render the grounds for the judgment expeditious and leave readers of our judgments and Applicants of the same Respondent State in similar situations completely baffled.