AFRICAN COURT OF HUMAN AND PEOPLES 'RIGHTS

Application 014/2015

Jibub Amir *alias* Mussa and Saïdi Ally *alias* Mangaya

v.

United Republic of Tanzania

Separate Opinion appended to the Judgment of 28 November 2019

1. I share the opinion of the majority of the Judges regarding admissibility of the Application, jurisdiction of the Court and the Operative Part.

2. However, I do not share the grounds on which the Court examined:

- Admissibility of the Application in relation to the objection by the Respondent State on exhaustion of local remedies concerning the Applicants' claims raised for the first time before the Court, namely, the illegality of the sentence inflicted on them;

- And the objection in respect of reasonable time.

- As regards the grounds for admissibility of the Application in relation to the objection raised by the Respondent State on exhaustion of local remedies concerning the Applicants' claims raised for the first time before the Court, namely, the illegality of the sentence imposed on them, the said grounds run counter to:

• the tenets of the obligation to exhaust local remedies before referral to the Court

3. It is common knowledge that, in many of its judgments, the Court restated the conclusions of the African Commission on Human and Peoples' Rights[1]

[1] Application No. 006/2012. Judgment of 05/26/2017 - *African Commission on Human and Peoples' Rights v. Republic of Kenya*, § 93; Application No. 005/2013 - *Alex Thomas v. United Republic of Tanzania*, Judgment of 20 November 2015; Application No. 001/2015. Judgment of 07/12/2016 - *Armand Guéhi v. Republic of Côte d'Ivoire*

according to which the condition set out in Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 on exhaustion of local remedies *"reinforces and maintains the primacy of the domestic system in the protection of human rights vis-à-vis the Court*". As such, the Commission aims at providing States the opportunity of addressing the human rights violations committed in their territories before an international human rights body is called upon to determine the States' responsibility in such violations.

4. It is however apparent from the judgment under reference in this Separate Opinion that the Court appropriated the theory of *"bundle of rights"* to dispose of certain requirements of the obligation to exhaust local remedies.

5. Yet, the tenets of this theory show that it was created and used in matters of property rights, because often among economists, such rights were the same as private property rights. The demonstration that flows from the theory has, above all, caused common ownership to evolve by highlighting the dismemberments of property, and hence its application in matters of the rights of indigenous peoples.

6. It emerges from the Respondent State's objections that the latter criticizes the Applicants for having failed to present certain claims before the domestic court prior to bringing the same to this Court for the first time, thereby disregarding the requirement of exhaustion of local remedies. This is also true for their allegations that the thirty (30) years sentence imposed on them was unconstitutional and inappropriate, and that they were not afforded legal assistance.

7. In response to these allegations, the Court upheld its jurisprudence on constitutionality petition[2], held that the local remedies concerned only ordinary remedies, and that in the present case, the Applicants had exhausted the said remedies.

8. The Court further stated that legal assistance is a fundamental right of the Applicants prosecuted for a crime and liable to be sentenced to a heavy penalty and, therefore, that the Court of Appeal should have discussed the issue even though the Applicant had not raised it[3].

[2] Paragraph 35 of the Judgment
[3] Paragraph 37 of the Judgment

9. With regard to the allegation that the thirty (30) years sentence was inappropriate, the Court *"observes that the alleged violations of the rights of the Applicants occurred in the course of domestic proceedings which led to the finding of guilt and to the sentence pronounced against him. The allegations raised by the Applicant* ***therefore form part of the bundle of rights and guarantees that were related*** *to or were the basis of their appeals*[4]*..."*

10. In many of its judgments, the Court has relied on this "bundle of rights" theory to dispose of certain claims brought before it in matters of exhaustion of local remedies[5].

11. In my opinion, applying this theory in matters of local remedies amounts to distorting its very basis and tenets. The Applicants' rights are diverse and different in nature and the allegations thereto related, if in the Charter, can be incorporated into a set of rights such as the right to information, freedom of expression, fair trial ...

12. At domestic level, all laws whatever the nature, spell out the scope of and the rules governing each right, and it lies with the national judge to consider certain rights as part of a bundle of rights and to adjudicate them as such.

13. In defining the aforesaid bundle of rights in relation to the national judge, the Court ignored the powers and prerogatives of judges in general and, more restrictively, in matters of appeal, especially as the Applicants have at no time responded to the Respondent State's allegation by proving that the appellate judges have the power to do so - since the national texts confer the said powers and prerogatives on them – but that they could consider requests brought, for the first time, before the African Court as part of a bundle of rights.

- **The prerogatives and jurisdiction of appellate judges before national courts**

14. It is an established fact that "appeal proceedings" are of two types:

- Appeal that has devolutive effect, and

[4] Paragraph 44 of the Judgment

[5] Application No. 005/2013. *Alex Thomas v. United Republic of Tanzania*, Judgment of 20/11/2015; Application No. 006/2015. *Nguza Viking and Johnson Nguza v. United Republic of Tanzania*, Judgment of 23/3/2018; Application No. 003/2015. *Kennedy Owino Onyachi v. United Republic of Tanzania*, Judgment of 28/9/2017

- Appeal that is limited to specific points of the judgment.

• Whereas the devolutive effect of an appeal means that the Court of Appeal has full and total knowledge of the litigation and must adjudicate in fact and in law with the same powers as the trial judge, the devolution occurs only where the appeal relates to all the provisions of the first judgment.

- The extent of the devolutive effect of the appeal will thus be determined by two procedural acts, that is, the statement of appeal or the notice of appeal that will not only limit the applicant's claims, but also the submissions of the parties which may contain new claims not mentioned in the notice of appeal.

• Limited appeal, for its part, means that the appeal is confined to specific points in the judgment.

15. Where the judge makes a ruling outside these two types of appeal and adjudicates on claims that have not been expressed, he/she will have ruled *ultra petita*, which will generate effects as regards appreciation of the decision.

16. With respect to the allegation that the 30-year sentence was inappropriate, the Court declared *"that the alleged violations of the rights of the Applicants occurred in the course of domestic proceedings which led to the finding of guilt and to the sentence pronounced against them. The allegations raised by the Applicant therefore is part of the bundle of rights and guarantees that were related to or were the basis of their appeals.* ***It follows that the domestic courts have had ample opportunity to address these allegations, even without the Applicants having to raise them"[6].***

17. The Court's conclusion as regards local remedies in relation to claims which have not been subjected to such remedies touches deeply on the prerogatives of the appellate courts and the scope of their jurisdiction over the case brought before them after the appeal and also on the purpose of imposing the exhaustion of domestic remedies on the Applicants as a right of Respondent States to review their decisions and thus avoid being arraigned before international bodies.

18. In my opinion: The Court should have consulted the domestic texts which govern the procedure and the jurisdiction of appellate judges in criminal matters, rather than rely on the **elastic** concept of bundle of rights which will time and again give it the power to examine and adjudicate claims that have

[6] Paragraph 44 of the Judgment

not been subjected to domestic remedies, and thus minimize the importance of such remedies in referrals to the Court.

19. In my view, this runs counter to the tenets of the obligation to exhaust domestic remedies and to the rights of States in this regard.

i. **As for the objection regarding reasonable time, application of this concept by the Court runs counter to the very essence of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules**

20. It is apparent from the Judgment under reference in this Separate Opinion[7] that although the Court declared the local remedies as having been exhausted on 14/4/2011, and thus that as at the date of filing of the Application, that is 6/7/2015, four (4) years, two (2) months and twenty-three (23) days had elapsed, the Court, in its deliberation and decision on the filing of the Application within reasonable time, held in conclusion that this period remains reasonable due to the fact that the Application was filed on 6/7/2015, three (3) months after the Applicants' application for review was dismissed by judgment of 20/03/2015.[8]

21. The Court pointed out, moreover, that the Applicants are lay incarcerated persons, and did not have the benefit of assistance by counsel, while noting the fact that they had filed for a review - an extraordinary remedy - and that they were not to blame for having awaited a decision in this regard.

22. Whereas it is apparent from Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 that the Application must be filed after the exhaustion of local remedies, paragraphs 6 of these same Articles confer on the Court the prerogative to determine whether the time limit for filing the Application is reasonable after the local remedies have been exhausted or the date that it would have set as being the commencement of the time limit for its own referral.

23. In the present case, the Court, having taken into account the facts which occurred after the ordinary remedies were exhausted, namely, the review application, to justify the period of four (4) years, two (2) months and three (3) days, could simply have retained the date of the judgment rendered after the

[7] Paragraph 36 of the Judgment
[8] Paragraph 49 of the Judgment

application for review. This falls within the very logic of the prerogatives conferred on it by the legislator in the second part of paragraph 6 of the above-mentioned Articles and would actually have led to a reasonable referral time of three (3) months and six (6) days.

24. This would have been even more pertinent, as the Court proferred as grounds for this lengthy time frame the fact that the Applicants were laymen in prison and did not have the benefit of legal assistance[9] - information not proven given that before this Court the Applicants did not need lawyers to defend themselves.

Bensaoula Chafika

Judge at the African Court on Human and Peoples' Rights

[9] Paragraph 50 of the Judgment