AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF

JOHN MARTIN MARWA

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 021/2017

RULING

22 SEPTEMBER 2022

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The Court composed of: Blaise TCHIKAYA, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO, Dennis D. ADJEI - Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court[1] (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

John Martin MARWA
Self-represented

Versus

UNITED REPUBLIC OF TANZANIA
Represented by:

i. Mr Gabriel P. MALATA, Solicitor General, Office of the Solicitor General;
ii. Dr Ally POSSI, Deputy Solicitor General, Office of the Solicitor General;
iii. Ms Caroline Kitana CHIPETA, Ag. Director of Legal Unit, Ministry of Foreign Affairs and East African Cooperation;
iv. Mr Abubakar MRISHA, Senior State Attorney, Office of the Solicitor General;
v. Ms Lydia THOMAS, State Attorney, Office of the Solicitor General; and
vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

after deliberation,

renders the following Ruling:

[1] Rule 8(2) of the Rules of Court, 2 June 2010.

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.[2]

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

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

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
   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.[3]

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

[3] Rule 63 of the Rules of Court, 25 September 2020.

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.

V. ON THE DEFAULT OF THE RESPONDENT STATE

16. Rule 63(1) of the Rules of Court[4] 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.[5] Despite the said

[4] Rule 55 of the Rules of Court, 2 June 2010.
[5] Rule 63 of the Rules of Court, 25 September 2020.

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.[6]

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.

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:

[6] *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.

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.[7] 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.[8]

iv. Territorial jurisdiction, given that the facts on which the alleged violations are based occurred on the territory of the Respondent State.

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

[7] *Andrew Ambrose Cheusi v. United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.
[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) (21 June 2013) 1 AfCLR 197 §§ 71 – 77.

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."[9]

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 are lay, indigent or incarcerated.[10]

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.[11]

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

[9] *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.
[10] *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.
[11] *Layford Makene v. United Republic of Tanzania*¸ ACtHPR, Application No. 028/2017 Ruling of 2 December 2021 (admissibility), § 48.

time.[12] The Court reached the same conclusion in respect of an Application filed after five (5) years and four (4) months.[13] 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.[14]

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 is not fulfilled then the Application becomes inadmissible.[15] 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.

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[12] *Hamad Mohamed Lyambaka v. United Republic of Tanzania*, ACtHPR, Application No. 010/2016. Ruling of 25 September 2020 (admissibility) § 50.
[13] *Godfred Anthony and another v. United Republic of Tanzania*, ACtHPR, Application No. 015/2015. Ruling of 26 September 2019 (admissibility) § 48.
[14] *Chananja Luchagula v. United Republic of Tanzania*, ACtHPR, Application No. 039/2016. Ruling of 25 September 2020, (admissibility) §§ 57-60.
[15] *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.

VIII. COSTS

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

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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".[16]

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 BENSAOULA dissenting,

[16] Rule 30(2) of the Rules of Court, 2 June 2010.

ii. *Finds* that the Application was not filed within a reasonable time;

iii. *Declares* that the Application is inadmissible.

On Costs

Unanimously,

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

Signed:

Blaise TCHIKAYA, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Modibo SACKO, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules, the Dissenting Opinion of Justice Chafika BENSAOULA is appended to this Ruling.

Done at Arusha, this Twenty-Second Day of September, in the Year Two Thousand and Twenty-Two in English and French, the English text being authoritative.