African Court on Human and Peoples' Rights.

The Matter of John Martin Marwa v. United Republic of Tanzania.

Application No. 021/2017

Judgment of 22 September 2022

DISSENTING OPINION

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 28/09/2017 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 24/03/2022, 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 21/09/2018, *Kennedy Owino Onyachi and others v. United Republic of Tanzania* of 28/09/2009 and *Alex Thomas v. United Republic of Tanzania* of 28/09/2017.....).

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 Ramadani* 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 Ramadani* 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) *Ramadani* 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.

Judge Bensaoula Chafika