DISSENTING OPINION OF JUDGE DUMISA B. NTSEBEZA

IN APPLICATION NO. 024/2017

HAMISI MASHISHANGA V. UNITED REPUBLIC OF TANZANIA

1. In accordance with Rule 70(2) of the Rules of Procedure of the Court, I write this dissenting opinion to the majority's decision to "declare the Application inadmissible". In reaching this conclusion, the majority considered and decided that all the admissibility requirements specified in Rule 50(2) of the Rules, which substantially reproduces Article 56 of the Charter, had not been met.

2. Contrary to the majority position of my fellow judges, I consider that the Application should have been declared admissible and that the time taken by the Applicant, i.e. (7) years, two (2) months and thirty (30) days after exhaustion of local remedies, should have been considered reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, taking into account the personal circumstances of the Applicant.

3. In its established jurisprudence, the Court has held that "…the reasonableness of the time frame for seizure depends on the specific circumstances of the case…".[1] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, the recent establishment of the Court and lack of awareness of the existence of the Court.

4. This Court has also held that it is not enough for Applicants to plead that they were incarcerated, are lay or indigent, to justify their failure to file an application within a reasonable period of time.[2] As the Court has previously pointed out, even for lay, incarcerated or indigent applicants, there is a duty for them to demonstrate how

[1] *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina Faso* (merits) (24 June 2014) 1 AfCLR 219, § 92. See also *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

[2] *Layford Makene v. United Republic of Tanzania,* ACtHPR, Application No. 028/2017 Ruling of 2 December 2021 (admissibility), § 48; *Rajabu Yusuph v. United Republic of Tanzania*, ACtHPR, Application No. 036/2017, Ruling of 24 March 2022 (admissibility), § 65.

their personal circumstances prevented them from filing their applications before this Court timeously.

5. In this case, I opine that the Applicant has met the threshold of circumstances that the Court has previously considered as reasonable grounds for seizing the Court under what would ordinarily be considered as an unreasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

6. The Applicant in this case did not have legal representation during the domestic proceedings, was incarcerated and restricted in movement with limited access to information and was self-represented before this Court. This, in my opinion, makes it conceivable that he did not have the necessary technical support to explore and envisage remedies other than those offered within the Respondent State.

7. Most importantly, I observe that, the Court of Appeal affirmed the conviction and sentence of the High Court on 1 June 2010, shortly after the Respondent State had deposited the Declaration on 29 March 2010, thereby corroborating the Applicant's claim of lack of information about the Court. Furthermore, the Applicant submits that he was not aware of the Court's existence because of its relatively recent establishment and only got to know about it after the first case by another prisoner from the same prison in which he was incarcerated, Uyui Central Prison, had filed his Application before this Court on 13 June 2017.

8. I am constrained to reiterate the Court's established jurisprudence in this regard[3], where it exercised its discretion to determine that similar reasons provided by the Applicants in previous cases called for a certain level of flexibility to be applied by the Court in assessing the reasonableness of the timeline for seizure of the Court.

9. In my considered opinion, the Applicant in this case met the threshold for his Application to be considered admissible. Moreover, I observe from the Registry records, that the Applicant was the 2nd person from that prison to file an Application

[3] *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application 005/2016 Judgment of 2 Dec 2021 (merits and reparations), §§ 51-52*; Amiri Ramadhani v. United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 50; *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 55; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, §§ 53-54.

two (2) months and eighteen (18) days, after a prisoner from the same penitentiary where the Applicant was imprisoned, had filed his case before this Court on 13 June 2017.

10. In declaring this Application inadmissible, the Court has compared this case with, and relied on the case of *Rajabu Yusuph v. United Republic of Tanzania*[4] where the Applicant claimed not to have known about the Court's existence before the first Application from his prison was filed. He took seven (7) years, seven (7) months and ten (10) days to seize the Court after exhaustion of local remedies. In *Rajabu Yusuph*, this Court held that the reason that the Applicant did not know about the Court's existence was not compelling and that he did not provide sufficient evidence to demonstrate that his personal circumstances had prevented him from filing the Application. Moreover, the Court was unpersuaded that Rajabu had pursued his case diligently.

11. I opine that the *Hamisi Mashishanga* case is distinguishable from the *Rajabu Yusuph* case to the extent that it was indeed the 2nd Application to be filed before this Court from Uyui Central Prison, where it can be inferred that the Court was still relatively unknown in 2017. Secondly, the first application[5] from Uyui Central Prison was filed after seven (7) years, two (2) months and fifteen (15) days after exhausting local remedies. However, in that case, the Applicant did not provide any justification for filing the Application late. The Application was therefore declared inadmissible by this Court.

12. I note that Applicant was arrested on 1 April 2004. He was charged and convicted by the High Court on 14 July 2004. The Court of Appeal affirmed his conviction and sentence on 1 June 2010, while the Respondent State deposited its Declaration on 29 March 2010. The arrest and trial at the domestic court occurred between 2004 and 2010. Again, I reiterate that this Court has previously held that the period

[4] *Rajabu Yusuph v. United Republic of Tanzania,* ACtHPR, Application No. 036/2017, Ruling of 24 March 2021 (jurisdiction and admissibility), § 69.

[5] *Abdallah Sospeter Mabomba and Others v. United Republic Tanzania,* ACtHPR, Application No. 017/2017, Judgment of 22 September 2022 (jurisdiction and admissibility) §53

between 2007 and 2013, which is the early years of the Court's operation, members of the general public, let alone persons in the situation of the Applicant in the present case, could not be presumed to have had sufficient awareness of the requirements governing proceedings before this Court.[6]

13. This decision, in my view, would imply that when considering the Applicant's time to seize this Court, at least three (3) years should be deducted from the seven (7) years, two (2) months and thirty (30) days, when the Applicant filed this Application before this Court after exhaustion of local remedies. This would bring the period down to four (4) years two (2) months and thirty (30) days. The Court has previously considered such a time as reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, whilst taking into account the personal circumstances of the Applicants.

14. Consequently, my considered opinion is that the peculiarities of this case justify the finding that the Applicant did not know about the Court's existence. His appeal was finalised by the Court of Appeal on 1 June 2010, and he had been detained in prison during the trial and shut away from the outside world. All this happened within a space of two (2) months and three (3) days after the Respondent State deposited the Declaration on 29 March 2010. This Court has held that during the years 2007 to 2013,[7] the Court was not well known, because of its recent establishment, especially by incarcerated persons who were not only locked away from the rest of the world but who did not have easy access to information.

15. I cannot conceive the kind of additional evidence this Court would require from the Applicant to satisfy itself that he really did not know about the existence of this Court at the time.

16. The end result is that I find that this Court should have dismissed the Respondent State's objection to the admissibility of the Application for having been filed at a

[6] *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application 005/2016 Judgment of 2 Dec 2021 (merits and reparations), §§ 51-52.
[7] *Ibid*.

time that was unreasonable. In conclusion, drawing from the facts of this case, the Court should have found the Application to be admissible within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules of Court. The Court should therefore have found its way clear to going ahead to examine the merits of the case.

Judge Dumisa B. NTSEBEZA