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

IGOLA IGUNA V. UNITED REPUBLIC OF TANZANIA

APPLICATION NO 020-2017

JOINT DISSENTING OPINION OF JUSTICE BEN KIOKO, JUSTICE TUJILANE R. CHIZUMILA AND JUSTICE DENNIS ADJEI

1. In the above-mentioned matter, the Court properly addressed itself to the admissibility requirements specified in Rule 50 (2) of the Rules, which substantially reproduces the provisions of Article 56 of the Charter. The majority opinion is that all admissibility conditions have been met and therefore the Application is admissible.

2. While we fully agree generally with the assessment and findings of the majority with regard to most of the admissibility conditions, we have parted ways in respect of the requirement of filing an application within a reasonable time enshrined in Rule 50(2)(f) of the Rules. We believe that the majority erred in interpreting and applying this condition to the present case, hence this dissenting opinion made pursuant to the provisions of Rule 70 (2) of the Rules of Procedure of the Court. We have reached this decision in order to ensure consistency in the decision of the Court, even though we strongly believe that a human rights court should as

much as possible understand and take into account the challenges faced by Applicants.

3. We believe that the text of a law must be given effect unless it is established that its application would render the text absurd. Furthermore, a Court has the right to depart from its established jurisprudence when it deems it fit to do so but must give cogent reasons for the departure. In the instant case, what is disturbing is that the Court is fixing a specific date (year and not month) when the public should be presumed to have become aware of the existence of the Court without offering any empirical evidence to that effect. It is as a result of the foregoing and other reasons that we will delve into hereinbelow that we hold the firm opinion that there was no basis to declare the application admissible.

A. FILING OF AN APPLICATION WITHIN A REASONABLE TIME

4. Article 56(6) of the Charter provides that applications will not be received by the Court, unless they "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." Article 56(6) of the Charter does not provide a specific time limit and therefore, the Court has resorted to a case-by-case approach.[1]

5. The requirement of filing an application within a reasonable time is an important admissibility criterion recognised in international human rights law.[2] It is a counterpart of the provision relating to prescription recognised in municipal jurisdictions. The principle is that applicants who wish to seize an international tribunal should do so within a reasonable time from the date they exhausted local remedies at the national level.

6. It is important to note that the rule seeks to ensure that applicants show diligence in pursuing their case and do not sleep on their rights. This is dictated by pragmatic considerations, particularly, when applicants take unreasonably long time to

[1] *Norbert Zongo v. Burkina Faso* (merits), *op. cit.,* § 92. See also *Alex Thomas v. Tanzania* (merits) *op.cit.,* § 73.
[2] See Article 35 (1) of the European Convention on Human Rights (1950), Article 46 American Convention on Human Rights

institute their case, the Respondent State would no doubt face difficulties in responding to the allegations and more so, before an international tribunal that needs to properly determine the case. As the Court has previously held:

> the purpose of Rule [50 (2)(f)] of the Rules is to guarantee "[j]udicial security by avoiding a situation where authorities and other concerned persons are kept in a situation of uncertainty for a long time". Also, "to provide the Applicant with sufficient time for reflection to enable him appreciate the opportunity of bringing a matter to court if necessary" and finally, "to enable the Court to establish the relevant facts relating to the matter".[3]

7. Other international courts also have a time limit in which applications should be filed at those Courts. Article 30 (2) of the Treaty Establishing the East African Community provides that an application should be filed within two (2) months of the date that an applicant became aware of the complaint. The East Africa Court of Justice has held that "[t]he Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30 (2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant."[4]

8. The European Court of Human Rights (ECHR) require Applications to be filed no later than four (4) months after exhaustion of local remedies. The ECHR was of the view that:

> The primary purpose of the four-month rule is to **maintain legal certainty** by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (; Lopes de Sousa Fernandes v. Portugal [GC], § 129). It also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, **since with the passage of**

[3] *Godfred Anthony and another v. United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility), § 45
[4] *Professor Nyamoya Francois* v *Attorney General of the Republic of Burundi and the Secretary General of the East African Community*, EACJ, Reference 8 of 2011.

time, any fair examination of the issues raised is rendered problematic (Ramos Nunes de Carvalho e Sá v. Portugal [GC], §§ 99-101; Sabri Güneş v. Turkey [GC], § 39.[5]

9. Article 46(1)(b) of the American Convention on Human Rights provides "that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment".

B. CONSIDERATION OF REASONABLE TIME IN THE PRESENT CASE

10. We are unable to join the majority of the Court in their decision, as the position taken by them does not accord with the jurisprudence of the Court. We do not intend to reproduce the facts of the case which have been well outlined in the decision of the majority and will only discuss the relevant part of the same when necessary.

11. In the present case, the Applicant was convicted of murder on 27 March 2001 and sentenced to death by hanging. He appealed to the Court of Appeal and it dismissed his appeal on 28 June 2003. The Court of Appeal being the highest judicial organ in the Respondent State means that the available local remedies were exhausted on 28 June 2003.[6]

12. Given that the Applicant could only seize the Court from 29 March 2010 as that is the date when the Respondent State filed its Declaration then the period for computation of reasonable time would be between this date and 13 June 2017, the date when the Application was filed before the Court. The period for consideration therefore, is seven (7) years, two (2) months and fifteen (15) days.

13. We note that the Court had held that between 2007 and 2013, during the early years of the Court, members of the general public in Tanzania did not know of the existence of the Court and that this period should be given to them as a moratorium.[7] The moratorium does not suggest that time shall not run against a potential applicant, but where an applicant whose right accrued to file an

[5] ECHR, *Mocanu and Others v. Romania* [GC], § 258.
[6] Paragraph 4 of the judgment.
[7] *Sadick Marwa Kisase v United Republic of Tanzania*, AfCHPR, application No 005/2016 Judgment of 2 December 2021 (merits and reparations) §§51-52

application within that time but could not file because he or she did not know of the existence of the Court is required to file it within a reasonable time from that date. Conversely, an Applicant who does not prove that he did not know about the existence of the Court would not benefit from the moratorium.

14. It is therefore not true that time did not run, as stated by the majority, against applicants between 2007 and 2013, especially after the Respondent State deposited its Declaration. The majority seems to construe the period between 2007 to 2013 as a period within which time shall not run, which interpretation will lead to absurdity and should not be adhered to. Applicants who filed their applications after 2013 shall be at the mercy of the Court to determine whether they were filed within a reasonable time or not.

15. Despite the six-year moratorium given to individuals who filed their cases against Tanzania to assert their rights within a reasonable time, the Applicant slept on his rights until 13 June 2017, when he filed this application.

16. It is important to recall that the Court has been consistent in its jurisprudence that that the determination of reasonableness "depends on the specific circumstances of the case and should be determined on a case-by-case basis."[8] Accordingly, the Court has taken into consideration circumstances such as imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and the use of extra-ordinary remedies as relevant factors to consider whether the delay of an applicant in seizing the Court is justified.[9] This approach has allowed the Court to employ some flexibility.

17. However, the Court has also, albeit implicitly, adopted a strict standard of proof to the effect that the longer an applicant delays to file his application, particularly for periods of over five (5) years, the stricter the Court's demand for justification with sufficient substantiation. For instance, in *Godfred Anthony and Ifunda Kisite v Tanzania*, the Court held that a delay of five (5) years and four (4) months was unreasonable despite the fact that the Applicants were "also incarcerated and thus restricted in their movement". The Court noted in this case that apart from simply describing themselves as "indigent", the applicants did not assert or provide "any

[8] *Norbert Zongo v. Burkina Faso* (merits), op. cit, § 92; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 73.
[9] See paragraph 35 of the judgment.

proof that they were illiterate, lay, or had no knowledge of the existence of the Court". The Court further observed that "the Applicants were represented by legal counsel in their trial and appeals at the domestic level but they did not file for review of their final judgments".

18. In a similar fashion, in *Yusuph Said v. Tanzania*, the Court held that a period of eight (8) years and three (3) months was an unreasonable lapse of time before the filing of an application. The Court held that "even though, he is incarcerated, the Applicant did not indicate how his incarceration impeded him in filing his application earlier than he did."[10] Moreover in *Chananja Luchagula v. Tanzania*, the Applicant was a death-row inmate, who filed his case after **six (6) years, five (5) months and fifteen (15) days** and it was found to be inadmissible for failure of filing it within a reasonable time.[11]

19. In assessing reasonableness, the majority, for the first time, found it important to consider the fact that the applicant was "a convicted inmate on death row, is secluded from the general population and cut off from possible information flow, and restricted in his movements".[12] The majority neither provided reasons nor specified circumstances unique to the instant case that justified a departure from the Court's earlier position, especially the two cases mentioned above, that of, Yusuph Said and Chananja Luchagula.

20. Furthermore, we are of the view that different treatment should not be given to the Applicant on the sole ground that he is on death row and cannot access information about the Court as the majority seem to adopt in the instance case. The Court differentiated between persons in prison custody serving different custodial sentences from the applicant and other persons in condemned cells as they have their freedoms curtailed to an equal extent and should be treated equally.

21. The treatment by the Court of persons serving different prison terms differently from those on death row and to make application filed by those on death row automatically admissible irrespective of the time the application is filed is

[10] *Yusuph Said v. United Republic of Tanzania*, ACtHPR, Application No. 011/2019, Ruling of 30 September 2021 (jurisdiction and admissibility), § 44.
[11] *Chananja Luchagula v. United Republic of Tanzania*, ACtHPR, Application No. 011/2016, Ruling of 25 September 2020 (jurisdiction and admissibility), § 60.
[12] Paragraph 40 of the judgment.

discriminatory and unfair. The position taken by the majority favours persons in death-row as opposed to other persons serving life or lesser prison terms and therefore failed to treat the two categories of persons in lawful custody equal before the law.

22. We are mindful that this Court is a human rights court and should exercise flexibility within the law to persons who allege that their human rights have been violated. However, the right to invoke human rights jurisdiction is time-bound in every jurisdiction as demonstrated above and therefore this benefits the vigilant and not the indolent. A person should not be permitted to keep a Respondent State in an uncertain situation as to whether a person whose case was heard by a domestic court would seek relief from a continental or regional court for human rights violations or not.

23. It is therefore our considered opinion that the majority should have, in line with the Court's previous decisions, computed reasonableness from the date of the deposit of the Declaration, not from the date that the public supposedly found out about the operations of the Court. In addition, the majority should have clearly stated what distinguished this case from the two others mentioned above which were found to be inadmissible because the Applicants therein did not justify why it took them so long to seize the Court. Additionally, even if it was justified to treat those on death row differently, which we refute, we think that there cannot possibly be any justification to fix a specific time when such persons could be taken to have become aware of the Court's existence, in the absence of empirical evidence.

24. The African Commission on Human and Peoples' Rights considered twenty-two months that it took an Applicant who was fleeing persecution to be unreasonable, arguing that it was "beyond a reasonable man's understanding of a reasonable period of time."[13] In our humble view, the seizing of the Court after seven (7) years, two (2) months and fifteen (15) days without any justification cannot be considered reasonable in the understanding of a reasonable man.

25. Whereas the Court has all the power to depart from its own jurisprudence, such departure must be warranted by cogent reasons and necessitated by the peculiar circumstances of the case, neither of which was present in the instant case. The

[13] ACHPR, *Majuru v Zimbabwe*, Communication No. 308/2005) [2008] ACHPR 95; (24 November 2008)

majority's position risks causing unjustified jurisprudential inconsistency and hence, gravely jeopardize legal certainty.

Signed:

Justice Ben KIOKO;

Justice Tujilane R CHIZUMILA;

Justice Dennis ADJEI;

Done at Arusha, this First Day of December in the year Two Thousand and Twenty Two, in English and French, the English text being authoritative.