AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Hamisi Mashishanga

v.

United Republic of Tanzania

Application No. 024/2017

Ruling of 1 December 2022

DISSENTING OPINION

Judge BENSAOULA CHAFIKA

1. I do not share the findings of the Court in the above-mentioned Ruling and the grounds for declaring the Application inadmissible on account of being filed beyond a reasonable time.

2. I wish to write this dissenting opinion because I am convinced that the Court should have declared the Application admissible based on the same grounds for which it declared it inadmissible, as well as other particulars that it did not raise, which have nevertheless become case-law.

3. The Court in its Ruling in the case of the *Beneficiaries of the late Norbert Zongo and Others v. Burkina Faso,* delivered on 21 June 2013, ruling on preliminary objections and with regard to reasonable time for filing a case before it, 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, to name but a few:

- *Sadik Marwa Kisase v. United Republic of Tanzania*, judgment of 2 December 2022, in which the Court considered the objection to admissibility raised by the Respondent State on the ground that the case was filed beyond a reasonable time. The Court dismissed the objection for the simple reason that the Applicant was in detention, had no legal representation before domestic courts and before this Court (paragraphs 51 and 52) and consequently considered the period of 16 months reasonable.

- *Christopher Jonas v. United Republic of Tanzania* judgment of 28 September 2017 and *Amiri Ramadhani* v. *United Republic of Tanzania*, where the Court considered the fact that the applicants were imprisoned, restricted in their movement, layman in law, indigent, lacking access to information, not having legal representation during the trial, being illiterate and unaware of the existence of the Court, made the period of five (5) years and one (1) month reasonable.

- Finally, the case of *Stephen John Rutakikirwa v. United Republic of Tanzania* judgment of 24 March 2022, where the Court reiterated this principle in paragraphs 45 and 48 when it declared the application filed within four (4) years and four (4) months reasonable, on the ground that the applicant was incarcerated, restricted in his movements with limited access to information and did not receive legal aid!

5. In the Ruling which is the subject of this dissenting opinion, the facts clearly indicate that no one contests that the Applicant was sentenced to thirty- five years' imprisonment and incarcerated after being found guilty by a decision of the District Court on 24 July 2004, confirmed by the High Court on 17 July 2006 and further by the Court of Appeal on 1 June 2010.

6. It emerges from the decisions rendered by the domestic courts, that the Applicant was not afforded legal representation during the entire procedure by the domestic courts and even before this Court. The Court has held in numerous judgments that these facts by themselves constitute a violation because given the seriousness of the facts and the heaviness of the sentence, the Applicant had the right to legal representation (*Diocles William v. United Republic of Tanzania,* judgment of 21 September 2018, *Kennedy Owino Onyachi and others v. United Republic of Tanzania,* judgment of 28 September 2009 and

Alex Thomas v. United Republic of Tanzania, judgement of 28 September 2017).

7. What saddens me in relation to the consistency of the Court's jurisprudence is that, in some rulings, the Court considered that "the personal situation of the applicants", especially the fact that they are lay people in law, indigent and incarcerated, constitutes sufficient grounds to grant rather long time-limits as reasonable time to seise this Court i.e., (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).

8. However, in other judgments, including this Ruling which is the subject of this opinion, (paragraph 92), the Court states the opposite, because, despite the presence of the above-mentioned particulars, the Court declared that the applicants are required to show how their "personal situation" prevented them from filing their application within a shorter period of time (5 years and 11 months in the case of *Hamad Mohamed Lyambaka v. United Republic of Tanzania,* judgment of 25 September 2020); (5 years and 4 months in the case of *Godfred Anthony and others v. United Republic of Tanzania,* judgment of 26 September 2019); (6 years 3 months and 15 days in the case of *Chananja Luchagula v. United Republic of Tanzania,* judgment of 25 September 2020).

9. At no point in these previous judgments did the court demonstrate **what more** it expected from the Applicant in terms of "personal situation". This has resulted in a situation where this Court has used contradictory grounds to determine reasonable time in applications filed at more or less the same time in cases against the same Respondent State!

10. While the Court should take into consideration that fact that an applicant did not have legal representation, especially incarcerated applicants and applicants sentenced to heavy penalties, knowledge of the existence of the court is also a

crucial element that should be considered as a ground for determining reasonable time.

11. In fact, in some judgments, the Court took into consideration this element, stating that the incarcerated applicant was restricted in his movements and did not have access to information and therefore was unaware of the existence of the Court (judgments in *Thobias Mango* and *Amiri Ramadhani* mentioned above and *Christopher Jonas* rendered on 28 September 2017).

12. However, in other judgments against the same Respondent State involving incarcerated applicants, the Court did not take into account this element, as is the case in the Ruling that is the subject of this opinion. Although paragraph 70 of the judgment states that this element has been considered in many of its judgments, the Court in paragraph 72 of its Ruling found, without taking into consideration the date of filing of the Respondent State's Declaration, that the Applicant did not sufficiently demonstrate how his personal situation prevented him from filing the application within reasonable time. The Court's decision was grounded on the fact that the Applicant had claimed that he filed his application after an inmate from the same prison had learned of the existence of the Court and had filed an application before this Court. The Court found in paragraph 73 that the 7 years, 2 months and 30 days that it took to file the application after the exhaustion of local remedies did not constitute reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

13. The date of filing of the Declaration and the period of time between the last decision of the domestic courts and the filing of the Application before the Court are elements that the Court, in numerous judgments took into account to adopt a shorter time-limit, considering it as "an element that proves the ignorance of the court by the applicant, the court being in its early stages of activity".

14. In the *Thobias Mango* and *Amiri Ramadhani* cases, among others, the Court clearly stated that between the date of depositing the Declaration in 2010 and the last decision issued by the domestic courts (2013), the Court was still in its infancy and could not take into consideration this period, insisting that it was in

the phase of completing its operationalisation process. Therefore, it would have taken time for the Applicant to be aware of the existence of the Court and the modalities of filing a case before it (*Thobias* judgment of 11 May 2018 para 55 and *Ramadhani* judgment of 11 May 2018 para 50).

15. In the instant case, the Appeal Court rendered its decision on 1 June 2010, which makes the above-mentioned jurisprudence applicable, especially since the Respondent State is the same, thus the Declaration was deposited in 2010.

    Therefore, between 2010 and 2013, the Applicant could not have known the Court, hence the need to reduce the period of 3 years taken by the Applicant to initiate his action before the Court in July 2017, meaning that it took 4 years to file a case before the Court. Furthermore, Article 56(6) of the Charter, which is restated in substance by Rule 50 of the Rules of Procedure, clearly states that the reasonable period of time runs "from the time local remedies are exhausted **OR** from the date the Court is seised of the matter."

    The Court should therefore have deducted these 3 years from the effective 7-year period to compute the time from 2013, which would reduce the period to 4 years instead of 7 years as found in the Ruling. The requirement to comply with this jurisprudential position is further reinforced by the Court's decision delivered in another case during the same session in which the Court delivered the judgment that is the subject of this opinion. In its judgment in *Igola Iguna v. United Republic of Tanzania*, delivered on 1 December 2022, the Court took into account the date and time-limits for the completion of the application for review in order to shorten the time-limit for consideration by several years. Thus, the said time-limit was considered to be 4 years instead of 7 years and the application was consequently declared admissible.

16. In the case of *Marwa Kisase* cited above against the same Respondent State (paragraph 52 of the said judgment) the Court declared 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 14 before this Court. Finally, the Respondent State deposited 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".

17. Applying this finding in the Marwa judgment to the present Ruling which is the subject of this opinion would have been fair and logical and would have led to the application being declared admissible as it responds to the same facts and elements since the applicant was incarcerated, having been sentenced to a heavy penalty, without legal representation at all stages of the proceedings.

18. This state of affairs suggests to me that the Court should, especially when it comes to the same Respondent State and incarcerated applicants sentenced to heavy penalties, frame all the elements that would lead to an application being declared either admissible or inadmissible instead of being selective which, without exaggerating, would make the grounds of the decision expeditious and would put the readers of the Court's judgments and applicants of the same Respondent State in similar situations. As the situation presents right now, the readers of these judgements are totally unable to comprehend the reason for this selectivity and for the Court's orders.

Judge Bensaoula Chafika