RULING

Tike Mwambipile and Equality Now v. United Republic of Tanzania

(1 December 2022)

Dissenting opinion of
Judge Blaise Tchikaya, Vice President

1. Regretfully, I am unable to agree with my honourable colleagues regarding the outcome of this case. The majority position did not seem to me to be well-founded.

2. It would have been more appropriate for the Court to render a decision on this major rights issue, unless there was a better reason for not doing so. This Opinion deplores the fact that it did not, although there was reason and cause to do so.

3. I regret that I cannot associate myself with the majority decision of the Court rendered by my Honourable Colleagues. The decision delivered on 1 December 2022 in the case of *Tike Mwambipile and Equality Now v. Tanzania* does not seem to me to be sufficiently reasoned.

A partial perception

4. *Madam Tike Mwambipile*, a Tanzanian applicant associated with *Equality Now*, a non-governmental organization (NGO), challenged the Respondent State's rules and guidelines expelling pregnant girls and adolescent mothers from public schools.[1]

[1] Pregnant girls were barred from attending public primary and secondary schools, even after giving birth, which, in the view of the Applicant, is discriminatory and violates the right to education.

5. As is often the case in human rights matters, major rights are at stake in the instant case, which, we stress, requires the Court to decide accordingly.[2] In addition to the African Charter on Human and Peoples' Rights, this dispute over young children deprived of education is at the confluence of at least four international human rights instruments. The first is the *African Charter on the Rights and Welfare of the Child* (1990, Article 11); the second is the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003, Article 12 of the Maputo Protocol); the third is *the African Youth Charter* (2006, Articles 13 and 23); and last but not least, *the Convention on the Elimination of All Forms of Discrimination against Women* (1979, Article 10). The Court could therefore not have failed to appreciate the legal gravity of the subject.

6. In the deliberations that followed the close of pleadings, the Court considered a question that relates to one of the three objections to admissibility raised by the Respondent State, namely, whether the case before the Court did not fall under the ambit of Article 56.7 of the African Charter on Human and Peoples' Rights in the sense that the Court's jurisdiction does not extend to:

> (...) matters which have been settled by the States concerned in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter.

A partial assessment of Article 56.7

7. In § 46 of the judgment, the Court rightly recalls that the purpose of Article 56(7) of the Charter is to prevent a case being brought against member states more than once for the same human rights violations. The result is twofold: a) the Court finds a violation of human rights; b) it decides if the Respondent State is legally liable for the said violations. It is worth recalling here that the Committee

[2] No less than seven (7) organizations filed *amicus curiae* briefs: (i) the Tanzanian Commission for Human Rights and Good Governance; (ii) Amnesty International; (iii) UNESCO; (iv) Tanzania Women Lawyers Association (TAWLA); (v.) Msichana Initiative; (vi) Clooney Justice Foundation; and (vii) Initiative for Strategic Litigation in Africa (ISLA), Human Rights Watch (HRW) and Women's Link Worldwide who submitted joint comments. See § 7 of the Judgment.

on the Rights and Welfare of the Child (ACERWC) issues well-advised communications but does not bring proceedings against States.

8. In paragraph 47, the Court recalls its previous decisions[3] in which it set out three cumulative criteria for determining whether the admissibility requirements under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules have been met. It would appear that the Court does not interpret them in a meaningful way. The outcome and settlement of this dispute does not appear to have taken into account key issues. Article 56(7) clearly provides that the jurisdiction of the Court does not extend to "[...]cases which have been settled by these States involved […]". For the sake of clarity, it would have been useful under Article 56(7) to demonstrate how the case could be considered settled.

9. While the Committee "shall draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples' Rights […]",[4] the Committee's mandate and procedures under Article 42 of the Charter are to "promote and protect the rights enshrined" in the Charter. The idea of promotion goes hand in hand with the idea of protection. There is no binding decision-making authority conferred on the Committee, other than its power to make proposals. However, this latter power does not in any way settle the instant case.

10. While the Committee produces Reports and Communications, it does not initiate legal proceedings against States. It does not produce the category of proceedings referred to in Article 56(7) of the Charter. It must be understood that international customary law recognises and approves all international dispute settlement initiatives.[5] But this is another matter altogether. Such an initiative does not invalidate the proceedings before a court properly seized.

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[3] *Dexter Eddie Johnson v. Ghana* (28 March 2019) 3 AfCLR 99, § 55; *Gombert v. Côte d'Ivoire* (2018) 2 AfCLR 200, § 45.

[4] Article 46 of the African Charter on the Rights and Welfare of the Child, 1990.

[5] For this reason, the International Court of Justice (ICJ) recognizes that "before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations", ICJ, *Concessions in Palestine and Jerusalem*, Greece v. United Kingdom, 30 August 1924, p. 15. See also ICJ, *Right of Passage in Indian Territory*, 26 November 1957. It is indeed specified that it is not excluded that any other procedure is subject to prior negotiation which is a treaty or customary obligation.

11. In any case, I fully agree with the finding that: “the ACERWC did indeed deliver [a] decision[6] [...] the latter is merely a recommendation which does not decide the case or, to use the terms of Article 56 § 7 of the Charter, does not ‘settle’ the case within the meaning of Article 56 § 7 of the Charter.”[7]

12. As for the East African Court of Justice, this Court was simply informed that a case on the same matter had been filed with that court concerning the expulsion of pregnant girls in line with the Education (Expulsion and Exclusion from Schools) Regulations. The case was still pending.[8]

13. Recent developments in the Respondent State could possibly have been the ground for the Court declaring the case inadmissible. For, intermittently, it is noted that significant regulatory and legislative work has been done.[9] In my opinion, a well-founded decision could have been rendered on this account.

14. There was no reason to withhold any decision as long as the issue of “girls expelled from schools” was pending and has not been settled judicially. Moreover, the Court does not cite any body vested with jurisdiction on such a judicial provision as a matter of substantive law.

Judge Blaise Tchikaya,
Vice President

[6] Decision No. 0012/Com/001/2019.
[7] Dissenting Opinion of Judge Rafaa Ben Achour attached to the *Tike Mwambipile v. Tanzania* (2022) decision.
[8]ACtHPR, *Judgment cited above*, § 11. See The East African Court of Justice, an application was filed on 24 April 2020 by two NGOs, namely, Inclusive Development for Citizens and Center for Strategic Litigation.
[9]Tanzania Secondary Education Quality Improvement Project (SEQUIP) approved on 31 March 2020 for the United Republic of Tanzania.