AFRICAN UNION		UNION AFRICAINE
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS **COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES**		

THOMAS MGIRA

V.

THE UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 003/2019

JOINT DISSENTING OPINION OF JUSTICE BEN KIOKO, JUSTICE TUJILANE 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.

3. 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, we have reluctantly reached this decision out of our firm belief that consistency should be ensured in the decisions of the Court.

4. We are of the view 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 departed from its jurisprudence and fixed on its own a specific period of years when the public should be presumed not to have been aware of the existence of the Court without offering any empirical evidence to that effect or the methodology used to arrive at the dates[1], This finding by the Court *suo motu* without any submissions by the parties begs the question: why seven years and why not five or ten years? 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

5. 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 seized 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.[2]

[1] The majority have expressed the view that "The Court also observes that the period between 2007 and 2013 were the early years of the Court's operation, when members of the general public, let alone persons in the situation of the present Applicant, could not have been fully aware of the existence of the Court".

[2] *Norbert Zongo v. Burkina Faso* (merits), *op. cit.,* § 92. See also *Alex Thomas v. Tanzania* (merits) *op.cit.,* § 73.

6. The requirement of filing an application within a reasonable time is an important admissibility criterion recognised in international human rights law.[3] 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.

7. 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 institute their case, as 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.[4]

8. 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

[3] See Article 35 (1) of the European Convention on Human Rights (1950), Article 46 American Convention on Human Rights
[4] *Godfred Anthony and another v. United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility), § 45

of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant."[5]

9. The European Court of Human Rights (ECHR) requires 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 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.[6]

10. 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

11. At the outset, it is important to recall that this Court has been consistent in its jurisprudence that the determination of reasonableness "should be carried out on a case-by-case basis depending on the circumstances of each case."[7] In this light, it has taken into consideration circumstances such as imprisonment, being lay without the benefit of legal assistance,

[5] *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.
[6] Ramos Nunes de Carvalho e Sá v. Portugal [GC], §§ 99-101; Sabri Güneş v. Turkey [GC], § 39.
[7] *Norbert Zongo v. Burkina Faso* (merits), op. cit, § 92; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 73.

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.[8] This approach has allowed the Court to employ some flexibility in applying the requirement of reasonableness to various applications differently taking into account the unique circumstances of each case.

12. However, the Court has also, albeit implicitly, adopted a strict standard of proof on incremental basis with the effect that the longer an applicant delays to file his application, particularly for over five years, the stricter the Court's demand for justification and proof of such justification. For instance, *in Godfred Anthony and Another 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 proof that they were illiterate, lay, or had no knowledge of the existence of the Court".[9] The Court further observed that 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".[10]

13. In a similar fashion, in *Yusuph Said v. Tanzania*, the Court held[11] 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 opined that while the applicant was incarcerated, there was no indication on how the incarceration prevented him from filing his application timeously.[12]

[8] See paragraph 41 of the judgment
[9] Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470, § 48
[10] Ibid § 49
[11] *Yusuph Said v. United Republic of Tanzania*, ACtHPR, Application No. 011/2019, Ruling of 30 September 2021 (jurisdiction and admissibility), § 44.
[12] Ibid.

14. Furthermore, the Court has previously decided that, when applicants *utilise* the review procedure in the respondent State, they are "entitled to wait for the review judgment to be delivered" and hence, reasonableness would only count from the date of delivery of the review decision. [13]

15. In the instant case, the Applicant was convicted of murder and sentenced to death on 8 April 2005. Challenging his conviction and sentence, he appealed to the Court of Appeal, which dismissed his appeal on 29 April 2010. The Court of Appeal being the highest judicial organ in the Respondent State means that the available local remedies were exhausted on 29 April 2010.[14] From this date to the date when the Application was filed before the Court, that is, 22 January 2019, a period of eight (8) years, eight (8) months and twenty-four (24) days had elapsed.

16. Despite this lapse of time, the majority relied on, among others, the Applicant's belated attempt to pursue the review procedure at the Court of Appeal by applying for extension of time to file an application for review by finding that since he was on death row the Application was admissible. It is our considered opinion that the Court erroneously declared that the application was filed within a reasonable time in a clear departure from its above established jurisprudence.

17. To begin with the date of computation of reasonableness, we find that the majority failed to appreciate that the Applicant did not "utilise" the review procedure, which according to the above-cited jurisprudence of the Court, is an important **factor** for the review procedure to have **the** effect of suspending the computation from the date when the Court of Appeal decided on the Applicant's appeal in the ordinary procedure, that is, 29 April 2010.

[13] Ibid, § 41, see also Werema Wangoko v. Tanzania (merits) (7 December 2018) 2 AfCLR 520 §§ 48-49
[14] Paragraph 4 of the judgment.

18. The majority wrongly took the date of dismissal of the Applicant's *request for extension of time* as the relevant date while in fact, the Applicant did not file **any** application for review before the Court of Appeal. It is imperative to note that the Applicant's attempt to institute an application for review was time barred because of his own failure to comply with the deadline specified in the domestic law, even though the Court of Appeal delivered its judgment in his presence and that he was represented by a lawyer. In spite of and on the basis of this, the majority went further to discount, again erroneously, the three years period from the Applicant's delay of eight (8) years, eight (8) months and twenty-four (24) days that lapsed between 29 April 2010 and the date the Application was filed before this Court, that is, 22 January 2019.

19. Secondly, in assessing reasonableness, the majority 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".[15] The majority did not provide any reasons for this or specify the circumstances unique to the instant case that justified departure from the Court's earlier position in, for example, *Yusuph Said v. Tanzania*, a case which concerned an applicant who was on death row. In *Chananja Luchagula v. Tanzania*, the Applicant was also a death-row inmate but his Application was found to be inadmissible as it was filed after a delay of six (6) years, five (5) months and fifteen (15) days.[16]

20. In the instant case, there was nothing on record to suggest that the Applicant was particularly "secluded" or was in any way in a different situation from other previous applicants who were in the same position as him. If the fact of being on the death row would automatically mean being cut off from the general population, the Court should have reached the

[15] Paragraph 46 of the judgment
[16] *Chananja Luchagula v. United Republic of Tanzania*, ACtHPR, Application No. 011/2016, Ruling of 25 September 2020 (jurisdiction and admissibility), § 60.

same conclusion of admissibility as in *Yusuf Said* and Chananja Luchagula cases.

21. Furthermore, in the instant case, the Court disregarded the fact that the Applicant was represented in national courts, which, as indicated in the Court's jurisprudence is an important factor in assessing the reasonableness of time. Additionally, in the above cited case of Godfred Anthony and Another v Tanzania, the Court in declaring the Application inadmissible, 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".

22. We therefore reiterate our firm position that the majority should have, in line with the Court's previous decisions, computed reasonableness from the date when the Court of Appeal rendered its judgment, not from the date the Applicant's request for extension of time was rejected for fault of his own. In addition, the majority should have clearly stated the reasons why it was necessary to depart from its jurisprudence and give more weight, in the absence of any evidence or submission by the Applicant, to the fact of being on death row in this particular case in the determination of reasonableness.

23. We wish to note that, 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 majority's strange position risks causing unjustified jurisprudential inconsistency and hence, gravely jeopardise legal certainty.

Signed:

Justice Ben KIOKO;

Justice Tujilane CHIZUMILA

Justice Dennis ADJEI

Done at Arusha, this Thirteenth Day of June in the year Two Thousand and Twenty-Three, the English text being authoritative.