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		

THE MATTER OF

UMALO MUSSA V. UNITED REPUBLIC OF TANZANIA
APPLICATION NO. 031/2016
JUDGMENT OF 13 JUNE 2023

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

1. In the above-mentioned matter, the Court properly addressed itself to the admissibility requirements specified in Rule 50(2) of the Rules of Court (the Rules), which substantially reproduces the provisions of Article 56 of the African Charter on Human and Peoples' Rights (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 a divergence of opinion with respect to 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 joint dissenting opinion issued pursuant to the provisions of Rule 70(2) of the Rules.

We have reluctantly reached this position to ensure consistency in the decisions of the Court and maintain legal certainty, even though we strongly believe that a human rights court should as much show flexibility and take into account the challenges faced by Applicants.

3. We also 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. What is disturbing in the instant case, similar to the *Igola Iguna v. United Republic of Tanzania*[1] case to which we also dissented, is that the Court is fixing a specific date (year and not month) 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. It is because 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 seized with the matter." Article 56(6) of the Charter does not provide a specific time limit and therefore, the Court has in its consistent jurisprudence resorted to a case-by-case approach.[2]

5. 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

[1] *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), § 45.
[2] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (merits) (28 March 2014), § 92. See also *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2014), § 73.
[3] See Article 35 (1) of the European Convention on Human Rights (1950), Article 46 American Convention on Human Rights.

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. Where applicants take an unreasonably long time to institute their cases, 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]

7. Other international courts also have a time limit within which applications should be filed at those Courts. In this regard, 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 African 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."[5]

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[4] *Godfred Anthony and Another v. United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility), § 45.
[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.

8. 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]

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 (6) months from the date on which the party alleging violation of his rights was notified of the final judgment". The Inter American Court of Human Rights has applied the rule strictly.

10. The African Commission on Human and Peoples' Rights considered twenty-two (22) 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."[7]

B. ASSESSMENT OF REASONABLENESS OF TIME TAKEN TO FILE THE PRESENT CASE

11. At the outset, 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

[6] ECHR, *Mocanu and Others v. Romania* [GC], § 258.
[7] ACHPR, *Majuru v Zimbabwe*, Communication No. 308/2005) [2008] ACHPR 95; (24 November 2008).

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.

12. The jurisprudence of the Court has been that where an applicant alleges mitigating factors intended to persuade the Court to make his case admissible, he must prove the same to the satisfaction of the Court. A mere assertion of a mitigating factor shall not suffice unless it is proved by the Applicant or the Respondent State does not deny or contradict it.[10] In this regard, in *Godfred Anthony and Ifunda Kisite v. United Republic of 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". 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".[11]

13. In similar fashion, in *Yusuph Said v. United Republic of 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 was incarcerated, the Applicant did not indicate how his incarceration impeded him in filing his application earlier than he did."[12] Moreover in *Chananja Luchagula v. United Republic of Tanzania*, the Applicant was a death-row inmate,

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[8] *Zongo v. Burkina Faso* (merits), *op. cit.*, § 92; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.
[9] Ibid. See § 35 of the Judgment.
[10] *Godfred Anthony and Another v. United Republic of Tanzania* (jurisdiction and admissibility) (26 September 2019) 3 AfCLR 470 § 48; *Hamad Lyambaka v. United Republic of Tanzania* (jurisdiction and admissibility) (25 September 2020) 4 AfCLR 470, § 48.
[11] *Anthony and Another v. Tanzania* (merits), *ibid*, § 49.
[12] *Yusuph Said v. United Republic of Tanzania*, ACtHPR, Application No. 011/2019, Ruling of 30 September 2021 (jurisdiction and admissibility), § 44.

who filed his case after six (6) years, five (5) months and fifteen (15) days and it was found to be inadmissible for failure to file the same within a reasonable time.[13]

14. In the present case, the Applicant was convicted of murder on 29 June 2005 and sentenced to death by hanging. He appealed to the Court of Appeal which dismissed his appeal on 21 May 2009. The Court of Appeal being the highest judicial organ in the Respondent State means that the available local remedies were exhausted on 21 May 2009.[14]

15. Given that the Applicant could only have seized the Court from 29 March 2010 as that is the date when the Respondent State deposited its Declaration under Article 34(6) of the Court's Protocol allowing applications by Non-Governmental Organisations (NGOs) and individuals to be filed against it, then the period for computation of reasonable time would be between this date (29 March 2010) and 8 June 2016, being the date when the Application was filed before the Court. The period for consideration, therefore, is six (6) years, two (2) months and nineteen (19) days.[15] The Applicant claimed that he was impeded from filing his application to the Court by virtue of being on death-row, without any further substantiation. He also argued that he filed an application for review, which the Respondent State disputed.

16. In the instant case, the Court has held that "the period between 2007 and 2013 was the Court's formative years and that during the said period, members of the public, let alone persons in the situation of the Applicant in the present case, could not be presumed to have been sufficiently aware of the Court's existence so as to file their applications soon after exhaustion of local remedies.[16] Consequently, the period to be assessed for compliance with the requirement for filing the Application within a reasonable time, is that between 2013, when the

[13] *Chananja Luchagula v. United Republic of Tanzania* (jurisdiction and admissibility) (25 September 2020) 4 AfCLR 561, § 60.
[14] § 4 of the Judgment.
[15] § 50 of the Judgment.
[16] *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application No. 005/2016, Judgment of 2 December 2021, § 52.

public would be expected to have become aware of the Court, and 2016, the year the Application was filed, which is a period of three (3) years".

17. In its assessment of reasonableness in the instant matter, the Court has held that the Applicant being on death-row was automatically impeded from filing his application within a reasonable time.[17] 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*.

18. In this regard, the Court's reasoning is at odds with the fact that other death-row applicants have managed to seize the Court much earlier than the present Applicant. For example, Marthine Christian Msuguri filed his Application within three (3) years, five (5) months and twenty-eight (28) days after exhaustion of local remedies,[18] Ally Rajabu and Others seized the Court, two years and four days after exhaustion of local remedies,[19] and Armand Guehi, seized the Court eleven (11) months and nine (9) days after exhaustion of local remedies.[20] This is clear evidence that being on death-row in and of itself cannot be considered as an automatic impediment to filing an Application within a reasonable time. Had the Applicant argued that he was in solitary confinement and allowed only a few hours out of his cell or he was indisposed, then that would have been a better justification of an impediment to filing the Application within a reasonable time after exhaustion of local remedies. The assessment and decision of the majority is also problematic at several levels.

19. First, the decision of the majority by a stroke of the pen departed from the previous jurisprudence of the Court by granting all applicants on death row a *suo motu* moratorium for the period 2007 to 2013. Before this decision of the majority,

[17] § 53 of the Judgment.
[18] *Marthine Msuguri v. United Republic of Tanzania*, ACtHPR, Application No. 052/2016, Judgment of 1 December 2022, § 44.
[19] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and Reparations) (28 November 2019) 3 AfCLR 477, § 49.
[20] *Armand Guehi v. United Republic of Tanzania* (merits and Reparations) (7 December 2018) 2 AfCLR 477, § 53.

lack of awareness of the existence of the Court was only a factor to be considered among others.

20. Second, the majority seem 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. The decision puts Applicants who filed their applications after 2013, and indeed the Respondent State itself, in a legal uncertainty and at the mercy of the Court as they will not know what determination the Court will make with regard to the condition relating to reasonableness of time. A person should not be permitted to keep a Respondent State in an uncertain situation as to whether he would seek relief from a continental or regional court for human rights violations or not.

21. Third, the end result of the majority decision is that different treatment has been given to the Applicant on the sole ground that he is on death row and supposedly cannot access information about the Court.[21] Furthermore, this amounts to differentiated treatment between persons on death-row like the applicant and those in prison serving other custodial sentences as they have their freedoms curtailed to an equal extent and should be treated equally.

22. Fourth, the treatment by the Court of persons on death row differently from those serving different prison terms, and to make applications filed by those on death row automatically admissible irrespective of the time the application is filed is discriminatory and unfair. The position taken by the majority favours persons on death-row as opposed to other persons serving life or lesser prison terms and therefore fails to treat the two categories of persons in lawful custody equally before the law. Equality before the law is one of the rights the Court is mandated to protect.

23. Fifth, and more importantly, in departing from its jurisprudence and fixing *suo motu* a specific period of years when the public should be presumed not to have been aware of the existence of the Court, the Court has failed to proffer any

[21] See § 53 of the Judgment.

empirical evidence to that effect or the methodology used to arrive at the dates.[22] This finding by the Court, on its own, without any submissions by the Parties begs the question: why seven years? Why not five or ten years? What factors did the majority consider to arrive at those dates? Is it not a safer approach to hear the Parties first before arriving at such a far-reaching decision?

24. In view of the foregoing, we hold the firm opinion that there was no discernible basis to depart from the previous jurisprudence and to declare the application admissible.

25. 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 rejects the indolent.

26. It is therefore our considered opinion that the majority should have, in line with the Court's previous decisions, computed time from the date of the deposit of the Declaration, not from the date that the public supposedly became aware of the existence of the Court. In addition, the majority should have clearly stated what distinguished this case from the previous ones 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.

27. The African Commission on Human and Peoples' Rights considered twenty-two (22) months that it took an applicant who was fleeing persecution to be unreasonable, arguing that it was "beyond a reasonable man's understanding of

[22] The majority decision merely makes a general assertion to the effect 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".

a reasonable period of time."[23] In our humble view, the seizing of the Court after six (6) years, two (2) months and nineteen (19) days without any justification cannot be considered reasonable in the understanding of a reasonable man.

28. Whereas the Court has all the power to depart from its own jurisprudence, as we have reiterated above, such departure must be warranted by cogent reasons and necessitated by the peculiar circumstances of the case, neither of which can be found in the majority decision in the instant case. The majority's decision risks causing unjustified jurisprudential inconsistency and hence, jeopardizing legal certainty in the Court's jurisprudence.

Signed:

Justice Ben KIOKO;

Justice Tujilane R CHIZUMILA;

Justice Dennis D. ADJEI

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

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