Partly dissenting opinion of Judge Rafaâ Ben Achour

1. While I agree largely with all the grounds and the operative part of the Court's judgment in Application No. 018/2017 lodged by *Mr Yassin Rashid Maige v. the United Republic of Tanzania*, I wish to dissent from the majority's opinion as regards the Applicant's allegation that he was tried within an "unreasonable" period of time. I believe that the time taken to try the Applicant is indeed unreasonable and therefore constitutes a violation of Article 7(1)(d) of the African Charter on Human and Peoples' Rights (hereinafter referred to as the Charter).

2. From the outset, it should be noted that the speedy delivery of justice, like the slow delivery thereof, has both advantages and disadvantages. It is in the interest of every litigant not only to obtain a final judicial decision, but above all to obtain it within a reasonable time so as to be able to fully enjoy the rights enshrined therein. The principle of reasonable time is explicitly provided for in the Charter: "Every person has a right to have his or her case heard. This right includes: [...] d. *the right to be tried within a reasonable time by an impartial tribunal*". Reasonable time, by definition, cannot be a precise maximum limit determined in an abstract manner[1]

3. In this case, the Applicant alleges that he was kept in detention for four (4) and a half years before being convicted and sentenced by the trial court of the Respondent State which, he claims, constitutes a violation of his right to be tried within a reasonable time, protected by Article 7(1)(d).

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[1] Albert Dione and Sadou Wane, *"Reflection on the criteria of reasonable time in criminal justice in Senegal) Réflexion sur les critères du délai raisonnable en matière de justice pénale au Sénégal"*, https://www.village-justice.com/articles/reflexion-sur-les-criteres-delai-raisonnable-matiere-justice-penale,35950.html

4. In its response, the Respondent State submits that the period of approximately five years taken to try the Applicant is reasonable in view of the nature of the offence and the circumstances in which it was committed. Referring to the charge sheet, the Respondent State pointed out that the Applicant and five (5) other co-accused were charged on 7 October 1999. On 12 February 2002, the prosecution opened its case and called five witnesses on different dates, after which the prosecution closed its case on 9 May 2003. The defence opened its case on 30 June 2003, when the Applicant appeared and gave evidence. The trial court delivered its judgment on 9 September 2003.

5. Ruling on that allegation, the Court upheld the Respondent State's submission. Referring to its judgment in *Wilfred Onyango Nganyi and 9 others v. Tanzania,* it rightly recalled that "there is no standard period that is considered as "reasonable" for a court to dispose of a matter. In determining whether time is reasonable or not, each case must be treated on its own merits"[2].

6. On this basis, the Court rightly adopted three criteria, namely the complexity of the case, the conduct of the parties and that of the judicial authorities[3]. However, the Court's application of these criteria to the present case was, in my view, erroneous and ignored a number of important factual elements in the case file.

I. On the complexity of the case

7. The complexity of the case is assessed in light of a number of variables relating to both the facts and the law. Above all, reasonableness must be demonstrated in concrete terms.

[2] *Wilfred Onyango Nganyi and Others v United Republic of* Tanzania (merits) (2016) 1 AfCLR 507, § 135.
[3] See *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, §§ 122-124; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 104; *Nganyi and Others v. Tanzania*, supra, § 155.

8. Several factors must be taken into account in determining the complexity of the case. This is the case, for example, with the nature and technicality of the documents and their volume, the nature of the investigations, the scope of the investigations, the availability of witnesses, etc. Complexity also results from the technical nature of the evidence, the dispersal of suspects in the country or abroad, medical expertise, etc.

9. With regard to “the complexity of the case, the Court notes the nature and seriousness of the offence, the circumstances in which it took place, the fact that the Applicant was charged together with various other accused and that the witnesses testified on different dates”. I am not at all persuaded that the case can be regarded as being of such complexity as to lead to the conclusion that the length of the proceedings was proportionate to their complexity.

10. It emerges from the record before the Court that, although seven (7) different persons were charged in the case, it did not involve different charges or multiple criminal acts committed in different locations. The only charge against the seven defendants was armed robbery, which took place in a single incident. Furthermore, there did not appear to be any major difficulties in gathering evidence and the case did not require any major police investigations.

II - On the conduct of the Applicant and the judicial authorities

11. As regards the conduct of the Applicant and the judicial authorities of the Respondent State, the Court notes that “no argument has been made concerning the level of responsibility of the Applicant in hampering or expediting the proceedings, or that the domestic authorities deliberately delayed the proceedings or unduly failed to expedite the proceedings”.

12. Here again, it emerges from the record that the judicial authorities bear a major share of responsibility for the delay in the investigation phase, a delay attributable not to reasons of proper administration of justice, but to lack of diligence at various levels of the judicial authorities. In fact, one hundred (100)

requests for adjournment were made by the judicial authorities, which principally led to the delay in the proceedings.[4]

13. It should first be mentioned that the proceedings before domestic courts lasted a total of thirteen (13) years, eight (8) months and twenty-one (21) days, from the day of the Applicant's arrest on 29 July 1999 until the date of the Court of Appeal's judgment of 19 April 2013, the date on which his conviction and sentence became final.

14. The Applicant was arrested on 29 July 1999 and brought before the trial court on 4 August 1999. The preliminary hearing was held on 2 May 2000, the trial commenced on 12 February 2002 and the District Court convicted and sentenced the Applicant on 9 September 2003. In total, the proceedings, from the Applicant's arrest to his conviction by the District Court, lasted four (4) years, one (1) month and eleven (11) days.

15. Furthermore, with regard to the length of the proceedings against the Applicant, the Respondent State gave only a general explanation, according to which the time taken to try the Applicant was reasonable, having regard to the nature of the offence and the circumstances in which it occurred, and also to the fact that the Applicant was charged at the same time as other defendants, and that the witnesses testified on different dates.

16. However, as it emerges from the record before the Court, the Applicant was immediately apprehended near the scene of the crime and only five (5)

[4] It emerges from the record that fifty-four (54) referrals were requested by the Public Prosecutor's Office without any explicit reason. Seventeen (17) postponements were requested by the prosecution because the investigation was not ready, of which seven (7) adjournments were requested because the investigation was not ready without mentioning any specific reason, and ten (10) adjournments were requested because the investigation was not ready, in particular because the prosecution was waiting for a report from the Investigation Bureau in Dar es Salaam concerning the weapon used in the armed robbery. Ten (10) adjournments were requested due to the unavailability of prosecution witnesses. Eight (8) adjournments were requested because the judicial authorities had not made arrangements to transport the accused persons to court. Four (4) adjournments were requested because the prosecution was not in possession of the police file. Two (2) adjournments were requested because the prosecution was not ready to present its final submissions. Two (2) adjournments were requested because the prosecutor was ill. One (1) adjournment was requested because the prosecution was on safari. One (1) adjournment was requested because the judge was on safari. One (1) referral was requested because the judge was unavailable.

witnesses were heard to decide the case. Although seven (7) different people were indicted in this case, it did not involve different charges or multiple criminal acts committed in different locations requiring multiple investigations and different instructions. The only charge against the seven defendants was armed robbery, which took place in a single incident. As a result, there did not appear to be any major difficulties in gathering evidence and the case did not require extensive police investigations.

17. Finally, it should be noted that the Respondent State did not adduce any evidence to demonstrate that the delayed finalisation of the trial was attributable to the Applicant's conduct. Although it emerges from the record that the Applicant requested, on six (6) occasions, an adjournment of the proceedings, these requests do not reveal a deliberate and systematic obstruction of the proceedings, nor can they be considered as frivolous and unnecessary, aimed solely at delaying the proceedings.

18. As the Court has held in a number of previous judgments, national court authorities have a duty to ensure that all those involved in a trial act with diligence to avoid unnecessary delay. Judges have the right, as well as the duty, to conduct judicial proceedings before them within a reasonable time[5]. The Respondent State had an obligation to ensure that the case was tried with due diligence and expeditiously[6]. I consider that the abnormally high number of one hundred (100) adjournments requested by the authorities shows a lack of diligence in ensuring a verdict within a reasonable time, especially as the accused was still in detention and deprived of his liberty.[7]

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19. For all these reasons I was unable to join the majority on this point alone. I consider that the period of four (4) years, one (1) month and eleven (11) days

[5] *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 153.
[6] *Armand Guehi v. Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 124.
[7] Pre-trial detention is a measure whereby the detainee's freedom is confiscated and his moral and material interests are called into question. It seriously compromises the presumption of innocence. By creating suspicion, the prisoner's honesty and reputation are compromised.

that elapsed between the Applicant's arrest and his conviction while in detention is unreasonable and constitutes a violation of Article 7(1)(d) of the Charter.

Judge Rafaâ Ben Achour