African Court on Human and Peoples' Rights

The Matter of

Leonard Moses

v.

United Republic of Tanzania.

Application No. 033/2017

Judgment of 5 September 2023

Declaration

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

2) I wish to write this Declaration which will only be a slight reiteration of my dissenting opinions on the same issues in previous judgments (Judgment of 25 March 2022 concerning Application 036/ 2017, for example). This is 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) In fact, in its judgment in the case of "*Beneficiaries of the late Norbert Zongo and others" v. Burkina Faso* rendered on 21/06/2013 on preliminary objections and with regard to the reasonable time for referral, the Court expressly declared that "the reasonableness of the

time limit for its referral depends on the particular circumstances of each case and must be assessed on a case-by-case basis".

4) The Court has applied this principle of "case-by-case" with regard to reasonable time, in many cases, including, *Sadick Marwa Kisase v. United Republic of Tanzania,* Judgment of 2 December 2021. In the judgment referenced, the Court dismissed the Respondent State's objection to admissibility based on failure to file the Application within reasonable time, on the ground that the Applicant was incarcerated, was afforded no legal representation before national courts or before this Court (paragraphs 51 and 52) and therefore considered the period of 16 months reasonable.

5) In the Judgment that is the subject of this Declaration, the facts clearly indicate that it is not in dispute that the Applicant was sentenced to thirty (30) years' imprisonment and twelve strokes of the cane and found guilty of rape by decision of the High Court of 7 March 2005.

6) It emerges from the decisions rendered by the domestic courts that the Applicant was not afforded legal representation during the entire procedure before 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 length of the sentence, the Applicant had the right to legal representation (*Diocles William v. United Republic of Tanzania*, judgment of 21 September 2018, among others),

7) What saddens me in relation to the consistency of the Court's jurisprudence is that, in some judgments , 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 seize this Court (4 years 8 months and 4 days in the case of *Thobias Mango v. Republic of Tanzania*, judgment of 11 May 2018 and 5 years 1 month and 12 days in the case of *Christopher Jonas v. United Republic of Tanzania)*.

8) However, in other judgments, including the Judgment that is the subject of this Declaration, (paragraph 53 and 54), the Court states the opposite, insofar as despite the presence of the above-mentioned particulars, the Court declared that the Applicants are required to show why they did not file their Application within a shorter period of time. For example, 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*.

9) At no point in these previous judgments did the Court indicate **what more** it expected from the Applicant, a detainee restricted in his movements who was sentenced to a heavy sentence without legal representation. This has resulted in a situation where this Court has proffered 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 as well as *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 Judgment that is the subject of this Declaration.

    This is because although the Court, in paragraph 49 of the Judgment, states that the date to be taken into account for assessing reasonable time was 29 March 2010, the date on which the Respondent State filed its Declaration, it did not take into account the period from 2010 to 2013 when the court was in its infancy and individuals were therefore unaware of its existence.

    The Court found in paragraph 53 that the 7 years, 6 months and 22 days that it took the Applicants to file the Application after the exhaustion of local remedies was not reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(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* judgments, 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 High Court rendered its decision on 7 March 2005, which makes the above-mentioned jurisprudence applicable, especially since the Respondent State is the same, such that 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 in 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 seized of the matter."

    It emerges from the record that on 7 September 2015 the Applicant filed a request for an extension of time to file an application for review of the decision of the Court of Appeal, which was rejected on 22

September 2017, that is, one month before the instant Application was filed.

In paragraph 55 of the Judgment, the Court acted as a national court to decide whether or not the request for an extension of time was admissible, even though a national court had dismissed it.

In my opinion the Court did not have to reconsider the admissibility of the application but merely to take into account the decision of the Court of Appeal on the matter in order to include it in the time-limit or otherwise.

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 Judgment that is the subject of this Declaration 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 stands right now, the readers of these judgements are totally unable to comprehend the reason for this selectivity and for the Court's decisions.

Judge Bensaoula Chafika

Done at Arusha, this Fifth Day of September in the Year Two Thousand and Twenty-Three, the French text being authoritative.