AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Application 007/2015

Ally Rajabu and Others

v.

United Republic of Tanzania

Separate Opinion appended to the Judgment of 28/11/2019

1. I concur with the opinion of the majority of the judges on the jurisdiction of the Court and the Operative Part of the Judgment.

2. However, in my thinking, the manner in which the Court has treated admissibility of the Application in relation to the objections raised by the Respondent State on the exhaustion of local remedies and on reasonable time deserves further attention.

i. On Admissibility of the Application based on the Respondent State's objection to exhaustion of local remedies

3. In my opinion, the Court's reasoning runs counter to the tenets of the obligation to exhaust local remedies before referral of a case to the Court, and also to the prerogatives and jurisdiction of appellate Judges before national courts.

• The tenets of the obligation to exhaust local remedies before referral to the Court.

4. It is an established fact that the Court has, in its jurisprudence, restated the conclusion of the African Commission on Human and Peoples' Rights[1] according

[1] Application No. 006/2012. Judgment of 05/26/2017 - *African Commission on Human and Peoples' Rights v. Republic of Kenya*, § 93; Application No. 005/2013 - *Alex Thomas v. United Republic of Tanzania*, Judgment of 20/11/2015; Application No. 001/2015. Judgment of 07/12/2016 - *Armand Guéhi v. Republic of Côte d'Ivoire*

to which the condition set out in Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 on exhaustion of local remedies *"reinforces and maintains the primacy of the domestic system in the protection of human rights vis-à-vis the Court*". The Commission thus aims to afford States the opportunity to address the human rights violations committed in their territories before an international human rights body is called upon to determine the States' responsibility for the said violations.

5. It is however apparent from the judgment under reference in this separate opinion that, in this matter, the Court appropriated the theory of *"bundle of rights"* to dispose of certain requirements of the obligation to exhaust local remedies.

6. Yet, the tenets of this theory show that it was created and used in matters of property rights, because often among economists, such rights were the same as private property rights. The demonstration that flows from the theory has, above all, caused common ownership to evolve by highlighting the dismemberments of property, and hence its application in matters of the rights of indigenous peoples.

7. It emerges from the Respondent State's objections that the latter criticizes the Applicants for having failed to present certain claims before the domestic court prior to bringing the same to this Court, thereby disregarding the condition of exhaustion of local remedies. This is also true for their allegations regarding their right to be heard and for the unconstitutionality of the sentence imposed.

8. In response to these allegations, the Court upheld its case-law with regard to constitutionality petition by considering that the local remedies concerned only ordinary remedies.

9. As regards the allegation that their right to be heard has been violated, the Court considers that *"by its established case-law, the right invoked by the Applicants is part of a bundle of rights and guarantees, which formed the basis of the proceedings before the High Court and the Court of Appeal. Consequently, where it is established that the domestic judicial authorities had the opportunity to address the alleged procedural violation, even though the Applicant did not raise the issue, the local remedies must be considered to have been exhausted"*[2].

10. The Court further held that *"in the instant case, given that the Court of Appeal was in a position to examine several claims of the Applicants with respect to the manner in which*

[2] Paragraph 38 of the Judgment

the High Court conducted the proceedings, there was ample opportunity to assess whether the right to be heard had been examined by the lower court"[3].

11. In many of its judgments, the Court used and reiterated this "bundle of rights" theory to dispose of certain claims brought before it under the obligation to exhaust the local remedies.

12. In my opinion, applying this theory in matters of local remedies amounts to distorting its basis and tenets.

13. The Applicants' rights are diverse and different in nature and the allegations thereto related, if in the Charter, can be incorporated into a set of rights such as the right to information, freedom of expression, fair trial ...

14. At the domestic level, laws, whichever they are, spell out the scope of and the rules governing each right. It lies with the national judge to consider certain rights as part of a bundle and to adjudicate them as such.

15. In defining the aforesaid bundle of rights in relation to the national judge, the Court ignored the powers and prerogatives of judges in general and, more restrictively, in matters of appeal, especially as the Applicants have at no time alleged that the appellate judges have the power to do so - since the national texts confer the powers and prerogatives on them - and they could however consider requests brought for the first time before the African Court, as part of a bundle of rights.

ii On the prerogatives and jurisdiction of appellate judges before national courts

16. It is common knowledge that "appeal proceedings" are of two types:

- Appeal that has devolutive effect, and

- Appeal that is limited to specific points of the judgment.

• Whereas the devolutive effect of an appeal means that the Court of Appeal has full and total knowledge of the dispute and must adjudicate in fact and in law with the same powers as the trial judge, the devolution occurs only where the appeal relates to all the provisions of the first judgment.

[3] Paragraph 39 of the Judgment

*. The scope of the devolutive effect of the appeal will thus be determined by two procedural acts, that is, the statement of appeal or the notice of appeal that will not only limit the applicant's claims, but also the submissions of the parties which may contain new claims not mentioned in the notice of appeal.

• Limited appeal, for its part, means that the appeal is confined to specific points in the judgment.

17. Where the judge makes a ruling outside these two types of appeal and adjudicates on claims that have not been expressed, he/she will have ruled *ultra petita*, which will legally impact on the decision.

18. The Court's conclusion as regards local remedies in relation to claims which have not been subjected to such remedies - as pointed out above - touches deeply on the prerogatives of the appellate courts, the scope of their jurisdiction over the case brought before them, and on the purpose of imposing the exhaustion of domestic remedies on Applicants as a right of Respondent States to review their decisions and thus avoid being arraigned before international courts.

19. The Court ought to have consulted the domestic texts which govern the procedure and jurisdiction of appellate judges in criminal matters, rather than rely on the **elastic** concept of bundle of rights which will time and again give it the power to examine and adjudicate claims that have not been subjected to domestic remedies, and thus minimize the importance of such remedies in referrals to the Court.

20. In my view, this runs counter to the tenets of the obligation to exhaust domestic remedies and to the rights of States in this regard.

ii. As for the objection regarding reasonable time, the application of this concept by the Court runs counter to the provisions of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules

21. Rule 40 of the Rules in its paragraph 6, clearly states that applications must be "*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*".

22. It is clear from the aforesaid that the legislator laid down two (2) options as to how to determine the starting point of reasonable time:

a) **the date** of exhaustion of local remedies set by the Court at 22/03/2013 - date of the judgment of the Court of Appeal. Between this date and that of referral of the matter to this Court, there was a time lapse of two (2) years[4].

b) **the date** set by the Court as being the commencement of the time limit within which it shall be seized with the matter, that is, the date the application for review was filed, i.e. 24/03/2013, which the Court did not take into consideration as a date but as a fact.

23. The Court ignored **this date** stating only that the facts of the case show that after filing their Application for Review on 24 March 2014, the Applicants were expected to observe some time while awaiting the outcome of the review procedure before bringing the matter before this Court on 26 March 22015. However, given that the application for review is a legal entitlement, they cannot be penalized for exercising that remedy[5].

24. Thus, the Court considered the period of two (2) years to be reasonable although it took into account the period spent awaiting the outcome of the application for review; and hence a fact that occurred after the exhaustion of local remedies. However, pursuant to the above-mentioned articles, the Court could have set the date for its referral in relation to the application for review given that the relevant judgment had not been rendered which would have resulted in a more reasonable referral time of one (1) year instead of two (2) years.

Bensaoula Chafika

Judge at the African Court on Human and Peoples' Rights

[4] Paragraph 46 of Judgment
[5] Paragraph 48 of Judgment