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Judgment

Shukrani Masegenya Mango and others v. Tanzania

Application No. 008/2015

Separate Opinion

of

Judge Blaise Tchikaya

1. Like my honourable colleagues, I subscribe to the Operative Part of this Judgement (*Shukrani Masegenya Mango and others v. United Republic of Tanzania*). The Application which brought the case before this Court was, after lengthy deliberations, ultimately inadmissible. I hereby wish to explain the reasons for this and also show that the Court should have given further consideration to the argument drawn from the presidential pardon which was, in the instant case, heavily impugned. It is true that whatever the consideration, I share the opinion that the Operative Part would have been the same because of the prior inadmissibility. However, the law applicable to the issue of "presidential pardon" in international human rights law deserved to be clarified.

2. Messrs *Shukrani Masegenya Mango*, *Ally Hussein Mwinyi*, *Juma Zuberi Abasi*, *Julius Joshua Masanja*, *Michael Jairos*, *Azizi Athuman Buyogela*, *Samwel M. Mtakibidya*, nationals of Tanzania, were convicted of murder and armed robbery in various cases. With the exception of *Ally Hussein Mwinyi*, who died on 11 May 2015, the Applicants are serving their sentences at Ukonga Central Prison in Dar-es-Salaam. It was a joint Application. The Applicants all claimed therein, without particular legal data, "to be aggrieved by the manner in which authorities in the Respondent State have exercised the prerogative of mercy which is vested in the President of the Respondent State".[1]

3. The case will not renew the jurisprudence of the Court. It is a unique case. Being inchoately in the *Yogogombaye* case (15 December 2009),[2] but obviously present in *African Commission on Human and Peoples' Rights*

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[1] AfCHPR, Judgement, *Shukrani Masegenya Mango and others v. Tanzania*, 26 September 2019, §6.

[2] AfCHPR, *Yogogombaye* case, 15 December 2009; *Dissenting Opinion* of Judge Fatsa Ouguergouz; see Tchikaya (B.), The first decision on the merits of the African Court on Human and Peoples' Rights: the *Yogogombaye v. Senegal* case (15 December 2009), *African Yearbook of Human Rights*, Vol. 2 (2018), p. 509.

v. Libya of 3 June 2013,[3] the prior consideration of cases has taken a decisive place in the work of the Court. The *Shukrani and others* Judgement confirms a judicial trend: on the one hand, many cases, like the instant case, stumble over the prior requirement of admissibility and, on the other hand, the judge is left only with the duty of jurisdiction, that is to say, the decision to exclude from consideration on the merits cases which do not fulfil the conditions of admissibility.

I. Confirmation of the preliminary rules of admissibility of cases (Article 56 of the Charter and Article 6 of the Protocol)

4. The *Shukrani Masegenya Mango and others* case confirms the doctrine of the African Court on the admissibility of applications, pursuant to Article 56 of the African Charter on Human and Peoples' Rights, Article 6(2) of the Protocol on the establishment of the Court and Rule 40 of the Rules of Court. This aspect of the proceedings also constituted the Respondent State's defence base. Tanzania argued, inter alia, that "the Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act".[4] It was thus emphasizing the Applicants' failure to exhaust domestic remedies. It further submitted, unlike the Applicants, that "except for the First Applicant, the Fifth Applicant and the Sixth Applicant, all the other Applicants never applied for review of their original cases though they lodged appeals at the Court of Appeal which were dismissed".[5] In its reply, the Court confirms the rule, which is constantly recalled in its case-law. It notes that in *Diakite Couple v. Republic of Mali,*[6] it held that "exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust (...) and that it is not enough for the Applicant to question the effectiveness of the State's local remedies on account of isolated incidents".[7] The Court concluded, as in the instant case, that the application was inadmissible.

5. This *Shukrani and others* case had a peculiarity. Two of the seven Applicants had filed an additional application. The First and the Seventh Applicants had filed a separate application from the joint grievances.

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[3] AfCHPR, *African Commission on Human and Peoples' Rights v. Libya*, (3 June 2013), *Dissenting Opinion* of Judge Fatsa Ouguergouz.

[4] AfCHPR, Judgement, *Shukrani Masegenya Mango and others v. Tanzania, op. cit.*, § 41.

[5] *Ibid.*, § 42.

[6] AfCHPR, Judgement on jurisdiction and admissibility, *Diakité Couple v. Republic of Mali*, 26 September 2017, § 53; see also AfCHPR, Judgement, Merits and Admissibility, *Dexter Johnson v. Ghana*, 28 March 2019, § 57.

[7] AfCHPR, Judgement, *Shukrani Masegenya Mango and others v. Tanzania, op. cit.*, § 50.

They challenged the legality of the sentence handed down for armed robbery. Thus, for them, there is an issue of the applicants' right to a fair trial. Both of them appealed their convictions and sentences to the Court of Appeal, which dismissed their appeals. As the highest court of the Respondent State, the Court of Appeal therefore had the opportunity to rule on the legality of the sentences invoked by the Applicants. As a result, the Application of the First and Seventh Applicants was admissible. The Respondent State's objection on that point was therefore dismissed.[8] The Court concluded that "the Respondent State has not violated any law",[9] that it remained in line with its previous decisions[10] and that of the relevant international law.[11]

6. The late Jean Rivero[12] saw the rules of prior exhaustion of local remedies as an influence of domestic law on the international judicial order. This is an instructive paradox, since it is international judicial law that requires the national judiciary to consider supremely and overtly the alleged violations by a national petitioner. The purpose of this being to correct the breach of the law at the place of commission. This is the main purpose of this rule of prior exhaustion of local remedies. The question is undoubtedly different and special for those rules that affect the reserved areas of the State (*The Westphalian State,* according to Alain Pellet[13]), as

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[8] *Ibid.*, § 55, 57 and 75(v).

[9] *Ibid.*, § 75.

[10] AfCHPR, *African Commission on Human and Peoples' Rights v. Libya* (Judgement on the merits), 2016, RJCA, 158; *Urban Mkandawire v. Malawi* (Admissibility) (2013), RJCA, 291; *Frank David Omary and others v. Tanzania* (Admissibility) (2014), RJCA, 371; *Peter Joseph Chacha v. Tanzania* (Admissibility) (2014), RJCA, 413.

[11] See AfCHPR, *Lohé Issa Konaté v. Burkina Faso,* Judgement, 5 December 2014. The Court echoed the Communication on *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe* and stated as follows: "It is a well-established rule of customary international law that before international proceedings are instituted, the various remedies provided by the State should have been exhausted (...). "International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain remedy from the national authorities. It must be shown that the State was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for victims of human rights violations."(See African Commission on Human and Peoples' Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe,* Communication No. 293/04, 7-22 May 2008, para. 60.

[12] Rivero (J.), *Le problème de l'influence des droits internes sur la Cour de Justice de la Communauté Européenne du Charbon et de l'Acier* [The problem of the influence of internal rights on the Court of Justice of the European Coal and Steel Community], *AFDI,* 1958. pp. 295-308.

[13] This concept of a Westphalian State, in that it reinforces the juxtaposition of States, gives an extension of this reserved area even more important: Pellet (A.), *Histoire du droit international : Irréductible souveraineté ? G. Guillaume (dir.), La vie internationale* [History of international law: Irreducible sovereignty? G. Guillaume (dir.), International Life], Hermann, Paris, 2017, pp. 7 to24.

it was in the instant case of *Shukrani and others*, with the question raised by the conditions of use of the "presidential prerogative of mercy".

II. Presidential prerogative of mercy, applicable law

7. In a clear statement, the Court goes on to state that: "in so far as it relates to all the Applicants and their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, it is inadmissible for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules".[14] Thus, admissibility conditions being cumulative, consideration of the elements drawn from the presidential pardon was superfluous.

8. This power to annul a sentence, or even the annulment of a prosecution procedure, is conferred on the highest political authority in the country. It is a monarchical "snub", and even an infringement on the law, against the power of the judiciary. This power of mercy exists in almost all democratic systems.[15] In the instant case, the Applicants are not disputing the basis, but "primarily alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy".[16] The arguments used by the Applicants were even more explicit. They stated that "the Respondent State treats prisoners convicted of corruption and other economic crimes lightly and favourably compared to other prisoners since they can access the presidential pardon twice, a condition which is not afforded to other convicts. The Applicants contend that this violates Article 3(1) and (2) of the Charter, and Article 7 of the Universal Declaration of Human Rights...". The Applicants were thus denouncing an allegedly arbitrary exercise of the presidential pardon. In the instant case, did this Court need to hear it?

9. The international justiciability of the discretionary acts of Heads of State remains debatable.[17] The application of international law, including human rights law, is essentially based on a principle that dates back as far as the 1927 *Lotus*[18] case, namely: "all that can be required of a State is that it should not overstep the limits which international law places upon

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[14] See AfCHPR, Judgement, *Shukrani Masegenya Mango and others v. Tanzania, op. cit.*, § 54.

[15] Laffaille (F.), *Droit de grâce et pouvoirs propres du chef de l'État en Italie, Revue internationale de droit comparé*, [Right of Pardon and Powers of the Head of State in Italy], *International Journal of Comparative Law*, flight. 59, 2007, pp. 761 to 804.

[16] See AfCHPR, Judgement, *Shukrani Masegenya Mango and others v. Tanzania, op. cit.*, § 48.

[17] Cosnard (M.), « Les immunités du chef d'État », SFDI, *Le chef d'État et le droit international. Colloque de Clermont*" [Immunities of the Head of State", SFDI, *Head of State and International Law. Clermont Conference (June 2001)*, Paris, Pedone, 2002, p. 201.

[18] See PCIJ, the *"Lotus" case*, France, Judgement of 7 September 1927, Series A, No. 10, p. 19.

its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty". It follows that the issue is whether the internal acts regarding the presidential pardon are detachable or not from the office of President. It is an office whose legal regime belongs globally to the internal sovereignty of States. The law applicable to the exercise of presidential pardon, except arbitrary controlled by international law, is subject to the domestic law of States. It was up to the Applicants, not the Court, to add the elements, the nature of which varies according to the national legal systems. It is indisputable that the control of international law on this aspect is not worthless. But the *Shukrani Masegenya Mango and others* case made no contribution thereto; they merely stated the arbitrariness of the Respondent State's use of the presidential pardon.

10. Acts of the executive, attached to the power, do not fall within the jurisdiction of the judicial powers normally exercised by the local judge because of the separation of powers. Louis Favoreu[19] proposed to submit them to constitutional power. This seems to be an illusion, since constitutional power remains dependent on the domestic law, which remains under the control of the sovereign power. Supranational law integrated into international law would exercise control over those acts to which would be subjected, not the presidential pardon itself, but its administration or exercise, under two conditions, however: that such acts are detachable from the exercise of the reserved area of the State, and that after validation of the conditions of admissibility, the acts are really tainted with arbitrariness.

11. As a result, even though in the *Shukrani and others* case the Applicants submitted that the Respondent State "automatically excludes prisoners serving long term sentences from the prerogative of mercy thereby violating Article 2 of the Charter and Article 13(1), (2), (3), (4) and (5) of the Respondent State's Constitution",[20] this Court refused to grant the request, as the procedural and substantive elements are not strictly associated.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
The Registrar
LE GREFFIER
ARUSHA - TANZANIA

Arusha, 27 September 2019

Judge Blaise Tchikaya

[19] Mauss (D.), Louis Favoreu, a constitutional law missionary, *RFDC*, 2004, pp. 461 to 463.
[20] See AfCHPR, Judgement, *Shukrani Masegenya Mango and others v. Tanzania, op. cit.*, § 7.