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Individual Opinion

Blaise Tchikaya, Judge at the African Court on Human and Peoples' Rights (AfCHPR)

Mgosi Mwita Makungu v. Tanzania

7 December 2018

1. There are works which though collective and have a common goal, still keep their specificities. The *Mgosi Mwita Makungu v. United Republic of Tanzania* decision of the African Court lends credence to this assertion. I agree with the majority of the judges as regards admissibility, jurisdiction[1] and the operative part, but I believe that the Court should have given further thought to the issue of consistency of the evidence before it in this case. The question arose as to the admissibility of Mr. *Mgosi*'s assertions in support of his claims; a crucial question, one may say, that the court should have set out in detail.

2. I believe that the court should have paid particular attention to the question which the point of law raises in that judgement. Had Mr. Mgosi sufficiently proven his key allegation that the Tanzanian State failed to provide him with the documents necessary for his appeal? The African Court should have made sure that this issue is well tackled and investigated well in advance of any other facets of this dispute. *A fortiori,* it is known that international human rights law has abundant jurisprudence[2] protecting the rights of individuals against the non-availability of documents necessary for procedure. The court was aware of this and it was within its jurisdiction to enforce this fundamental right. But, of course, this must be clearly proven.

3. It is needful to consider not only the insufficiency of the allegations on the ground that the applicant did not substantiate them (I) but also that proof of claims have always impacted the judgements of the Court.

I. The claims presented are not substantiated

4. The applicant sought compensation from the Arusha Court sitting in Tunis, for

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[1] There were no objections to jurisdiction or admissibility. As it established in *Alex Thomas v. Tanzania,* 20/11/2015 and *Peter Joseph Chacha v. Tanzania*, 28/3/2014: …"as long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned , the Court will have jurisdiction over the matter".

[2] EUCJ, ***Seyersted and Wiberg v. Sweden,*** 20/9/2005 (right of access to personal information in the file held by the public services); CEDH ***Ramzy v. The Netherlands,*** 20 May 2010; CEDH, ***Gulijev v. Lettonia,*** 16 December 2008 ; CEDH, ***Tsourlakis v. Greece,*** 15 Octobre 2009.

the prejudice generated by the refusal of the State of Tanzania to provide copies of the records of proceedings in the criminal judgments of the *Bunda* District Court and the decisions of 18 June 1996 and 15 April 1996, respectively, finding the applicant guilty of the offence of armed robbery and sentencing him to 35 years in prison. The Applicant also claimed that he had requested the said records from the Respondent State on several occasions, but to no avail. He said he needed the documents to lodge appeal. He further alleged that twenty years had elapsed between his declaration of guilt and conviction on the one hand, and the filing of his application before the Court on the other. Given the passage of time, it is understandable that the evidence in assessing this allegation would be of paramount importance in the conduct of the trial before the Court.

5. It was clear from his application that the applicant did not contest the charges levelled against him; on the contrary, his claims were centred on the alleged failure of the Tanzanian State to make legal remedies available to its citizen in accordance with the African Charter on Human and Peoples' Rights[3]. However, it is apparent from the documents before the Court that Mr. Mgosi filed a notice of appeal dated 16 April 1996 in criminal case No. 278 of 1995 and another notice of appeal dated 22 June 1996 in criminal case No. 244 of 1995. In accordance with Tanzanian law, these notices would constitute appeals in the strict sense only if they are accompanied by an appeal file. Such file must be accompanied by records of the trial proceedings. The absence of these documents allegedly handicapped the applicant in his effort to file a proper appeal. He was reportedly refused the documents, thus making his appeal incomplete or inadmissible.

6. In the instant case, it seems unconvincing: (1) that the key decisive elements emanate from the claims of Mr. Mgozi and (2) that the said claims are not verified and sufficiently investigated by the Court, even though the latter relies on them for its proceedings, and (3) that the Court is discarding an approach which it has always adopted. On 23 March 2018, it had this attention in the case of *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Tanzania,* which was decided on 23 March 2018. The court emphasised the value of greater scrutiny of the probative value of allegations. The court seemed to have established its jurisprudence based on the evidence adduced by the parties in the context of its jurisdiction in that case. There was in the *Nguza* dispute, a problem of identification of the accused persons. The Court noted that "the court is of the opinion that the decision on the form of identification of the accused falls within the discretion of the competent national authorities, since it is they

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[3] The violations are: "the right to equality before the law and to equal protection of the law (Section 13 (1) of the Charter); the right to protection of its interests by courts and public bodies; the right to non-discrimination by persons exercising state functions (Section 13 (3) of the Charter); the right to a fair trial, to lodge an appeal or to exercise any other remedy against the decision of a court or any other competent body (article 13 (6) (a)) of the Charter; and also as this led to a failure to observe National Law, there was a breach of the duty to observe and respect the Constitution and laws (article 26(1))...finally, an infringement of the right to appeal (article 7(1) (a)).

which determine the probative value of the evidence and they have a wide discretion in this respect. The Court generally defers to the decision of national courts as long as this does not give rise to a denial of justice"[4]. The Court adopted a concrete approach to its investigation; a public hearing was required.

7. A litigation is the sum total of litigious material facts[5] in so far as those facts constitute essential elements of the decision. The material accuracy of such elements is consubstantial with the decision. Here is a meeting point between domestic human rights law and international human rights law[6]. The administration of evidence will always be a legal as well as a practical issue. Mr. *Mgosi* acknowledged before the Court that he had filed two notices of appeal without being able to tender exhibits. Apart from the fact that he does not state before the Court that his appeal would have succeeded, had it been filed, it is further clear that the refusal of the State which he alleges according to the Court, is based only on his claim. He simply alleged that because of the refusal he could not defend his cause before the court of Appeal. Even if there had been no lawyer, it is possible to suppose that Mr. Mgosi, just as he was able to file the notices of Appeal, did not continue the procedure normally, in the belief that because of his heavily sanctioned offences, he was already condemned. It may also be said that the different approaches of the applicant, some of them through defence organisations, entailed unearthing a dispute that has already been settled. The judgement states that "the president of the Mwanza District Court, on which the Bunda District Court is administratively dependent, wrote to the Applicant on 13 October 2010 to inform him that the record of proceedings in criminal cases had not yet been returned from the High Court, where they had been sent to by letter dated 7 November 2003"[7]. Similarly, it is reasonable to assume that subsequent events in which the applicant "sought the intervention of the Respondent State's Commission for Human Rights and Good Governance in his criminal cases of 1995"[8] cannot be used in judicial decisions. The commission's letter of 3 July 2013, in which it informed the applicant on 11 May 2012 that the record of proceedings in respect of his cases before the Bunda District Court could not be located, does not concern the point of law raised here, that is, the deadline for appeal. In any event, if the state had actually refused to produce the necessary documents in support of the appeal, after a certain time, the applicant would have been entitled to file his appeal, within a time which takes into account the general principle of law that a case must be heard. Mr. Mgosi was entitled to appeal without these documents, as the notice of Appeal had been filed.

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[4] See CADHP, ***NGuza Viking,*** 28/3/2018, § 89.

[5] Mougenot (D. R.), ***La preuve,*** Larcier, Bruxelles, 2002, No. 14 -1.

[6] Favoreu (L.), Challenge and evidence before the International Court of Justice. About South West African Affairs, ***AFDI,*** 1965. pp. 233-277 ; v. also, the matter of the ICC, ***Detroit De Corfu, United Kingdom V. Albania, 25 March 1948, Rec.*** 1948, p. 15 ; merits, 9 April 1949, ***Rec.*** 1949, p. 4 ; st, ICC, ***Temple de Preah-Vihear,*** 26 May 1961 and 15 June 1962 M. Lalive, Some remarks on evidence before the Permanent Court and the International Court, Swiss Yearbook of International law, 1950, p. 97, note 72).

[7] See Judgement, § 45 and seq.

[8] ***Idem,*** § 48.

8 In this view, as one might think, this case does not leave room for reflection on equality of arms, a principle of the Common Law system that prescribes a fair balance between the Parties; a principle which could have been used had the applicant established the State's refusal. However, as the court pointed out in the same year, proof of refusal "falls within the discretionary powers of the competent national authorities since it is they who determine the probative value of that evidence and they enjoy a wide discretion in that regard ". Coming back to the requests for copies of the record of proceedings and judgements, the application was dismissed on 21 September 2015 on the ground that it was unfounded.

9 The above demonstrates the importance of the provision of evidence that has always impacted on the court's judgements.

II. Proof of claims has always impacted the judgement of the Court

10 Only proven claims form the content of judicial decisions[9]. In AfCHPR, *Abubakari v. Tanzania*[10], the court noted that "it is for the party alleging discriminatory treatment to prove it ". This shows the decisive nature of the evidence of claims adduced before a court. It is rightly believed that where claims are proven, this should be reflected in the operative part. In this Mgosi decision, I stand with the majority on the fact that the Court does not grant "the applicant's request to order his release, without prejudice to the decision of the respondent State to take such a measure on its own initiative ". It had thus rejected that point, which featured among the prayers of the applicant.

11 The essential nature of the concrete evidence adduced in support of a claim naturally shapes a judicial decision. Mr Mgosi does not provide the court with any concrete evidence of the exercise of appeal, but merely states that he was unable to do so, even though in accordance with the Tanzanian system, he had gone beyond the notice of appeal stage. The court should not grant his requests. It stated in the case of *Alex Thomas V. Tanzania*[11] that general claims whereby his right has been violated are not sufficient. Concrete evidence is required. We understand the meaning of its decision in this case.

12 *Mr. MGosi* supposedly did not benefited from the availability of the domestic courts. The violation of article 7(1)[12] of the African Charter on Human and Peoples' Rights was

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[9] See ECHR, Gafgen v. Germany, 1 June 2010: the applicant brought an action before the court alleging a violation of article 3 ECHR on the ground that the treatment he was allegedly subjected to during the interrogation of the National Police concerning the whereabouts of the child he had abducted amounted to torture. The use of material evidence obtained through his confession, which incriminated him, should have been excluded by respect for the right to a fair trial. The court had issued a decision on this evidence, article 6 ECHR on the right to a fair trial would have been violated. Also see: ECHR, 1 June 2010, Gafgen v. Germany (application No. 22978/05), reports of judgements and decisions 2010-IV, pp. 327-407.

[10] *ACHPR,, Mohamed Abubakari v United Republic of Tanzania*, 3/6 2016

[11] *ACHPR,, Alex Thomas v United Republic of Tanzania, 20/11/2015.*

[12] This article states that "every individual shall have the right to have his case heard. This comprises: the right to an appeal to competent national organs against acts of violating his fundamental rights recognized and guaranteed by conventions, laws, regulations and customs in force. ".

retained in the operative part of judgement. In my opinion, this aspect - availability of justice - does not form part of the shortcomings actually attributable to the State. While remaining in solidarity with the majority of my colleagues, it should be noted that the question at issue is the applicant's inconsistency and lack of rigour in the use of the means of action at his disposal. To refuse a litigant all means of action may mean denying him the action in question, but in this case it seems possible to say that this was not the case. The first point of the operative part should be specific.

13 The Court had to examine the wrongful conduct of the domestic courts. The applicant in this case pointed to the impartiality of the judges in establishing the breaches enshrined in the Charter. In the case of *Thobias Mango and others v. Tanzania,* decision of 11 May 2018, the aim of which was to highllight the lack of judicial fairness. As in the present case, the African Court found that the applicant had failed to prove that the judges of the national courts were biased and thus generated a violation of the right to be tried by an impartial tribunal[13]. In the present case, the court, while citing its jurisprudence- Abubakari[14] - noted that the domestic courts had determined that there was evidence beyond a reasonable doubt that the applicants had committed the crime of which they were accused. The relevance to the case at hand lies in the fact that the MGosi decision sets aside the necessary and thorough verification of the applicant's claims and allegations concerning his initiative to lodge an appeal. Reasonable doubt persists

14 A special feature is worth noting. It is tied to the specificity of the litigation of the Court. This is also present in the MGosi case. While the burden of proof did not always rest with the applicants in human rights cases, it was desirable for the court to make reasonable use of the principle. It is right that the person who alleges a wrongful practice or initiative that causes damage should adduce proof thereof. The adage is universally known: "*actori incumbit probatio, reus in excipiendo fit actor*" (the one who asserts a right must prove it). The material elements of human rights abuses leading to a suit in court, are often extremely damaging, and come after lengthy internal proceedings. The emergence of evidence at international level is necessary as much as it is complex. The African Human Rights judge, as in Mgosi case, must face up to this fact.

15. While sharing the position of my colleagues on the decision on the merits, I nevertheless express this individual opinion to highlight the insufficiency of unsubstantiated or unproven claims before the Court.

Tunis, on 07/12 /2018

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[13] *ACHPR, Thobias Mang 'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania, 11/5/2018, § 104.*

[14] *ACHPR,, Mohamed Abubakari v United Republic of Tanzania, 3/6/ 2016*