African Court on Human and Peoples' Rights

Application 004/2015

In the Matter of Andrew Ambrose Cheusi

V

United Republic of Tanzania

Separate Opinion appended to the Judgment of 26/06/2020

I concur the view of the majority of the judges as to the admissibility of the application, the jurisdiction of the Court and the operative part on certain points.

On the other hand, I believe that the manner in which the Court has:

(1) dealt with the objection raised by the Respondent State as to the filing of the application within a reasonable time,

(2) concluded in the same paragraph on the two cases which are the subject of the Applicant's allegations

(3) dismissed the claim for reparations in respect of the material damage and the damage concerning the indirect victims alleged by the Applicant.

Is inconsistent with the provisions of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules of Court as regards the first point, the legal logic that would require this period to be calculated for each application before the Court and Article 61 as regards the last.

.../.

1) As to the objection raised by the Respondent State to the filing of the application within a reasonable time

Under Article 56 of the Charter and Rule 40 (6) of the Rules of Court, it is clearly stated that applications must be submitted within a reasonable time from the exhaustion of domestic remedies or from the date fixed by the Court as the date on which the time-limit for its own seizure begins to run. In the instant case, as regards the first case, the Court has set the date for the exhaustion of domestic remedies as 29 May 2009. As to the assessment of the reasonable time limit, the Court found that the period of four (4) years, nine (9) months and twenty-three (23) days that had elapsed since the Respondent State's filing of the declaration under Article 34(6) of the Protocol on 29 March 2010 and the date of referral to the Court of the Application dated 19 January 2015 was reasonable, as the Applicant was imprisoned with the likelihood of being unaware of the very existence of the Court. The Applicant had not benefited from legal assistance during the appeal proceedings before the domestic courts[1] and was awaiting the outcome of his second appeal pending before the High Court until 19 March 2017, by which time he had already brought his case before the Court. In this regard, the Court noted that "between 2011 and 2013 he had not remained inactive and, pending the examination of his case, had sent several reminders to the various judicial authorities ...".[2] (Paragraph 70 of the judgment).

In light of Rule 40(6) of the Rules of Court, it is clearly stated that applications must be "filed within a reasonable time from the date local remedies are 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". It therefore follows that there are two (2) options as to how to define the starting point of the reasonable time. These are,

- Either from the date of exhaustion of domestic remedies, set, in this case, by the Court, for 29 May 2009, the date of the judgment of the Court of Appeal which also took into consideration the date of the Declaration made by the Respondent State on 29 March 2010, which gave rise to a time-limit of four (4) years, nine (9) months and twenty-three (23) days on the date of the filing of the application on 19 January 2015.

[1] - § 69 of the Judgement

[2] - § 70 of the Judgement

- Or the date chosen by the Court as the starting date for the commencement of the period of its own referral. Although it has set the date on which the period of its own referral, the date of the Declaration, begins to run, the Court has taken into consideration facts occurring after that date (2010 and 2013) "reminders to the various judicial authorities ...." as factors that could be taken into account in assessing the reasonableness of the time limit for referral under Article 56(6)....

I am of the view that this manner of interpreting the above-mentioned Article is erroneous and does not meet the spirit of the text, since the Articles of the Charter and the Rules clearly state the date chosen by the Court and not the facts....

- In my opinion, by taking the date of the Court of Appeal's judgment and the date of the filing of the declaration made by the Respondent State (29 March 2010) and by taking into account events occurring after that date, the Court has departed from the very meaning of the Article, since by this approach, it has not determined any date as the starting date for the commencement of the time-limit for its own seizure and has, on the other hand, confused the two choices afforded to it by the above-mentioned Articles....

- It would have been more logical to consider, since the legislator recognizes this option for the Court, the date on the letters sent to the Chief Justice, November 8, 2013, which would have made the time limit more reasonable since it would have been two (2) years.

Such an approach would have been more consistent with Article 56(6) of the Charter, which clearly specifies this choice by using the conjunction "or" and not the words "failing that".

<u>2) The conclusion in the same paragraph made by the Court in two separate cases that were the subject of the Applicant's allegations</u>

It is clear that, in its analysis of the facts, the Court distinguished between two cases brought before it by the Applicant and that for each case it concluded.

What is surprising is that, although the Court considered each case separately and found a violation in each of them on the basis of legal reasoning, when it came to the reasonable time limit, it did not specify that time limit in relation to each case.
Indeed, with regard to domestic remedies, it is clear from paragraph 56 of the judgment that the Court did specify that in the second case "the Applicant did appeal to the High Court and that, despite several communications to the authorities concerned, the case was still pending at the time he brought the matter before to the Court .... The Applicant should be deemed to have exhausted local remedies".
As to the discussion on reasonable time, in paragraphs 62 to 72 of the Judgment, the Court discussed this condition, which was raised by the Respondent State in relation to the first case, but failed to do so in relation to the second. It concluded on the basis of the four (4) years, nine (9) months and twenty (20) days' time limit, the time limit used for the first case, that if it refers to the second case, it is just to consider it as a fact which will lead it to conclude that the time limit is reasonable in relation to the first case.

With regard to the second case, it is clear that after having concluded that domestic remedies had been exhausted as of the date of the appeal of 27/10/2006 pending before the High Court until 19 March 2017, the date on which the Court of Appeal ruled, and well after the filing of the application in this Court, the Court should have considered the time limit reasonable, as it was open until the day of the filing of the application in this Court.
By concluding in the same paragraph for both cases, the Court failed in its obligation to give reasons for its judgments as set out in Rule 61 of the Rules of Court.

3) The rejection of the application for reparation in respect of the material and moral damage to the Applicant and the indirect victims alleged by the Applicant

In its operative part on monetary reparations Roman paragraphs VI and VII, the Court concluded that the application was dismissed on the basis of insufficient information. I do not agree with this conclusion for the following reasons:

On reading Rule 39(2) of the Rules, it is clearly stated that " the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".

As for Rule 41 of the same Rules, it provides in turn that "the Court may, before or during the course of the proceedings, call on the parties to file any pertinent document or to provide any relevant explanations. The Court shall formally note any refusal to comply".

Finally, it follows from Rule 45 of the said Rules that "the Court may, either on its own motion or at the request of a party or, where appropriate, of the representatives of the Commission, obtain any evidence which it deems relevant to the facts of the case. It may, notably, ...".

It is apparent from paragraph 139 of the Judgment that the Court confirmed that it had established the Applicant's alleged right to free legal assistance and the right to be tried within a reasonable time. However, in paragraphs 142 and 143, the Court dismissed the Applicant's claims for material damages on the ground that he had not adduced any evidence of the alleged damages with documents proving financial income from his occupation, payments to the Advocate, costs of proceedings and the like.

However, it is not apparent from the reasons for the judgment that, in accordance with the above-mentioned articles, the Court asked the Applicant to submit the documents proving the harm suffered, thereby failing to comply with the rule requiring it to adduce reasons for its judgments.

Moreover, in relation to the non-pecuniary damage suffered by the indirect victims, the Court also considered the lack of evidence in relation to the Applicant's allegations, as it had not proved the identification or filiation of the indirect victims.

In my opinion, this approach is contrary to the spirit of the above-mentioned instruments and to the positive role that a judge must play for the proper administration of justice.

It is worthy to mention in this respect that the application was registered on 19 January 2015 and that between 6 July 2018 and September 2019, the Respondent State had already raised this lack of evidence on the part of the Applicant and that on the closing date of the reparations proceedings, 29 September 2019, the Court could have responded by asking the Applicant to file the documents. If such a request had not been complied with, the Court would have based the dismissal of the applications on Rule 41 of the Rules.

By doing so, the Court has failed in its obligation to give reasons for its judgments within the meaning of Rule 61 of the Rules of Court.

Bensaoula Chafika

Judge at the African Court on Human and Peoples' Rights.