008/2015
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(000369 – 000364) DN

000369

Dissenting opinion of Judge Rafaâ Ben Achour

1. In the above judgment, *Shukrani Masegenya Mango and Others v. United Republic of Tanzania*, I do not subscribe to the decision of the majority of the judges of the Court declaring the application inadmissible, on the one hand, "in relation to all the Applicants for failure to comply with the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules, in so far as it relates to the allegation of violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy"[1] and, on the other hand, declaring"[t]he Application admissible in respect of the allegation by the First and Seventh Applicant in relation to the legality of their sentence for armed robbery"[2] and consequently to rule on the merits of the first and seventh Applicants' claims, which are, by the way, the common claims of all the Applicants. In my opinion, the application as a whole should have been declared admissible and not inadmissible for some and admissible for others.

2. By using this legal apparatus of treating the same applicants differently, the Court breached the unity of the application submitted by the seven applicants at the same time (I). Furthermore, and beyond this first objection, by declaring the application concerning all the Applicants inadmissible as to "the manner in which the right of presidential pardon has been applied", the Court ignored its established case law on extraordinary remedies, in particular the appeal for unconstitutionality before the Tanzanian courts **(II).**

I. Insufficient understanding of the unity of the application

3. It is important to note from the outset that on 17 April 2015, the Court received the same and only application, filed by seven individuals" jointly raising one major common grievance, which relates to the exercise of the presidential prerogative of mercy"[3]. Two of them (first and seventh Applicants) were convicted and sentenced

[1] Point (iii) of the operative part.
[2] Point (iv) of the operative part.
[3] Paragraph 1 of the judgment.

for armed robbery, the other five were convicted and sentenced for murder. All these Applicants, with the exception of one of them (second Applicant), are serving their respective sentences at Dar es Salaam Central Prison.[4].

4. It is important to emphasize that none of the seven Applicants has invoked a single grievance of his own, that is, a grievance separate from the one invoked by all the others. In addition to the unity of the Applicants, the application is also characterized by the unity of its subject-matter and the unity of the grievances invoked.

5. First of all, in examining the admissibility of the application, as requested by Article 6(2) of the Protocol and Rule 39(1) of its Rules, the Court considers the examination of the objections to admissibility raised by the Respondent State, including the recurring objection to the non-exhaustion of local remedies.

6. The Respondent State's main submission is that"[t]he Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act, challenging the alleged violations of their rights, especially in relation to the alleged discrimination by virtue of the exercise of the presidential prerogative of mercy"[5]. It should be noted that, in its submission, the Respondent State did not distinguish between the Applicants. He treated the application as a whole and sought to dismiss it as a block on the grounds of inadmissibility.

7. In response to this objection of the Respondent State, the Court contends that" in resolving the admissibility of this Application the Court considers it apposite to make a distinction among the Applicants before pronouncing itself on this issue "[6].

8. In this paragraph, the Court's reasoning moves from form to substance. Indeed, the Court is not interested in the issue of exhaustion of domestic remedies and decides to make a distinction between the applicants on the basis of their claims before deciding on admissibility. For the Court, while the seven applicants" primarily alleginga violation of their rights to equality and non-discrimination by reason of the

[4] *idem.*
[5] Paragraph 41 of the judgment.
[6] Paragraph 48 of the judgment (emphasis added).

exercise of the presidential prerogative of mercy..., the first and seventh applicants, in addition to the claims made by everyone else, are also challenging the legality of their sentences imposed on them for armed robbery"; and the Court concludes that it "will proceed to deal with these allegations seriatim "[7].

9. However, admissibility does not apply to "allegations" but to the requirements of the format of the application. As stated in Rule 40 of the Rules of the Court, entitled "Conditions for Admissibility of Applications ", for the application to be considered, it must "be filed after exhausting local remedies, if any [...] ". The question is therefore whether the Applicants, before bringing the case before the African Court, have made use (or at least attempted to make use of) what domestic law provides them with as a judicial means of asserting their rights.

10. Carrying on with its reasoning, the Court states "in relation to the alleged violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy, the Court notes that the Applicants do not dispute that the avenue offered by the Basic Rights and Duties Enforcement Act was available to them whereby they could have challenged, before the High Court, the alleged violation of their rights"[8]. In so doing, the Court suggests that it is ruling on the merits of the case.

11. In the following paragraphs, the Court revisits the issue of exhaustion of local remedies, first recalling its case law in *Couple Diakité v. Republic of Mali*[9], and further noting that "[t]he Applicants could have approached the High Court[...] It was not open to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them"[10], and then concluding that " in light of the above, the Court finds that the Application, 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, is inadmissible, for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the

[7] Paragraph 48 of the Judgment (underscored by the author).
[8] Paragraphe 49.
[9] "the exhaustion of local remedies is a requirement of international law and not a matter of choice and it is incumbent on the complainant to take all necessary measures to exhaust or at least attempt to exhaust local remedies; it was not enough for the complainant to question the effectiveness of the State's domestic remedies because of isolated incidents".
[10] Paragraph 51

Rules ". The judgment could have stopped at that point and dismissed the application in its entirety[11].

12. At this juncture, a question arises, to which we unfortunately do not have an answer: what is the causal relationship between paragraphs 46 and 47 of the judgment on the one hand, and paragraphs 48, 49 and 50 of the judgment on the other?

13. However, and despite the finding that the application is inadmissible, as reiterated in paragraphs 51 and 52 of the judgment, the Court retracts at paragraphs 53 to 56 with the exception of the case of Applicants Nos. 1 and 7. For the Court, the said Applicants "made an additional allegation which is distinct from the allegations made by all the Applicants jointly"[12]. This is no longer an issue of admissibility but one of merits. This is evidenced by the fact that the Court "notes, firstly, that the legality of their sentence for robbery implicates their right to fair trial"[13].

14. It is therefore not understandable why the Court considers, for the case of five Applicants, that they should have brought this action and not ignored it in "offhandedly " and exempted two other Applicants from the action because they had made additional allegations in relation to their co-applicants.

15. Thus, after distinguishing where there was no need to distinguish, the Court severed the unity of the application and did not really consider the objection raised by the Respondent State.

II. Is the appeal for unconstitutionality an extraordinary appeal?

16. Under Article 56(6) of the Charter as reiterated in Rule 40(6), the Court has always held that local remedies must be exhausted after the Application has been brought, including judicial remedies and that such remedies must be available, effective and sufficient.

[11] Paragraph 54 of the Judgment
[12] Paragraph 55 of the judgment.
[13] *Idem.*

17. In these particular cases of appeals for review and unconstitutionality before the Court of Appeal in the Tanzanian judicial system, the Court has a wealth of consistent case law. It has always considered that these two remedies are "extraordinary remedies" which are neither necessary nor mandatory and that, consequently, the exhaustion requirement of the Charter and the Rules does not apply to them[14].

18. In the above judgment, the Court gives the impression that it has reversed its case law, or at least partially reversed it. Indeed, the Court considers that, with regard to five of the Applicants,"[t]he Applicants could have approached the High Court to challenge the legality of the exercise of the presidential prerogative of mercy , the Prisons Act, the Parole Act and other laws which they perceive to be implicated in the discrimination that they allegedly suffered '". The Court adds that "it was not open to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them"[15]. It should be noted that the laws cited in this paragraph do indeed constitute the remedy for unconstitutionality provided for in the Basic Rights and Duties Enforcement Act of the United Republic of Tanzania.

19. It follows from this ground of inadmissibility held by the Court against five Applicants that the appeal for unconstitutionality is no longer considered by the Court as an extraordinary remedy from which the Applicants are exempted, but now as a

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[14] Application 005/2013 *Alex Thomas v. United Republic of Tanzania*; Application 006/2013 *Wilfred Onyango Nganyi v. United Republic of Tanzania*; Application 007/2013 *Mohamed Abubakari v. United Republic of Tanzania;* Application 003/2015 *Kennedy Owino Onyachi and Charles John Mwanini Njoka c. United Republic of Tanzania*; Application 005/2015 *Thobias Mang'ara Mango and Shukurani Masegenya Mango v. United Republic of Tanzania*; Application 006/2015 *Nguza Viking (Baba Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania*; Application 011/2015 *Christopher Jonas v. United Republic of Tanzania*; Application 027/2015 *Minani Evarist v. United Republic of Tanzania United Republic of Tanzania*; Application 006/2016 *Mgosi Mwita Makungu v. United Republic of Tanzania*; Application 020/2016 *Anaclet Paulo v. United Republic of Tanzania*; Application 016/2016 *Diocles William v. United Republic of Tanzania*

[15] Paragraphe 51

necessary and compulsory remedy. However, and unlike the treatment meted out on these five Applicants, the Court refrains from sanctioning the first and seventh Applicants for failure to bring the same action for unconstitutionality. With regard to these two Applicants, the Court reiterates its traditional position. It recalls " reiterates its position that the remedy of a constitutional petition, as framed in the Respondent State's legal system, is an extraordinary remedy that an applicant need not exhaust before approaching the Court. For this reason, the Court holds that the First Applicant and Seventh Applicant need not have filed a constitutional petition before approaching the Court." [16].

20. The underlying reason for this differential treatment of the Applicants seems to be the consequence of what we have developed above, namely the combination of elements of a different nature concerning the merits of the case on the one hand and the procedure on the other hand.

21. For these reasons, I have voted against this judgment.

Arusha, 26 September 2019.

Judge Rafaâ Ben Achour

[16] Paragraph 54 of the judgment.