016/2017
28/03/2019
(000530 - 000525) RMI

Judgment

Dexter Eddie Johnson v. Republic of Ghana

Application No. 016/2017

Dissenting Opinion

of

Judge Rafaâ Ben Achour

1. I voted against the above Judgment *(Dexter Eddie Johnson v. Republic of Ghana)* for two reasons.

2. I consider that the Court should have declared the Application inadmissible, not on the basis of Article 56(7)[1] of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and Rule 40(7) of the Rules of Court (hereinafter referred to as "the Rules"), but rather on the basis of Article 56(6)[2] of the Charter and Rule 40(6) of the Rules, that is, for failure by the Applicant, Dexter Eddie Johnson (hereinafter referred to as "the Applicant") to file his Application before the Court within a reasonable time after the exhaustion of local remedies (hereinafter referred to as "LR") (**I**).

3. Furthermore, and assuming that the said timeframe is reasonable, as held by the Court in paragraph 45 of the Judgment, the Court should have declared the Application admissible and proceeded to the merits of the case, because, in my opinion, the case has not been "settled in accordance with the principles of the United Nations Charter, the Charter of the Organization of African Unity and the provisions of the present Charter." The Views of the UN Human Rights Council (hereinafter referred to as "HRC") do not, in my opinion, "settle" the case. (**II**)

I. Non-observance of reasonable time for seizure of the Court

4. The requirement of the Charter, also reflected in the Rules of Court, to file the application within a reasonable time, is a requirement based on the need for legal safeguards. This requirement is enshrined in the instruments of the three regional human rights Courts. However, whereas the Inter-American and European conventions have set the deadline at six months as from the date of exhaustion of local remedies,[3] the Charter left it first at the discretion of the Commission, and later, that of the Court, taking into consideration the circumstances of each case.

[1] For commentary on this article: See. OUGUERGOUZ (Fatsah). "Article 56", In KAMTO (Maurice) (Dir). *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court of Human and Peoples' Rights. Article- by -article Commentary*. Brussels. Bruylant, 2011. p. 1044.

[2] For commentary on this article: See. *Idem*. p. 1043.

[3] Art. 35 (1) of European Convention and article 46(1)(b) of the Inter-American Convention.

5. It should be recalled that, in the instant case, the Application was brought before the Court on 26 May 2017, whereas the Supreme Court of Ghana, the apex court of the Ghanaian judicial system, delivered its final judgment, dismissing the Applicant's appeal and upholding the death sentence imposed on him on 16 March 2011[4]. Thus, a period of six years and two months elapsed between the date of delivery of the Judgment of the Supreme Court of Ghana and the filing of the Application before the Court. Are there any objective and subjective justifications for such a delay?

6. The Court did not even try to justify the Applicant's delay in filing his Application. It glanced through, and without the slightest analysis, all the admissibility requirements enumerated in Articles 56 (from § 1 to § 6) of the Charter and 40 (from § 1 to § 6) of the Rules. The Court dealt with the six grounds of inadmissibility in one *lump*, noting "that the Application discloses the identity of the Applicant; is compatible with the Constitutive Act of the AU and the Charter because it invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter; is not written in disparaging or insulting language directed at the Respondent State and its institutions or the African Union; is not based exclusively on news disseminated through mass media; and was sent after the Applicant exhausted local remedies since the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State; and was also filed with this Court within a reasonable time after the exhaustion of local remedies". Accordingly, "the Court [found] that the Application meets the admissibility requirements under Article 56(1) to 56(6) of the Charter, which are reflected in Rule 40(1) to 40(6)."

7. It is unfortunate that, in dealing with such an important issue, the Court simply states that "[...] and was also filed with this Court within a reasonable time." Thus, the Court turns a blind eye to the time taken by the Applicant to bring his application before it and provides no justification, from this point of view, for the admissibility of the Application.

8. However, the Court substantiated its stance, albeit cursorily, with respect to other grounds of admissibility of the Application. Such was the case when it talked of the Application being compatible with the Constitutive Act of the AU and the Charter because, according to the Court, the Application "invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter". Similarly, as regards the exhaustion of local remedies, the Court notes that "the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State". Yet no justification is given, no matter how brief, with respect to "reasonable time".

9. The fact that the Respondent State did not raise any objection to admissibility is no justification for such a quick glance, reduced in just one sentence, through six admissibility requirements that the Court has a duty to analyse. The Court seems to have been in a hurry to dwell only on one requirement, namely the one provided for in Articles 56(7) of the Charter and 40(7) of the Rules.

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[4] Judgment, Para. 26.

10. However, it would have been of utmost importance, for the proper administration of justice and in compliance with the Protocol and the Rules, for the Court to focus more on the issue of timeframe, as it has always done in its settled jurisprudence.

11. In other cases, however, where the timeframes for bringing an application were shorter, the Court had always analyzed the reasons which could have prevented the applicants from being more diligent in respect of the "reasonable time".

12. Indeed, in its settled jurisprudence, the Court has always been very sensitive to the personal circumstances of the applicants (indigence, illiteracy, detention, extraordinary or non-judicial remedies, etc.), and has always shown great flexibility in computing reasonable timeframe.[5]

13. The Court has always had to rule, and very rightly so, on a case-by-case basis, in order not to be stuck in a very rigid and strict arithmetical consideration.[6] In *Warema Wanganko Werema and Waisiri Wanganko Warema of 7 December 2018,* the Court considered 5 years and 5 months as a reasonable timeframe. It, however, justified its generosity in the following words: "The Court further notes that the Application was filed on 2 October 2015, that is, after five (5) years and five (5) months from the date of the deposit of the said declaration. In the intervening period, the applicants attempted to use the review procedure at the Court of Appeal, but their application for review was dismissed on 19 March 2015 as having been filed out of time. In this regard, the key issue for determination is whether the five (5) years and five (5) months' time within which the Applicants could have filed their Application before the Court is reasonable."[7] The Court further noted that "the Applicants do not invoke any particular reason as to why it took five (5) years and five (5) months to seize this Court after they had the opportunity to do so, the Respondent having deposited the declaration envisaged under the Protocol, allowing them to directly file cases before the Court. Nonetheless, although they were not required to pursue it, the Applicants chose to exhaust the above-mentioned review procedure at the Court of Appeal. It is evident from the record that the five (5) years and five (5) months delay in filing the Application was due to the fact that the Applicants were awaiting the outcome of the [review proceedings] and at the time they seized this court, it was only about six (6) months that had elapsed after their request for review was dismissed for filing out of time."[8]

14. Whereas this is the first time that it has been seized of a case within a timeframe of six years and two months after the exhaustion of local remedies, the Court now pushes its liberalism to the point of emptying the "reasonable time" requirement of all its content, thus opening the door to legal insecurity, which the Charter and the Rules seek to prevent. The Court's total silence on such an issue of public order leaves the litigation open-ended. In allowing a period as long as six years and two months without

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[5] The European Court of Human Rights, though bound to respect the six months timeline, also stated: "The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute." Judgment, *Comingersoll S.A. v. Portugal,* Application No. 3532/97, Grand Chamber, 6 April 2000.

[6] In *Zongo & Others v. Burkina Faso*, the Court stated: "The reasonableness of timelines for referral of **cases** to the **Court** depends on the **circumstances** of each **case** and must be determined on a **case-by-case basis**". Preliminary Objections, Application ..., 21 June 2013, para. 121.

[7] Judgment, para. 48.

[8] Judgment, para. 49.

conclusive factual reasons, the Court has gone too far beyond the margin, thereby denying Article 56 (6) of the Charter and Rule 40 (6) of the Rules of Procedure any meaningful effect. It has widely opened a door that will be very difficult for it to close and, moreover, this would not encourage States to make the Declaration accepting the competence of the Courts to receive petitions from individuals and NGOs, pursuant to Article 34(6) of the Protocol.

15. In the instant case, it should be noted that the Applicant did not hasten to seize the Court. He waited until 26 May 2017 to do so. Throughout this period, he spent time seeking other remedies internally (request for presidential pardon)[9] and before an international tribunal (The Human Rights Committee), which are not considered by the African Court as remedies that had to be exhausted. This is clearly pointed out in paragraph 57 of the Judgment.

16. According to the Court's settled case-law, the request for presidential pardon is not considered as an LR to be exhausted by the applicants. Consequently, the date on which the request for pardon was denied cannot be considered as a starting point for the calculation of the time limit for bringing an application before the African Court. In its judgment of 3 June 2016, in *Mohamed Abubakari v. United Republic of Tanzania*, the Court held that "the remedies that must be exhausted [by the Applicants] are ordinary judicial remedies". Obviously, the request for presidential pardon does not fall into this category.

17. Similarly, recourse to an international, universal or regional judicial or non-judicial body cannot constitute an LR. It is by definition an external remedy whose admissibility is predicated upon the exhaustion of LRs. In its Views, on 27 of March 2014, the CDR noted that [The Committee has ascertained, as it is required to do in accordance with the provisions of article 5(2)(a) of the Optional Protocol, that the same question was not under consideration before another international body for purposes of investigation or settlement. It notes that domestic remedies have been exhausted. The State Party has not challenged this finding. The requirements set forth in Article 5(2)(a) of the Optional Protocol are therefore fulfilled.]

18. In fact, the Applicant, weary of the dilatory tactics of the Respondent State, decided to seize this Court six years and two months after the delivery of the Supreme Court judgment dismissing his appeal and upholding his sentence, and more than four years later, the Views of the HRC. For this Court, all these facts are of no moment!

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[9] The Republic of Ghana is one of the 29 States that respected the moratorium on executions. In case of a death penalty, it is customary to seek a presidential pardon.
The President of Ghana has always commuted death penalties to life imprisonment. Thus, in 2009, the outgoing President of Ghana, John Agyekum Kufuor, commuted the penalties of all those who had been sentenced to death to life imprisonment, or to an imprisonment term of twenty years for those who had spent a decade on death row. In the same vein, those who had received a death penalty but had fallen seriously ill were released following a medical report to that effect. We have no information as to whether Applicant Dexter Eddie Johnson benefitted from such a measure.
https://www.peinedemort.org/document/3481/Grace_presidentielle_Ghana_condamnes_mort
Also, in 2014, on the occasion of the 54th anniversary of the Republic of Ghana, President John Dramani Mahama commuted the death penalties of 21 inmates to life imprisonment.
https://www.peinedemort.org/document/7564/grace_presidentielle_commue_peines_21_condamnes_mort_Ghana

19. In my opinion, not only does the six years and two months' timeframe for bringing an application before the Court exceed all the reasonable time limits, but that fact also deserved to be noted. Until this Judgment, never had the African Court stretched its indulgence to such limits and never had it dealt with an issue in such a rapid and uncontested manner.

II. Settlement of the case by the Human Rights Committee

20. Just like Article 56 (6) of the Charter and Rule 40 (6) of the Rules, Article 56 (7) and Rule 40 (7) of the Rules are aimed at preserving judicial safeguards by ensuring that a case of human rights violation is not considered by several international courts at the same time. Pursuant to these Articles and Rules, for an application to be admissible, it must "not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or any legal instrument of the African Union". These articles and Rules fail to mention cases where the principle of "*non bis in idem*" has to apply. It simply presents a laconic formula which refers to the principles of the UN Charter.

21. Considering the deadline of six years and two months as reasonable, the Court declared the Application admissible pursuant to Article 56 (7) of the Charter and Rule 40 (7) of the Rules. It held that the case has been settled "in accordance with either the principles of the Charter of the United Nations or the Charter of the Organization of African Unity or the provisions of the present Charter." In making such a finding (the HRC's settlement of the case), the Court refers to *Gombert* v. *Côte d'Ivoire* of 22 March 2018 in which it stated that: "The Court also notes that the notion of "settlement" implies the convergence of three major conditions: (i) the identity of the parties; (ii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and (iii) the existence of a first decision on the merits."[10]

22. In the instant case, in scrutinising the said three conditions, the Court failed to note that the *Gombert* case was settled by a sub-regional judicial body, namely, the Community Court of Justice of the Economic Community of West African States (ECOWAS), whereas the *Dexter* case was before a quasi-judicial body, the HRC, whose "decisions" do not constitute res *judicata*.

23. In my opinion, the case has not been "settled" by the HRC. The findings made by the HRC are legally called "Views." As the name suggests, the Views of the HRC merely "note," "observe," "identify" a situation of human rights violations contrary to the International Covenant on Civil and Political Rights. This explains why the Committee uses diplomatic and non-authoritative language at the end of its decision, in that it "*requests* the Respondent State to file, within 180 days, information about the measures taken to give effect to its views, and also *requests* the Respondent State to publish the HRC's Views and have them widely disseminated in the Respondent State." The

[10] Judgment, Para. 48.

requests do not create a legally binding obligation on the Respondent State. As a party to the Covenant, the Respondent State must do its utmost to stop the violation.

24. On the contrary, a court decision "settles" the case, that is, it closes the hearing. It settles the dispute by stating the law as it is and, thus, places on the Respondent State an absolute obligation which produces a specific result, and not a best efforts obligation.

25. Since the Court held that the Application was admissible because it was filed within a reasonable time, it should have made an analysis of the notion of settlement for its finding that the Application is admissible and, then, proceeded to consider the merits of the case.

26. Thus, the one and only reason for the inadmissibility of the Application arises from the Applicant's non-observance of the reasonable time to file his Application and not from the HRC's settlement of the case.

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27. Having demonstrated extreme flexibility with respect to the requirement of Article 56(6) of the Charter and Rule 40(6) of the Rules on reasonable time, the Court should also have found the Application admissible pursuant to Article 56(7) of the Charter and Rule 40(7) of the Rules, since the Views of HRC did not amount to a settlement of the case.

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

Arusha, 28 March 2019

Judge Rafaâ Ben Achour