

African Court on Human and Peoples' Rights

Tike Mwambipile and Equality Now

v/

United Republic of Tanzania

Application No. 042 /2020

Individual opinion

1. In this opinion, I would like to state my support for the grounds stated by the Court in its above-mentioned Ruling, in which it declared the application inadmissible on the basis that the measures sought by the Applicants are identical to those sought in the complaint brought before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which issued a decision in this regard at its 39th Session held from 21 March to 1 April 2022. However, I also raise a few issues that remain unaddressed and are food for thought.

1) My support for the Ruling.

2. In its Ruling, the Court found that the Applicants in their Application filed with the Court on 19 November 2020, alleged violations of certain rights of pregnant girls in connection with the fact that they were barred from attending public primary and secondary schools both during pregnancy and after childbirth. According to the Applicants, such a restriction constitutes a flagrant violation of the affected girls' rights to education and non-discrimination.
3. However, it was noted during the course of the proceedings that other entities had filed applications before the ACERWC and the East African Community Court of Justice (EACJC) alleging the same violations.
4. It then became clear that while the application pending before the EACJC has not yet been decided, the application before the ACERWC was decided by

decision issued in its 38th session, mentioned above, hence the Ruling that is the subject of this opinion. In the said Ruling, the Court decided to apply the admissibility requirement laid down in Article 56(7) of the African Charter on Human and Peoples' Rights (the Charter), restated in Rule 50(2) of the Rules of Court (the Rules), and to declare the Application inadmissible on the ground that the claims have already been settled.

5. I fully agree with this finding for the good reason that paragraph 7 of Article 56 of the Charter in its French version clearly specifies that the application filed with the Court shall not concern cases that have been “settled by these States involved in accordance with 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”.
6. It is clear that the legislator did not, at any time, specify the entity that settles the case, but rather focused on the instruments applied in the settlement. The requirement is therefore related to the human rights jurisdiction of the entity concerned and to its jurisdiction to apply the relevant instrument, in the instant case, the Protocol.
7. It is important to remember that settling a dispute or a difference is not the exclusive jurisdiction of the judicial authorities. However, the settlement can take place after the intervention of any entity vested with jurisdiction to settle disputes (e.g., mediator, administration, conciliator, arbitrator, committees ...). If the definition of settlement is “to give a final solution to a question”, the term “final” is unambiguous as regards the solution decided by entities other than judicial bodies, insofar as they are vested with the jurisdiction to settle disputes and enforce the proposed solutions will, in any case, depend on the will of the parties!
8. Even if Article 56 paragraph 7 of the Charter includes the words “settled by the States” - as is the case in the English version of the Charter - the Court specified in paragraphs 45 and 73 of the Ruling the reasons for this rule on the basis of a communication from the African Commission on Human and Peoples' Rights in

which it was decided that the State could not be prosecuted and convicted more than once for the same alleged violation of human rights, on the one hand, and that the ACERWC is an institution with the legal mandate to examine the dispute at the international level, on the other.

9. It follows that the ACERWC, being an organ established by the African Union to monitor the implementation of the African Charter on the Rights and Welfare of the Child, can only render decisions that are binding on states. The principles of effectiveness and good faith execution of treaties enshrine this position in international law. Reference can be made in this respect to Article 26 of the Vienna Convention on the Law of Treaties and the judgment of the Inter-American Court of Human Rights in *Loayza Tamayo v. Peru* (September 17, 1997 - merits). *Peru* (September 17, 1997 - merits).

2) The remaining grey area:

10. However, it appears from the Applicants' requests before the Court that, in addition to the allegations of human rights violations, they have specifically requested that the Respondent State be ordered to:

- "Take constitutional, legislative and administrative measures to guarantee the right to education..... as well as a right to reparations...
- Order the Respondent State to report to the Court within six months [...]
- Order the Respondent State to publish the judgment in this matter on the official website [...]
- Find a violation of human rights that were not specifically mentioned by the Petitioners...
- to grant such other measures as the Court may deem necessary in the circumstances ..." (paragraph 19, subparagraphs 7, 8, 9, 10, 11 and 12 of the Application? (Paragraph 19 subparagraphs 7, 8, 9, 10, 11 and 12 of the Application)

11. In my opinion, the Court should have discussed jurisdiction and admissibility in respect of these requests, since they are not identical to those made before the ACERWC. On the other hand, and consequently, the Court had to address them, since the said requests would not have been settled.
12. The complementarity between these two African human rights bodies and the fact that they have the same sources of law, is not in doubt.
13. For the sake of this complementarity, the Court should have adjudicated these requests either by referring to the decision of the ACERWC to complete its findings and addressed the new claims cited above filed before it.
14. Alternatively, the Court should have dismissed the said requests on the ground that they had already been made and considered before the ACERWC.



Judge Bensaoula Chafika

