



Arusha, Tanzania
Website: www.african-court.org
Telephone+255-732-979-509

JUDGMENT SUMMARY

SYMON VUWA KAUNDA AND OTHERS

V.

REPUBLIC OF MALAWI

APPLICATION No. 013/2021

JUDGMENT ON MERITS AND REPARATIONS

5 SEPTEMBER 2023

A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Arusha, 5 September 2023: The African Court on Human and Peoples' Rights (the Court), today, delivered a judgment in the case of *Symon Vuwa Kaunda and Others V Republic of Malawi*.

Symon Vuwa Kaunda, Getrude Mnyenyembe, Daniel Tula Phiri, Mpata Shadreck Tayani, Nkhasi Esau Nsinawana, and Kayafa Phiri (hereinafter referred to as "the Applicants"), are Malawi nationals. Following elections held on 21 May 2019, the Malawi Electoral Commission declared Mr Symon Vuwa Kaunda elected as a Member of the National Assembly of the Respondent State for the Nkhata Bay Central Constituency. Mr Ralph Joseph Mhone, who contested in the same Constituency, filed a petition challenging Mr Symon Vuwa Kaunda's with the High Court of Malawi which, on 16 September 2019, dismissed the petition on the ground that there was insufficient evidence to overturn the First Applicant's election. However, Mr Mhone appealed to the Malawi Supreme Court of Appeal, which, on 21 April 2021, set aside the High Court's judgment and ordered the nullification of Mr Symon Vuwa Kaunda's election as a member of the National Assembly and directed the holding of a fresh election.

Following that decision, the Applicants filed this Application on 5 May 2021 alleging that, the aforementioned decision of the Malawi Supreme Court of Appeal violates their rights to equality before the law by placing undue emphasis on procedural compliance when determining the election petition; the right to be heard by unjustifiably denying the First Applicant's reasonable request for extension of time to file additional documents; the right to an appeal to competent national organs against acts violating the First Applicant's fundamental rights, as the Malawi Supreme Court of Appeal failed to competently discharge its functions when it misdirected itself in the re-consideration of evidence at Msinjijiwi Polling station; and the right of Applicants' to free political participation by ordering that a fresh election be conducted. All these rights are guaranteed under Articles 3(2), 7(1), 7(1)(a) and 13(1) of the Charter, respectively. The Applicants also sought reparations to redress these alleged violations.

The Respondent State, having failed to file its defence, did not make any prayers.

The Court observed that, as per Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol), although its jurisdiction was not challenged by the Respondent State it was bound to examine all aspects of its jurisdiction. On material jurisdiction, the Court noted that the Applicants alleged the violation of rights guaranteed under Articles 3(2), 7(1), 7(1)(a) and 13(1) of the Charter, which is an instrument to which the Respondent State is a party. The Court held, therefore, that it had material jurisdiction because the Applicants had alleged violations of their rights protected under the Charter. Under Personal jurisdiction, the Court found that it had personal jurisdiction because the Respondent State has ratified the Protocol and made the Declaration under Article 34(6) of the Protocol. This Declaration allows individuals to file applications against the Respondent State as per Article 5(3) of the Protocol. On temporal jurisdiction, the Court also held that it had temporal jurisdiction as the alleged violations occurred after the Respondent State became a party to the Charter, the Protocol and had deposited the Declaration required under Article 34(6) of the Protocol. On territorial jurisdiction, the Court confirmed that the alleged violations all occurred within the territory of the

Respondent State, which is a State party to the Protocol. From the above analysis, the Court held that it had jurisdiction to hear the Application.

With regards to admissibility, under Article 6 of the Protocol, the Court was required to determine whether the requirements of admissibility, as provided under Article 56 of the Charter and Rule 50 of the Rules of Court (the Rules), had been met. The Court then satisfied itself that all conditions of admissibility set out in the said Article and Rule were met. It held that the identities of the Applicants were disclosed; the Application was compatible with the Constitutive Act of the African Union and the Charter; that the Application did not contain disparaging nor insulting language. The Court further found that the Application was not based exclusively on news disseminated through mass media and was filed after exhaustion of local remedies, and that the Application did not concern a case which was already settled within the terms of Article 56 (7) of the Charter. The Court therefore declared the Application admissible.

On the merits, the Court considered whether the Respondent State violated the Applicants' rights enshrined under Articles 3(2), 7(1), 7(1)(a) and 13(1) of the Charter, respectively, by examining four allegations made by the Applicants being: (i) the right to equal protection before the law by placing undue emphasis on procedural compliance when determining the election petition; (ii) whether the 1st Applicant was deprived of his right to be heard by unjustifiably denying him reasonable request for extension of time to file additional documents, (iii) whether the Applicants were deprived of their right to an appeal to competent national organs against acts violating the first applicant's fundamental rights by the Supreme Court failing to competently discharge its functions when it misdirected itself in the re-consideration of evidence at Msinjywi Polling station, (iv) whether the decision of the Malawi Supreme Court of Appeal to nullify the elections and order fresh elections deprived their right to freely participate in governance and public affairs, and denied the 1st Applicant the opportunity to represent his people as a member of Parliament.

On the first issue, the Applicants contended that the Respondent State placed undue emphasis on procedural compliance when determining the election petition without

consideration of the consequences and costs of such measures in relation to the rights of the Applicants to participate in governance and public affairs, hence depriving them of their right to equal protection before the law. The Court found that, in any event, States, within permissible limits, are allowed latitude to configure their electoral management bodies to satisfy their peculiar local exigencies. In the present case, the Malawi Supreme Court of Appeal found that, there was lack of, or inadequate civic voter sensitization about the registration which led to a low turnout. This was due to citizens not being aware of the need to register to vote as most people thought that National Identity Registration, which they did previously with the National Registration Bureau, qualified them to vote without having to specifically register again to vote. Therefore, the Malawi Supreme Court of Appeal had rightly ordered that the election be held afresh to ensure that it was conducted in a manner that abides by electoral laws. It was found that, by doing so, the Malawi Supreme Court of Appeal did not violate the Applicants' right to equality.

The Court further observed that, the Applicants merely alleged that the Respondent State's Supreme Court of Appeal placed undue emphasis on procedural compliance in respect of registration of voters without stating how doing so led to a breach of their right to equality. They did not also demonstrate how the Malawi Supreme Court of Appeal's emphasis on procedural compliance run counter to established rules in the national law or violated their right to equality or equal protection of the law. The Court held, therefore, that the Applicants should have provided evidence as to how they were treated differently from other persons in the same situation.

The Court, therefore, found that, the Respondent State did not violate Article 3(2) of the Charter.

Regarding the allegation of violation of the right to be heard, the 1st Applicant alleged that he was unjustifiably denied reasonable request for extension of time to file additional documents by the Malawi Supreme Court of Appeal. The Court found that the Malawi Supreme Court of Appeal's denial of the 1st Applicant's request for extension of time to file additional documents, including the final tallying sheets and results for the contested polling stations on the ground that his lawyer was based in Mzuzu, a city located six hundred and fifty-five (655) kilometres from the seat of Malawi Supreme Court of Appeal

was justifiable; that the Applicant was not, at any point, denied the opportunity to be heard because he sought to make an application for extension of time to file additional documents on the date of hearing without providing satisfactory reasons for adducing the documents before the Court earlier despite the matter being adjourned several times.

The Applicants further averred that the Respondent State's Supreme Court failed to completely discharge its functions when it misdirected itself in the reconsideration of evidence at Msinjijiwi Polling Station. The Court found that the right to have one's cause heard entails the possibility of the Applicant to have his evidence received and considered by courts. In the instant matter, this Court observed that the act of the Malawi Supreme Court of Appeal did not misdirect itself but rather exercised its appeal prerogative by reconsidering the evidence adduced before the High Court, especially the assertion that alterations were made to the voting records at Msinjijiwi polling station. The Court, therefore, found that there was no violation by the Respondent State of the Applicants' right to be heard.

On the last allegation, that the decision of the Malawi Supreme Court of Appeal to nullify the elections and order fresh elections, disenfranchised the right of the second, third, fourth, fifth and six Applicants to freely participate in governance and public affairs, and denied the First Applicant the opportunity to represent his people as a member of parliament, it was the contention of the Applicants that such breach arose from the fact that the Supreme Court's decision was based on facts, which although true, were not material and did not affect the outcome of the election.

This Court noted that the Applicants' allegation pertains to the manner in which the Supreme Court of Appeal of the Respondent State adjudicated on the electoral petition and decided to annul the election. As it emerges from the record, the Applicants averred that the Supreme Court did not make a proper finding by nullifying the election on grounds such as some ballot boxes not being secured, results sheets being tempered, parties' representatives keeping the result sheets at their home, and the presiding officer of one polling station altering the number of votes. According to the Applicants, while those

grounds were true, they were not material and did not affect the outcome of the election in a manner that warranted the results being nullified.

The Court noted that, in considering whether those grounds warranted that the results be nullified, the Malawi Supreme Court of Appeal found that the High Court properly made its decision against the weight of evidence by finding that there was insufficient evidence to overturn the election of the First Applicant. It was on these grounds that the Supreme Court of Appeal set aside the High Court's judgment and ordered the nullification of the said election and ordered that a fresh election be conducted. The Court held that there was nothing manifestly erroneous in the manner in which the Supreme Court of Appeal assessed the evidence, and decided as it did.

Consequently, the Court dismissed the Applicants' claim and held that the Respondent State had not violated the Applicants' right to participate freely in governance and public affairs protected under Article 13(1) of the Charter.

In this case, given that the Court had not found any violations, it also held that it could not order reparation since there was no infringement of rights to the Applicants.

Regarding costs, the Court ordered that each party should bear its own costs.

Further Information

Further information about this case, including the full text of the decision of the African Court, may be found on the website at: <https://www.african-court.org/cpmt/details-case/0132021>

For any other queries, please contact the Registry by email registrar@african-court.org.

The African Court on Human and Peoples' Rights is a continental court established by African Union Member States to ensure the protection of human and peoples' rights in Africa. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights and any other relevant human rights instrument ratified by the States concerned. For further information, please consult our website at www.african-court.org