

Dissenting opinion of Judge Rafaâ Ben Achour

1. I very much regret the decision of the Court regarding the duration of the trial that culminated in the sentencing of Applicant Dominick Damian. Indeed, majority of the judges held that the duration of the trial was reasonable. Thus, the Court held that “the Respondent State did not violate the Applicant’s right to be tried within reasonable time, protected by Article 7(1)(d) of the Charter”.¹
2. The facts of the case show that the Applicant was kept in pre-trial detention, for five (5) years and two (2) months, including one (1) year and nine (9) months from the day of his arrest to the day of his committal and, three (3) years and five (5) months from his first appearance before the High Court with jurisdiction in the matter and his conviction by same. This means that he was deprived of his liberty and kept in detention throughout this period.
3. The Court’s decision that Applicant’s trial was conducted within reasonable time is an unfortunate precedent. The decision could be understood or interpreted as the Court legitimising the Respondent State's disregard for the principle of presumption of innocence and the need for trials to be held within reasonable time, which are rights guaranteed by Articles 7(1) (e) and (d) of the Charter, 14(2)² and 9(2)³ of the ICCPR as well as Guideline M(3)(a) of the Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights on 29 May 2003.⁴

¹ § 67 of the Judgment.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings, and should the occasion arise for execution of the judgment”.

⁴ 3. The right to be brought promptly before a judicial authority.

a. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to ” release.

4. In the present case, which has been pending before it since 2016,⁵ the Court is giving pride of place to the dysfunctions of the national judicial systems, in this case, that of Tanzania. It appears to vindicate the redundant objections that the Respondent State raises in most cases concerning the conduct of trials, alleging that the Court acts as an appellate jurisdiction in relation to domestic courts.
5. However, in its previous case-law,⁶ *in particular* in *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania*, the Court has held that the right to be tried within a reasonable time is an important aspect of the right to a fair trial.⁷ It has also held that the right to a fair trial implies that legal proceedings must be conducted within a reasonable time.⁸
6. It will be recalled that the Applicant in his application alleges that the period of more than five (5) years for which he was held in pretrial detention is abnormally long and therefore constitutes a violation of his right to a fair trial since, as recalled above, he was arrested on 27 August 2007 with his trial only commencing on 30 November 2012.
7. It is important to note at the outset that the Respondent State neither contested this allegation nor provided any explanation of the time that elapsed between the Applicant's arrest and his final conviction. This in itself constitutes acquiescence on the part of the Respondent State.
8. In this case, however, all the traditional criteria taken into consideration by the Court in several other cases in assessing the reasonableness of the length of criminal proceedings⁹ buttress the unreasonableness of the above-mentioned period of five (5) years and two (2) months taken for the Applicant's indictment

5. The Application was filed on 1 September 2016 and served on the Respondent State on 15 November 2016.

⁶ *Cheusi v. Tanzania* (judgment), *supra*, § 117.

⁷ *Nganyi and Others v. Tanzania* (Merits), *supra*, § 127 and *Benedicto Daniel Mallya v. United Republic of Tanzania* (Merits and Redress) (26 September 2019), 3 AfCLR 504, § 48.

⁸ *Cheusi v. Tanzania* (judgment), *supra*, § 117.

⁹ *Msuguri v. Tanzania* (Merits and Reparations), *supra*, § 83; *Cheusi v. Tanzania* (Judgment), *supra*, § 83; *Cheusi v. Tanzania* (judgment), *supra*, § 117; *Amini Juma v. United Republic of Tanzania*, ACHPR, Application No. 024/2016, judgment of 30 September 2021 (merits and reparations), § 104 and *Guéhi v. Tanzania* (merits and reparations), *supra*, §§ 122 to 124.

and conviction proceedings. The criteria include the (I) complexity of the case, (II) the Applicant's conduct and (III) the conduct of the domestic judicial authorities.¹⁰

I. The complexity of the case

9. With regard to this first criterion, the Court has consistently adopted a case-by-case approach. It took into account factors such as the number of witnesses who testified, the availability of evidence, the level of complexity of the investigations, and the existence of scientific evidence.¹¹
10. In the present case, the proceedings brought against the Applicant before the national courts did not require difficult or in-depth investigations. It concerns a murder charge based on statements made by the dying victim. The public prosecutor's office did not need to call many witnesses or experts. It called only three (3) witnesses, who were known in advance, even before the indictment procedure was initiated.
11. Moreover, the evidence was not difficult to gather. Indeed, no scientific evidence, such as DNA samples, was produced during the trial and the arguments raised during the trial focused mainly on the credibility of the witnesses.
12. Consequently, the case was not complex and the prolonged proceedings, which were not essential for determining the truth, cannot be substantiated or justified by the nature and complexity of the case. The overriding concern of the judicial authorities should have been to speed up the proceedings to avoid arbitrary denial of the defendant's liberty.

¹⁰ The case-law of the ACHPR is in this respect consistent with the case-law of the ECHR, according to which " The Court recalls that the reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case and having regard to the criteria established in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and that of the competent authorities" (see, among many others, *Pélissier and Sassi v. France* [GC],^{no.} 25444/94, § 67, ECHR 1999-II)

¹¹ *Cheusi v. Tanzania*, *ibid.* § 117; *Guéhi*, *ibid.* § 112 and *Nganyi and Others v. Tanzania* (Merits), § 115.

13. The Court admits, moreover, that "in such circumstances, [it] considers that the case was not complex, and the delay claimed by the Applicant cannot therefore be attributed to the nature and complexity of the case"¹².

II. The Applicant's conduct

14. In some cases, an applicant's conduct may justify prolonged proceedings. This could be the case if the accused is recalcitrant and refuses, for example, to appear before the court or in the event of force majeure, such as the accused being unavailable due to illness or other reasons.
15. In the present case, the Applicant was arrested immediately after the fatal attack on his mother on 27 December 2007. He was arrested the same day at his home after the village chief had reported the incident to the police. He was therefore in the custody of the authorities and was not accused of any obstructive behaviour likely to delay the proceedings, nor does anything of the kind appear in the file.
16. The Court also accepts this in § 60 of the judgment. What about the conduct of the judicial authorities of the defendant State?

III. The conduct of the domestic judicial authorities

17. The conduct of the Respondent State's authorities to avoid any unreasonable prolongation of the proceedings is an important, and indeed decisive, criterion. It should be borne in mind that this involves the denial of a fundamental human right, namely the right to freedom. The Court rightly stresses this when it states that "in determining whether the period of five (5) years and three (3) months between the arrest and the trial of the Applicant is reasonable, the Court deems it appropriate to assess the conduct of the Respondent State's judicial authorities during the said period"¹³.

13. § 52 of the Judgment.
14. § 52 of the Judgment.

18. To that end, it is appropriate to consider not only the attitude of the domestic courts, but also the relevant provisions of the domestic law and the extent to which they comply with the obligations entered into by the Respondent State at international level.
19. With regard to the Respondent State's domestic law, Article 32(2) of Tanzania's Criminal Procedure Code (CPC) states that an accused person must be brought before a court "*as soon as possible*"¹⁴ where the offence is punishable by death.¹⁵
20. In addition, Section 244 of the CPC, read in conjunction with Section 245, provides that the indictment proceedings must also take place "*as soon as possible*".¹⁶
21. Lastly, Section 248(1) of the CPC provides that the proceedings may be adjourned from time to time on warrant, and that the accused may be detained for a reasonable period, not exceeding fifteen (15) days, at any time.¹⁷

¹⁴ Emphasis added.

¹⁵ Section 32(2) - Where, in the absence of a warrant, a person has been taken into police custody for an offence punishable by death, he shall be brought before a court as soon as possible.

Section 32(3) - Where a person is taken into police custody pursuant to an arrest warrant, he shall be brought before a court as soon as possible.

¹⁶ Section 244 - Where a person is charged with an offence which cannot be tried in a lower court or in respect of which the *Director of Public Prosecutions* indicates to the court in writing or otherwise that it is not appropriate to determine the offence by summary trial, the proceedings in respect of the charge shall be taken, in accordance with the following provisions, by a lower court of competent jurisdiction.

Section 245(1) - After the arrest of any person or after the completion of investigations and the arrest of any person for the commission of an offence triable in the High Court, the person arrested shall, within the time prescribed in section 32 of this Act, be brought before a court of inferior jurisdiction under whose jurisdiction the arrest was made, stating the charges expected to be brought against him, to be dealt with according to law, subject to the provisions of this Act.

¹⁷ Section 248(1) - Where, for any reasonable cause to be stated in the pleadings, the court considers it necessary or desirable to postpone the hearing, it may from time to time, by warrant, detain the accused for a reasonable period not exceeding fifteen consecutive days in a penal institution or other place of safety.

Section 248(2) - Where the period of pre-trial detention does not exceed three days, the court may orally order the police officer or the person who has the accused in his custody, or any other relevant authority or person, to keep the accused in detention and to bring him to the time set for the opening or continuation of the investigation.

22. It should also be noted that the High Court of the Respondent State is empowered, under Sections 260(1)¹⁸ and 284(1)¹⁹ of the CPC, to adjourn the trial of an accused to a later hearing if there are sufficient reasons, such as the non-appearance of witnesses, to justify the resulting delay. However, the said provisions stipulate that the length of the delay must be "reasonable".
23. All these legislative provisions comply with the spirit and the letter of the international provisions cited in paragraph 3 of this opinion. All of them stress the need to speed up proceedings.
24. In its judgment, the Court made a distinction between two stages of the proceedings before the domestic courts, i.e. the indictment proceedings²⁰, on the one hand, and the commencement of the trial, on the other.
25. As regards the indictment proceedings, the Applicant was committed to the High Court for trial on 3 June 2009. A period of one (1) year and nine (9) months elapsed between the day the Applicant was arrested and the day he was indicted.
26. The Court notes that the Respondent State does not put forward any specific reasons to justify this delay of almost two (2) years. It also notes that, in the present case, the indictment states that, on 7 August 2008, the Public Prosecutor informed the Registrar of Bukoba High Court that the Applicant had been charged with murder. This information was recorded on 2 September 2008 and the Applicant was subsequently committed to the High Court for trial on 3 June 2009. Therefore, the Applicant did not appear before the High Court for trial during the entire period of almost two (2) years.

¹⁸ Section 260(1) - The High Court may, at the request of the prosecutor or the accused, if it considers that the adjournment is justified, adjourn the trial of any accused to its next session held in the district or in any other appropriate place, or to a subsequent session.

¹⁹ Section 284(1) - Where, by reason of the non-appearance of witnesses or any other reasonable cause to be recorded in the pleadings, the court considers it necessary or desirable to defer the commencement or adjournment of a trial, it may, from time to time, defer or postpone the trial on such conditions as it thinks fit for such period as it thinks reasonable and may, by warrant, remand the accused in custody in a penal institution or other place of safety.

21. § 52 of the Ruling.

27. Paradoxically, the Court admits that "in accordance with the relevant provisions of the law of the Respondent State [...], in such cases the trial must begin as soon as possible"²¹.
28. As regards the conduct of the trial itself, the Court's entire argument suggests that the delay was abnormally long, but it comes to a surprisingly opposite conclusion.
29. The Court notes that after the Applicant's appearance before the High Court on 3 June 2009, the case was adjourned to a date to be determined and notified by the District Registrar. In the meantime, the Applicant was remanded in custody. When the case was subsequently scheduled for trial on 31 May 2012, the hearing was adjourned again, as the sitting session had come to an end. On two further occasions, on 27 and 29 November 2012, the public prosecutor's office again requested that the case be adjourned on the grounds that hearings in other cases had not yet been completed. The Applicant's trial finally opened on 30 November 2012.
30. The Court justifies the protracted proceedings on the grounds that criminal trials in the Respondent State's judicial system are conducted in sessions, overlooking the fact that the Applicant was all the while in prison in uncertainty and anguish as to his fate.
31. The Court admits that the trial was adjourned on several occasions "due to time constraints because the sessions had ended before the case could be heard"²². It further states that "[I]t is also established that the cases which were awaiting trial before the Applicant's imprisonment were still in progress and that the successive sessions had to follow their normal course"²³.
32. Quite surprisingly, the Court concludes that "[i]n the light of the foregoing and having regard to the circumstances of the case, the Court considers that the

22. § 52 of the Judgment.

23. § 52 of the Judgment,

24. Idem.

period of five (5) years and three (3) months between the Applicant's arrest and the commencement of his trial cannot be regarded as unreasonable within the meaning of Article 7(1)(d) of the Charter"²⁴ and that "consequently, the Court considers that the Respondent State has not violated the Applicant's right to be tried within a reasonable time, protected by Article 7(1)(d) of the Charter"²⁵.

33. These are the facts and legal reasons for our dissent on the specific issue of reasonable time for trial. The Court did not pay due attention to the cardinal value that any human rights court must guarantee, namely freedom.
34. On the other points of the judgment, we can only endorse all the Court's conclusions and decisions, and in particular its decision to reopen the trial in light of the series of violations found.

Judge Rafaâ Ben Achour



25. § 52 of the Ruling.
26. § 52 of the Ruling