AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER

OF

EMMANUEL YUSUFU NORIEGA

V

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 013/2018

JOINT PARTIAL DISSENTING OPINION

BY CHAFIKA BENSAOULA VICE PRESIDENT AND STELLA I. ANUKAM AND DENNIS D. ADJEI, JUDGES

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1. We agree with our brothers and sisters on all the violations found in favour of the Applicant against the Respondent State except a violation of the right to a fair trial by failing to try the Applicant within a reasonable time as guaranteed in Article 7(1) (d) of the African Charter on Human and Peoples' Rights. We are of the opinion that the violation found by the majority, in which the Respondent State failed to try the Applicant within a reasonable time, is without a legal basis, and we shall express our disagreement in this partial dissenting opinion.

2. The Applicant alleges that the processes from the time of his arrest on 4 November 1995 to the commencement of his trial by the High Court on 11 December 1998 and the finalization of the appeal by the Court of Appeal on 27 October 2009, the highest Court in Tanzania was unduly prolonged as it took 13 years, 11 months and 23 days.

3. As it could be gleaned from the record of proceedings before the African Court, the Applicant was arrested on 4 November 1995 for a charge of murder, and his statement was recorded by the Police and Justice of the Peace at the Magistrate Court on 6

November 1995, thus 2 days after his arrest. The Applicant was arraigned before the Magistrate Court for committal proceedings and was committed by the Magistrate Court on 29 April 1997 to be arraigned before the High Court for the trial for murder. The trial before the High Court commenced on 5 November 2003 and ended on 12 March 2005, and the High Court rendered its judgment on 18 March 2005.

4. The Applicant filed a notice of appeal against the decision of the High Court, to the Court of Appeal on 18 March 2005, and the Court of Appeal rendered its judgment on 29 October 2009 and affirmed the judgment of the High Court. The Applicant filed a review application against the decision of the Court of Appeal before the same Court on 15 April 2014, which is 4 years and six months after the delivery of the judgment by the Court of Appeal. The Court of Appeal dismissed the review application on 18 August 2017 as unmeritorious.

5. The majority in this decision failed to take into account the processes involved in offences punishable by death, including investigation, committal proceedings, and preliminary hearing before the High Court before the commencement of the trial, and concluded that the trial was not conducted within a reasonable time. The laws are to ensure that the integrity of criminal trial in offences punishable by death or a number of years is not compromised by side-stepping any of the procedures provided, and as a result, such cases cannot be heard within the shortest possible time. From the facts of the case, the Applicant was arrested on 4 November 1995, and his statement was taken by the Police and Justice of the Peace on 6 November 1995. The Applicant was committed by the District Magistrate on 29 April 1997, after which the preliminary hearings began on 11 December 1998 and ended on 25 September 2003. The trial before the High Court took place between 11 December 1998 and 25 September 2003. It took less than eight years from the time of the arrest of the applicant for judgment to be delivered. The combined effect of Sections 244 and 245 of the Criminal Procedure Act (the CPA) provides for committal proceedings in offences punishable by death, and committal proceedings shall be held as soon as practicable.

Section 244 of the CPA provides as follows:

> "Whenever any charge has been brought against any person of an offence not triable by a subordinate court or as to which the court is advised by the Director of Public Prosecution in writing or otherwise that is not suitable to be disposed of upon summary trial, committal proceedings shall be held according to the provisions hereinafter contained by a subordinate court of competent jurisdiction. Sections 236 and 237 of the Criminal Procedure Code as amended by No. 10 of 1969 are relevant. Section 236 - When an accused person has been committed for trial the charge, copies of the statements and documents produced to the court during the inquiry, and the record of the proceedings of the inquiry, duly signed and authenticated by the magistrate, shall be transmitted without delay by the committing court to the Registrar of the High Court and authenticated copies of the charge, the statements, documents and proceedings aforesaid shall be forwarded to, the Director of Prosecutions. Section 237 also provides thus- The Director of Public Prosecutions may, at any time during a preliminary inquiry has been concluded, at any time before the trial before the High Court, request the court which is conducting or which conducted the preliminary inquiry to proceed to try the accused person on the charge in respect of which the inquiry is being or has been conducted, or where the charge is for an offence not triable by a subordinate court, on a charge for some other offence triable by a subordinate court and upon such request being made such court shall proceed to try the accused on such charge as if proceedings by way of preliminary inquiry had never been commenced.[1]"

6. The High Court of the Respondent State sits in sessions, and when a criminal trial cannot be held in one session and has to be postponed to another session where the High Court considers that that there is sufficient cause for the delay to postpone the trial to another session, these proceedings form part of the preliminary hearing before the High Court. Consequently, reasonableness of time shall not be determined without taking into account that the High Court sits in sessions and sittings are not available all year long and which affects the time that trial may be commenced and completed.

[1] Section 244

Section 260(1) of the CPA provides as follows: –

> "It shall be lawful for the High Court upon an application of the prosecutor or the accused person, if the court considers that there is sufficient cause for the delay, to postpone the trial of any accused person to the next session of the court held in the district or at some other convenient place, or to a subsequent session.[2]"

7. The established jurisprudence of this Court provides that in determining the right to be tried within a reasonable time, the Court adopts a case-by-case approach, and the factors it takes into account include the complexity of the case, the conduct of the parties and the conduct of the police and judicial authorities as to whether they exercise due diligence where the applicant faces severe penalties including offences punishable by death or where long sentence may be imposed upon conviction.[3]

8. The Respondent State called five witnesses, and in a matter where the Applicant puts up a defence of intoxication, the prosecution shall have the onerous duty to examine the medical condition of the Applicant, the Applicant's mental condition at the time he murdered the victim. We are of the considered opinion that the case was complex, and that accounts for the reason why the prosecution called five prosecution witnesses. It is, therefore, wrong for the majority to conclude that the case was not a complex one.

9. The majority was further influenced by Sections 32(1), (2) and 3 of the CPA, which deals with bail pending investigation and is therefore irrelevant to determining whether a case was heard within a reasonable time or not. Section 32 of CPA is intended to ensure that accused persons are not detained at the police department which investigates without arraigning them before a court to determine whether to grant bail or not. The majority should not have taken into account the question of bail where an accused person is arrested, as it is not the case of the Applicant that he was not taken before the court when he was arrested. We are of the opinion that the majority arrived

[2] Section 260(1) of the Criminal Procedure Code
[3] AfCHPR *Nzigiyimana Zabron v United Republic of Tanzania*, (merits) Application No. 051/2016) (Judgment of 4 June 2024)

at a wrong conclusion, which is partly attributable to reference to the requirements of Section 32 of the CPA to determine the reasonableness of time.

> "Section 32(1)- Where any person has been taken into custody without a warrant for an offence other than an offence punishable with death, the officer in charge of the police station to which he is brought may, in any case, and shall if it does not appear practicable to bring him before an appropriate court within twenty four hours after he was so taken into custody, inquire into the case and, unless the offence appears to that officer to be a serious nature, release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a court at the time and place to be named in the bond; but where he is retained in custody, he shall be brought before a court as soon as practicable.
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> Section 32(2) - Where any person has been taken into to custody without a warrant for an offence punishable with death, he shall be brought before a court as soon as practicable.
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> Section 32(3) - Where any person is arrested under a warrant of arrest, he shall be brought before a court as soon as practicable[4]."

10. The Applicant, upon his conviction by the High Court on 18 March 2005, filed a notice of appeal against same on that date, and the judgment of the Court of Appeal was rendered on 27 October 2009. The Applicant, who is alleging delay in prosecuting the appeal, failed to inform this Court of the date on which the record of appeal was prepared by the High Court for the appeal to be heard. The basic rule of evidence is that a party who asserts has the burden to prove it against the other party. The majority failed to discuss the party who has the burden of proof and shifted the burden to the Respondent State to discharge. We are of the considered opinion that the Applicant failed to prove the cause of the delay before the Court of Appeal, and we hold that the Applicant failed to discharge the burden of proof, and the issue should be ruled against him. The majority, further failed to appreciate that an appeal, which is a creature of statute, is filed as of right, and it is the next stage of the trial, and it is, therefore, incongruous to merge the appeal process with the trial, which is separate and distinct.

[4] Section 32(1)

We are of the considered opinion that the four and half years within which the appeal records were obtained, heard, and judgment delivered cannot be said to be unreasonable. The Applicant could not prove any lapses on behalf of the Respondent State, and we find it difficult to understand the legal basis upon which the majority concluded that the appeal process was delayed by the Respondent State.

11. The Applicant who alleges that the trial process was unduly prolonged and which the Respondent State denied, has to be proved by the Applicant, but the majority unfortunately shifted the burden of proof to the Respondent State contrary to the Court's own jurisprudence and that of the African Commission on Human and Peoples' Rights. The Applicant was represented by counsel throughout the proceedings and the Applicant should be in the position to prove the part played by the Respondent State which unduly prolonged the trial but the Applicant failed to prove the same. The African Commission, in its established jurisprudence, has held that the Applicant bears the initial burden of proving his case, including establishing the facts and the alleged violations before the burden of proof may shift to the respondent State to rebut the allegations.[5]

12. The Applicant, being dissatisfied with the judgment of the Court of Appeal delivered on 27 October 2009, which affirmed the judgment of the High Court confirming his conviction, sat on his rights until 15 April 2014, when he filed an application for review, which he could have filed as of right within fourteen days but filed it barely four and half years from the date of the delivery of the judgment and which was dismissed by the Court of Appeal on 18 August 2017.[6]

[5] AfCHPR, *Michelot Yogogombaye v Senegal* (jurisdiction), Application No. 001/2008, Ruling of 15 December 2009; African Commission on Human and Peoples' Rights, Sir Dawda K. Jawara / The Gambia, Communication no. 147/995;and Zimbabwe Human Rights NGO Forum v Zimbabwe , African Commission on Human and Peoples' Rights, Communication no. 245 /02, 2006.

[6] Tanzania Court of Appeal Act(Cap 141)[RE 2019],Section 95 (1) provides an application for review shall be made by petition which shall be lodged with the Registrar within fourteen days after the date of the decision of the Court.

13. We hold that the Applicant failed to prove to the Court that the trial was unduly prolonged at the instance of the Respondent State, and the Applicant is not entitled to the relief sought.

Signed:

Chafika BENSAOULA, Vice President

Stella I. ANUKAM, Judge

Dennis D. ADJEI, Judge

Done at Arusha, this Twenty Sixth Day of June in the year Two Thousand and Twenty-Five the English text being authoritative.