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Dissenting Opinion

Blaise Tchikaya, Judge

African Court on Human and Peoples' Rights (ACHPR)

The Matter of *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania*

7 December 2018

1. Having not been able to agree with my colleagues in the decision *Werema Wangoko Werema and Waisiri Wangoko Werema v. United Republic of Tanzania*, I hereby explain why I hold a different view. My idea is that this case should have been dismissed as inadmissible by the Court sitting in Tunis. The matter has been brought too late before this Court.

2. In the instant case, the Applicants are serving 30 years prison sentence at Butimba Central Prison in Mwanza, Tanzania, following their conviction for armed robbery. They petitioned the African Court on 2 October 2015. The petition came after the Tanzanian courts (the High Court and the Court of Appeal) upheld their conviction by Judgments of 9 October 2002 and 1 March 2006[1]. The Application was filed before the African Court in 2015, that is, nine years after the last decisions of the domestic courts. This Application should have been rejected by this honourable Court because of the time - too long - elapsing between 2006 and 2015.

3. Procedural incidents seem to have been debated in the case, but this could not convince. The context of the case, indeed, shows that no legally valid element intervened to breach the nine years period preceding the Application before the African Court. The Court should have proffered as reason for rejecting the Applicant's case the general principle of reasonable time[2].

4. It will therefore be shown that this appeal is manifestly out of time (I). Besides, the imperativeness of reasonable time will be raised as it renders

[1] ACHPR, Matter of *Werema Wangoko Werema and Waisiri Wangoko v. Tanzania*, 7/12/2018, p. 3, § 6.

[2] Fauveau (I. N.), Duration of international trial and the right to a fair trial, *Revue québécoise de droit international*, Hors-série, October 2010, p. 243

legally incomprehensible the decision of the Court in this case. The appeal of *Messers Werema* against Tanzania should be deemed inadmissible (II).

I. That the Application was filed out of time is clearly established

5. The mere fact that an appeal is out of time obliges the judge to dismiss it, whatever the cause. This is somehow a counterpart to the obligation on the part of States to organize their judicial system in a way that ensures that their courts can guarantee for everyone the right to obtain a final decision on disputes within a reasonable time.

6. As has been stated, the dates, which are not contested by the Applicants, indicate clear nine years between the Tanzanian domestic judges and the date on which this Court was seised (2006-2015). Two elements, which are fairly broadly recognized in the Court's jurisprudence could have interrupted and reactivated these time frames; they are the present application for review in this case (A) and the incident resulting from a letter from the Tanzania Human Rights Commission(B). The inadmissibility of the application for review as submitted confers no new right in as much as the appeal was submitted out of time. The issue is therefore no longer that of exhaustion of local remedies, since the local remedies had been exhausted in this case. This can therefore be considered as having no legal effect, same as the issue of the letter from the Tanzania Human Rights Commission referred to in the case file.

A. The Applicants' Application for review was out of time, and hence fruitless

7. The review remedy was one of the arguments available to reactivate the case. It is apparent from the case file that the application for review of their conviction before the Court of Appeal was dismissed on the ground that it had been brought out of time. An appeal may be considered only if it is positive, regardless of its merits. It legitimately must not amount to a maneuver or a diversion. It must fulfill the conditions of admissibility. The appeal for review of a decision must itself be valid and must be filed within deadlines, if the appeal is to reactivate the deadlines.

8. The applicants could have requested, and could still request, an extension of time. *Messers Werema* do not challenge this observation, but instead sought to circumvent it through extra-judicial elements, elements that Tanzanian justice refuses to internalize. Even if one holds the view that the national judge must not lend himself to a rigid interpretation of the domestic

law[3], he retains the power of control over the time in which to render justice in the interest of all. The view may be held that the Tanzanian judge had been able to assess the merits of the appeal brought before him.

9. Since the time limit had been set, the applicants could have requested an extension of time. They simply suggest that they hardly cooperated in a proper administration of justice. It is in these circumstances that the Respondent State, concerned about the idea of rendering justice to the victims, was able declare that the Application could not succeed. We are faced in this regard with the assumption from which the idea was forged that the right of access to the courts that benefits the litigants is not absolute; that it has obvious and accepted limitations. This is particularly the case for the conditions of admissibility of an application. The said conditions, by their very nature, call for regulation by the State. The latter has a margin of manoeuver in making assessment[4]. This, indeed, have been accepted by jurisprudence and doctrine. These powers of the State are always in a relation of tension between the offense committed and the administration of a just and proportionate punishment.

B. The incident introduced by the Tanzania Human Rights Commission does not prosper

10. An investigation by the Commission for Human Rights and Good Governance (CHRGG) supposedly revealed that the victim had received reparation from the actual aggressors, at the request of the local authorities That procedural incident seemed to show that the conviction of *Messers Werema* was either wrong or improper. It is presumably based on a mistake of fact as regards the identity of the true perpetrators of the crimes. The applicants allege that this finding was confirmed by "the unfolding truth". These facts were presumably not mentioned in the records of all the proceedings conducted by the domestic courts.

11. The aforesaid allegations are contained in a letter from the Commission for Human Rights and Good Governance, an organ of the Government of the Respondent State established for the purpose of promoting human rights. The

[3] ECHR: Judgment *Ivanova and Ivashova v. Russia*, 26/4/2017

[4] ECHR: Matter of *Luordo v. Italy*, 17/7/2003 : "The Court also recalls that the right to a tribunal is not absolute; it lends itself to implicitly accepted limitations, particularly with regard to the conditions of admissibility of an appeal, because by its very nature it requires a regulation by the State, which enjoys in this respect a certain margin of manoeuvre in making assessment" (*Ashingdane v. United Kingdom*, Judgment of 28/5/1985, Série A No. 93, pp. 24-25, § 57) », § 85.

evidence on file shows that the Respondent State was aware of the Commission's findings. In any event, only the national judge, subject to a denial of justice, may re-examine and validly adjudicate on the facts initially placed on the file record of a case.

II. Messers Werema's Application against Tanzania should be deemed inadmissible for having been filed in an unreasonable time

12. An action can only be brought within an acceptable period of time, mindful of the procedure and guaranteeing the rights of others. "Reasonable period of time"[5] presupposes three dimensions, that is, the reasonable period of time to be respected in domestic proceedings, the reasonable period of time within which the international court must render its decision and, finally, the reasonable period of time that the applicant must observe in submitting his application to the international judge[6]. It is the latter dimension that is at issue in the *Werema case* before this Court. In the same vein, the International Court of Justice recognized a *corpus* of rules in its *Advisory Opinion on the Review of Judgment No. 158 of the United Nations Administrative Tribunal in 1973*[7], which includes procedural rights, "the right of access to an independent and impartial tribunal established by law, the right to obtain a court decision within a reasonable time ... ". This is the line followed by the Court and as expressed in *Norbert Zongo v. Burkina Faso*[8], of which the famous paragraph 121 states that the Court "appreciates the reasonableness of reasonable time on a case-by-case basis" (A). This analysis leads to the conclusion that the *Messers Werema* arrived late before the African Court and that their application does not respect the fundamental principle of reasonable time (B).

A. An infringement of the fundamental principle of reasonable time

13. Desperate, the applicants seem to have simply gone in search of new judgments in disregard of the time and the role of each jurisdiction. In *Ernest Francis Mtingwi v.*

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[5] Article 8.1 of the Inter-American Convention on Human Rights provides that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law..."

[6] Article 7 of the African Charter on Human and Peoples' Rights stipulates that: "Every individual shall have the right to have his cause heard. This comprises: ... the right to be tried within a reasonable time by an impartial court or tribunal".

[7] ICJ : *Application for review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion,* 12/7/1973, Rec. 1973, p. 209, §92

[8] ACHPR, Matter of *Norbert Zongo*, Preliminary objection and merits, 29/6/2013 and 28/3/2014

Tanzania, however, the Court declared that it is not an appellate body for decisions rendered by national courts. This position was also emphasized in its judgment of 20 November 2015 in the matter of *Alex Thomas v. Tanzania*. It is up to each court to ascertain whether actions have been brought before it within a reasonable time. The Court had to indicate that it did not deviate from its jurisdiction to ascertain whether the proceedings before the national courts had met the international standards established by the Charter or other applicable human rights instruments[9].

14. It turns out that, in this case, the Court should dismiss this Application for having been filed within unreasonable time. The applicants in fact lodged an application for review of the judgment of the Court of Appeal on the ground that it contains "manifest errors". On 19 March 2015, the Court of Appeal dismissed the Application on the ground that it had not been filed within the time frame prescribed by law. The Applicants do not dispute the lateness of their application for review pursuant to Article 107(A)(2)(c) and (e) of the Constitution of Tanzania. The time limit for appealing to the Court of Appeal in this case is the one applicable to ordinary proceedings, and this period may be extended for just cause. The Application did not meet the conditions of admissibility set out in Article 40(5) of the Rules concerning the exhaustion of local remedies.

15. It is clear that the application for review was not presented in acceptable terms before the domestic judge who had jurisdiction to hear it. As such, it cannot justify the fact that the Court regards it as an element capable of reactivating the assessment of reasonable time. Presented in 2015, the African Court accepts, in the interest of effective preservation of human rights, that extraordinary remedies do reactivate deadlines, but it is right that the said remedies comply with the law and that they meet the required conditions. The application for review *Werema et al.* has been submitted out of time and the Applicants themselves do not dispute this.

16. It was during the *Genie Lacayo* case, subject of the decision of 29 January 1997, that the Inter-American Court was able to adjudicate for the first time on application of Article 8, § 1 of the Inter-American Convention on Human Rights. The Court had defined the principle of reasonable time. On the criteria defined by the inter-American judge in the afore-mentioned important jurisprudence, one of them is notable in the *Werema case*: the non-diligent character of the applicants[10].

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[9] ACHPR, Matter of *Norbert Zongo*, Preliminary objection and the merits, 29/6/2013 and 28/3/2014.
[10] Among the three criteria identified for assessing reasonable time, complexity of the case, behavior of the parties and the attitude of the courts, are recognized.

B. A position dismissing the Application in this case would not have contradicted the Court's jurisprudence

17. The Court had two options: (1) to dismiss, by way of an order, after finding that the 19 March 2015 review decision had been dismissed for having been filed out-of-time; or, 2) having associated the merits with the procedure, take a relatively simple decision to dismiss.

18. Our jurisprudence is precise. Applicants are not required to exhaust extraordinary remedies. The Court had noted that in the Tanzania judicial system, the procedure for filing an application for review before the Court of Appeal is an extraordinary remedy which the applicants are not required to exhaust before bringing a case before it[11]. When they exercise this remedy to activate a deadline, the balance of rights and legal certainty must be recognized in order to recognize the procedural and substantive conditions that must be respected. The *Werema* review application did not meet these conditions.

19. The duty of promptness attached to human rights litigations has been observed by the Tanzania judicial authorities. The deficiencies were not held against them until the late application submitted for review. In *Wong Ho Wing v.Peru*[12], the Inter-American Court analyzed compliance with the right to judicial protection and procedural safeguards. In that case, the Inter-American Court sets forth four elements to be taken into account in determining whether a procedure has exceeded the reasonable time. These are: the complexity of the case, the procedural activity of the person concerned, the conduct of the judicial authorities and the sufferings of the person concerned as a result of his legal situation. These conditions were followed in the *Werema* case until rejection of the request for review.

20. To take into account the peculiarity of the case, it may be noted that it involved a period of too long a stagnation. The Court noted that the Court of Appeal delivered its criminal appeal judgment on 1 March 2006. The Court further found that the application was lodged before it on 2 October 2015. The unduly long stagnation period ended. This state of affairs has already been denounced in international human rights law. The applicants must be diligent and not provoke inactions in the

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[11] ACHPR: Matter of *Mohamed Abubakari*, 3/6/2016, § 66 to 68,

[12] IACHR Matter of *Wong Ho Wing v. Peru*, Preliminary Objection, Merits, Reparation and Costs 30/6/2015

judicial process. The applicants are required to do so in their own interest and for equilibrium of the law[13]

In view of the foregoing, I file this dissenting opinion as I could not be convinced of the outcome of this case.

Done at Tunis, this Seventh Day of December in the Year Two Thousand and Eighteen, in English and French, the French text being authoritative

Blaise Tchikaya, Judge

[13] The time-limits for bringing proceedings leading to inadmissibility (*Melnyk v. Ukraine*, § 26, *Miragall Escolano and Others v. Spain* § 38). It is however up to the litigants to act with due diligence (*Kamenova v. Bulgaria**, §§ 52-55).

2018-12-07

Disenting Opinion of Judge Tchikaya in Werema Case Dated 07 December 2018

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