024/2015
07/12/2018
(000313 – 000310) RM

Joint Separate Opinion of Justice Ben KIOKO and Justice Tujilane R. CHIZUMILA

1. We fully agree with the findings of the majority on the merits of this application. However, there is one particular issue in the judgement which we believe that the majority could have been more robust in its reasoning and eventually order the Respondent State, even if as *obiter dictum*, to take necessary steps to clarify the doubt cast by the new evidence obtained from the Commission on Human Rights and Good Governance (CHRGG), which is the national human rights institution of the Respondent State.

2. The letter from the CHRGG to the Applicants informed them that the former had established, as indicated in Paragraph 70 of the Judgment, that the true perpetrators of the crime were other persons and who had in fact paid compensation of six (6) cows and Tanzania Shillings one hundred and twenty thousand (120,000 TZS) to the victim.

3. The Court in paragraph 73 of its decision has observed that the letter issued by CHRGG was not adequate evidence for it to conclude that it would potentially annul the conviction of the Applicants or likely result in a substantially different outcome to the one reached by the domestic courts. This is, as the majority noted, because of the fact that the said letter, indicating that the true perpetrators of the crime in question were others, not the Applicants, was issued following a preliminary investigation by CHRGG into the matter. However, it should be noted that this aspect was not contained in the letter to the Applicants and was highlighted only in the letter to the Court, perhaps, with the intention of justifying why the Commission could not appear before the Court on this matter.

4. In their submissions, the Applicants have not indicated that the attention of the Respondent State's judicial or justice authorities was drawn to the letter or that they had an opportunity to undertake a further enquiry on the issues raised in it. This is partly because the Applicants received the letter only in 2011 long

after the appellate proceedings in the domestic courts were completed in 2006 and it was not practically possible for them to file it as evidence to challenge their conviction in the course of such proceedings. It is also not clear whether the CHRGG on its part communicated the contents of the letter to judicial or justice authorities or whether the latter had attached the letter to their request for review at the Court of Appeal, which was declared inadmissible only in 2015 for being filed out of time.

5. Indeed, if the Applicants had alleged in their application before this Court that the letter was attached to their application for review before the Court of Appeal, in our view, this court would have had to examine whether domestic courts had violated applicant's rights by not doing substantial justice without regard to technicalities. In the circumstances, we concur with the majority's conclusion that there are no sufficient grounds to find violations of the rights of the Applicants entailing the responsibility of the Respondent State.

6. Granted that the findings of the CHRGG point to the possibility that the Applicants may have spent over 17 years in prison for a crime they did not commit, it is our strong opinion that a human rights court ought to explore all avenues to ensure that the Respondent State undertakes full investigations on this matter to establish the culpability or otherwise of the Applicants. This could have included requiring the parties to appear before the Court and making submissions on this matter. In addition, the letter tendered by the Applicants, as the majority observed, comes from a government institution, that is, CHRGG, with a constitutional mandate to protect human rights in the Respondent State. Although it is not clear whether the full investigations have been concluded by CHRGG, we are of the considered view that the fact that it is a constitutionally established body gives some weight to the probative value of the letter.

7. Furthermore, we do not see how the categorical finding by the CHRGG can change even after further investigations. Payment of compensation of cows and money in a traditional setting in an African village cannot be a confidential exercise. In any event, the information given by the CHRGG was collaborated

by the Applicants' assertions that the prosecution witnesses had admitted to the former's witnesses that they erred in identifying the real culprits and that they apologised to the Applicants' relatives for the same.

8. Despite the fact that the Respondent State's responsibility is not engaged, we also think that the Court should have given some importance to the said letter and taken judicial notice of its contents to urge or at least, encourage the Respondent State to take necessary measures to clear the shadow of doubt cast on the Applicants' conviction. We understand that the majority's hesitance to do so stems from the lack of an explicit normative basis that would enable the Court to make such order in circumstances where it has not found the Respondent State in breach of its international obligations in the Charter or other human rights treaties to which is it is a party.

9. However, it is also not unusual for international courts to make remarks, including in the form of *obiter dictum* when the need arises and we are of the view that the majority could have done the same in the instant Application.

10. In view of the above, we regret that the Court failed to nudge or urge the Respondent State to take judicial or other administrative measures to decisively establish the truth of the preliminary findings of the CHRGG and to clear any doubt about the culpability of the Applicants.

11. As the traditional legal adage goes 'It is far *better* that ten *guilty* men go *free* than one *innocent* man is wrongfully *convicted'. Even after conviction, the right to be heard requires the possibility of review of such conviction when, for example, there is new evidence, which, as is the case in the instant Application, casts doubt on the Applicants' conviction.* Every government owes a duty of care to its citizens and since the CHRGG is a government agency it should not be difficult for the authorities to implement whatever final findings have been reached relevant to the culpability of the Applicants.

12. Furthermore, in our view, the Court's reasoning should not have been predicated on speculation as to the potential impact of the letter on the Applicants' conviction, had it been available at the time of their trial and appellate proceedings. What is more relevant and which the majority should have relied on, rather, is the fact that there is nothing on record to show that the letter was presented and considered by the domestic courts although it was in the possession of the Applicants at the time of the Application for review of the Court of Appeal's decision.

13. In spite of the fact that the Court has not urged the Respondent State to ensure that investigations initiated by CHRGG are concluded and necessary action taken as may be necessary, we express the hope that the State will still do so in exercise of its international responsibility and the duty it owes to its citizens.,

Done at Tunis, this 7th of December in the year Two Thousand and Eighteen in English and French, the English text being authoritative.

Justice Ben KIOKO-Vice President

Justice Tujilane R. CHIZUMILA

2018-12-07

Joint and Separate Opinin Of Justice KIOKO and CHIZUMILA in Werema Case Dated 07 DEcember 2018

African Court on Human and Peoples' Rights

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