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26/09/2019
(000380 – 000376) ON

African Court on Human and Peoples' Rights

Shukrani Masegenya Mango and others v. United Republic of Tanzania

Application No. 0082015

Dissenting opinion attached to the Judgment of 26 September 2019

1. I would have shared the opinion of the majority of the Judges with regard to the Operative Part of the Judgment. Unfortunately, the manner in which the Court treated the admissibility of the Application is at variance with the principles governing joint application.

2. It is clear from the joint application filed on 17 April 2015 that the Applicants, seven in all, alleged human rights violations by the Respondent State, but it should be noted that:

3. Although Shukrani Masegenya Mango and Samuel Mtakibidya were both convicted and sentenced for armed robbery, the sentences condemning them were not rendered by the same court. The proceedings that led to the conviction of one and the other are completely distinct in dates, in facts and in law. Indeed:

4. Shukrani Masegenya Mango was prosecuted for armed robbery before the Mwanza District Court, convicted on 7 May 2004 and sentenced to 30 years' imprisonment;

5. While Samuel Mtakibidya prosecuted for armed robbery before the Handeni District Court in Tanga was found guilty and sentenced to 30 years' imprisonment on 5 August 2002.

6. As for Applicants Ally Hussein Mwinyi and Juma Zuberi Abasi, the former charged with murder before the Dar es Salaam High Court, was convicted and

sentenced to death on 15 February 1989 and on 21 September 2005, his sentence was commuted to life imprisonment. The latter charged with murder was convicted by the High Court of Dar es Salam on 27 July 1983 and sentenced to death; his sentence was commuted to life imprisonment on 14 February 2012.

7. As for Applicants Julius Joshua Masanja and Michael Jairos, the former was tried for murder before the Dodoma High Court, convicted and sentenced to death on 11 August 1989, and his sentence commuted to life imprisonment on 13 February 2002. The latter was prosecuted for murder before the Morogoro High Court, convicted and sentenced to death on 25 May 1999, with his sentence commuted to life imprisonment on 12 February 2006. Lastly, Applicant Azizi Athuman Buyogela prosecuted for murder before the Kigoma High Court, was found guilty and sentenced to death, sentence commuted to life imprisonment on 28 July 2005.

8. Although all the Applicants are indeed accusing the Respondent State of human rights violations, Applicants Shukrani and Samwel are, in addition, challenging the legality of the sentence pronounced against them.

9. It is clear from the foregoing that each Applicant was prosecuted and convicted by different judicial authorities, on different dates, for different events, even though some of the charges have the same characterization and others the same convictions.

10. A reading of the definitions of joint application leads to summarizing it into one action or one legal proceeding or one procedure that allows a large number of persons to sue a legal or natural person in order to obtain an obligation to do, not to do or give.

11. Originally from the United States, the first joint application took place in the 1950s after the explosion of the cargo ship at Texas City, where 581 people perished and the beneficiaries of the victims filed a lawsuit for reparation by

joint application. This procedure is now widespread in several Common Law countries and also in several European countries.

12. The advantage of this remedy is that a large number of individual complaints are tried in a single trial when the facts and standards are identical, to avoid repetition over days with the same witnesses, the same evidence and the same issues from trial to trial.

13. It also solves the problem of paying lawyers when the compensation is modest, ensures all applicants the payment of compensation by avoiding that the first to file an application are served first without leaving anything for subsequent applicants, centralizes all the complaints and equitably shares the compensation between claimants in case of victory and, lastly, it avoids discrepancies between several decisions.

14. Victims are of a similar situation, the damage caused by the same person with a common cause, the prejudice must be common, the issues on which the judges should rule must be common in fact and in law.

15. The choice between joint application and individual application must be assessed on a case-by-case basis, since major damages are generally not appropriate for collective processing because the complaint almost always involves issues of rights and facts that will have to be tried again on an individual basis.

16. It follows from comparative law, as well as from certain decisions of international human rights bodies, that a joint application is subject to conditions other than admissibility and jurisdiction over the existence of a sufficient link drawn from the following elements:

- identity of the facts,
- identity of jurisdiction,
- identity of procedure leading to the conviction of the applicants.

17. In it Grand Chamber Judgment on *Hirsi Jamaa and others v. Italy* delivered on 23 February 2012, the ECHR was seized by 24 claimants (11 Libyans and 13 Eritreans).

18. In that case, more than 200 migrants had left Libya in three boats bound for the Italian coasts. On 6 May 2009, while the boats were 35 miles south of Lampedusa in international waters, they were intercepted by Italian coast guards and the migrants were taken back to Tripoli. The Applicants (11 Somalians and 13 Eritreans) argued that the Italian authorities' decision to send them back to Libya had, on the one hand, exposed them to the risk of being subjected to ill-treatment and, on the other hand, to the risk of being subjected to ill-treatment if repatriated to their countries of origin (Somalia and Eritrea). They thus invoked the violation of Article 3 of the European Convention on Human Rights. They also felt that they had been subjected to collective expulsion prohibited by Article 4 of Protocol 4. Lastly, they invoked the violation of Article 13 of the ECHR since they considered that they had no effective remedy in Italy to complain about alleged breaches of Articles 3 and 4 of Protocol 4.

19. The application was lodged with the European Court of Human Rights on 26 May 2009. In the judgment rendered, the European Court of Human Rights observed that the applicants were all within the jurisdiction of Italy within the meaning of Article 1 the ECHR, since they complained of the same facts and alleged the same violations. It unanimously concluded on the admissibility of the joint application and the violation of Article 4 of the Protocol.

20. Similarly, in *Wilfried Onyango Nganyi and 9 others v. Tanzania*, the African Court on Human and Peoples' Rights considered on 18 March 2016 that the application fulfilled the conditions of admissibility of a joint application cited above, because they were prosecuted for identical facts in an identical procedure before the same courts and in a single judgment at national level.

21. Faced with this state of affairs, the Court in its Judgment which is the subject of this dissenting opinion, declaring the application admissible without basing its decision on legal grounds for the admissibility of the joint application and by ignoring this peculiarity of the application, breeched the principles of reasoning decisions set forth in Rule 61 of the Rules and has completely shifted from its jurisprudence and that of international human rights courts.

Judge Bensaoula Chafika

African Court on Human and Peoples' Rights

2019-09-26

Dissenting Opinion of Judge Bensaoula CHAFIKA in the Matter of Shukrani MANGO Et AL Versus The United Republic of Tanzania

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