

African Court Jurisprudence: Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania

By Harriet Page

Periodically, ARC reviews the jurisprudence of the African Court of Human and Peoples' Rights. In respect of Application No 006/2013, Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania, the following case summary has been prepared by Harriet Page on behalf of ARC.

Application

The Application was filed on 23 July 2013 by 10 citizens of Kenya against the United Republic of Tanzania. The Applicants alleged that they were in Mozambique exploring business opportunities when on the 16 December 2005 they were kidnapped and arrested by Mozambican police in collaboration with Kenyan and Tanzanian Police Forces. The Applicants alleged that this took place after a false report made by Maimouna Salimo alleging that the Applicants were linked to dangerous elements in the Kenyan military forces.

The Applicants alleged that they were acquitted by a Mozambican Judge who ordered their release, but Mozambican Police kept them in custody until they were transferred, allegedly unlawfully, to Tanzania on 16 January 2006 by military plane. This transfer by military plane happened after the Applicants refused to board a commercial flight bound for Dar-es-Salaam in the presence of Tanzanian and Kenyan Police Officers.

When the Applicants landed on 16 January 2006, they alleged they were handcuffed, blindfolded and driven to three different locations and locked up. They then alleged that on the 19 January they were driven to Kilimanjaro International Airport Police Station where they alleged they were victims of severe beatings with heavy sticks and metal rods, torture by electric shocks from a torture police squad and were refused access to their lawyers.

The Applicants alleged that they were eventually charged with a range of serious criminal offences. and claim that the trials for these offences have been delayed and contain multiple violations of human rights.

Three were released after a murder charge was withdrawn by the Respondent for lack of evidence, but five were convicted for conspiracy to commit an offence of armed robbery. They were sentenced to 30 years in prison. The remaining two Applicants died in detention during the course of the trial.

Proceedings before the National Courts of Tanzania

The Applicants alleged that they have exhausted all local remedies, pointing out that their Applications proceeded to the Court of Appeal twice, both without success. The Applicants state that the reason they brought their Application to the Court is because the Respondent was taking too long to initiate proceedings as directed by the Court of Appeal in Case 79 of 2011.

At the time the Applicants submitted their application there were three criminal cases pending in the Respondent's Courts.

Alleged violations

The Applicants alleged that their right of properties, rights of freedom, rights of work and rights to be tried within a reasonable time by the Courts were violated by the Respondent State.

Procedure before the Court

Pan African Lawyers' Union (PALU) took over representing the Applicants on 11 August 2014 after initial problems with the Applicants' counsel.

The Applicants applied to the Court on 13 May 2015 that the Court direct the Respondent to transfer them from prison in Dar-es-Salaam to Karanga Prison in Moshi so that they could be present at the hearing. On the 18 May 2015, the Court decided that the presence of the Applicants was not necessary given the circumstances of the case.

On the 21 May 2015 a public hearing took place where both Parties made oral submissions and responded to questions by the Court.

Prayers of the Parties

The Applicants applied for restoration of their rights which were violated by the Respondent State and an order for reparations to remedy the violations.

In summary, the Applicants also applied for:

- a declaration that the Respondent State had violated their right to be tried within a reasonable time, as required by Article 7 of the Charter;
- a declaration that their right to be afforded legal aid and representation for the entire duration of the trial had been violated;
- an order that the pending case be concluded within a reasonable time as the Court may determine;
- an order that the Court orders that the Respondent State provide legal aid and representation to the Applicants for the remainder of the Appeal within the National Courts;
- reparations;
- an order for their immediate release; and
- any other declaration that the Court may deem fit.

The Respondent raised objections in regards to the Court's jurisdiction and the admissibility of the Application. In regards to the admissibility of the Application, the Respondent argued that:

- the Application had not evoked the jurisdiction of the Court;
- the Applicants had no "locus standi" to file an Application before the Court and it should be denied as per Article 34(6) and 5(3) of the Protocol;
- the Application had not met the admissibility requirements under Rule 50(2), (5) and (6) of the Rules or Article 56 and Article 6(2) of the Protocol;
- the Application had not met the mandatory procedural requirement in Rule 34(1);
- the Application be dismissed under Rule 38; and
- the cost of the Application be borne by the Applicants

In regards to the merits of the Application, the Respondent submitted that:

- the Tanzanian Police did not forcefully kidnap and abduct the Applications in collusion with Mozambican and Kenyan Police Officers;
- that the Government of the United Republic of Tanzania had not violated the Applicants' right to own property, right to freedom, right to work, right to be tried within a reasonable time;
- no reparations be awarded; and
- the cost of the Application be borne by the Applicants.

Jurisdiction of the Court

The Court overruled the Respondent's objection that its jurisdiction had not been invoked simply because the Applicant's have not mentioned the Protocol or the Charter. The Court stated that it is sufficient that the rights allegedly violated are guaranteed by the Charter or any other instrument to which the Respondent is a party. Therefore, it held that it had jurisdiction *ratione materiae* to deal with the Application.

The Court also found that it had *ratione personae* to receive the Application, thus rejecting the Respondent's argument that the Court lacks jurisdiction because of the allegations against Kenya and Mozambique.

The Court's jurisdiction *ratione temporis* and *ratione loci* has not been challenged.

Admissibility of the Application

The Respondent set out four preliminary objections to the admissibility of the Application and the Court dealt with each of these in turn.

Firstly, the Respondent argued that the Application does not comply with Rule 34(1) of the Rules of the Court because the Application was not signed by the Applicants or their representatives. However, the Court found this objection "immaterial and irrelevant" as the Application was supported by documents which were signed.

Secondly, the Respondent argued that the Application is incompatible with the Charter of the Organisation of African Unity or with the Charter under Rule 40(2) as the Application did not refer directly to the African Charter. However, the Court held that the Application is in line with the objectives of the African Union as it requires the Court to consider whether human rights are being protected by the Respondent. Therefore, the Court rejected the Respondent's objection on this ground.

Thirdly, the Respondent argued that the Application is inadmissible as local remedies had not been exhausted as there were ongoing cases before national courts. However, the Applicant's argued that their Application is in regards to the prolonged period the national courts have taken to deal with their cases. Therefore, the Court had to decide whether the Application fell under the permissible exception to Rule 56(5) of the Charter that local remedies have to be exhausted. This exception states that applications to the Court must, "be filed after exhausting local remedies, if any, unless it is obvious that this procedure (local remedies) is unduly prolonged". The Court noted that the delay must have been unjustifiable to be "unduly prolonged". The Court held that since it has been ten years since proceedings started, the local remedies had been "unduly prolonged", therefore, dismissing the Respondent's objection.

Finally, the Respondent argued that the Application should be declared inadmissible because unreasonable time had lapsed before filing the Application. However, the Court held that there had only been a period of four months between the Court of Appeal ruling and the Application being filed in the African Court. The Court deemed four months to be reasonable time. Therefore, the Respondent's objection was overruled.

The Court held that the Application satisfied all conditions of admissibility under Article 56 of the Charter and Rule 40 of the Rules.

Merits

In their Application, the Applicants alleged that the Respondent had violated their right to own property, right to freedom, right to work and their right to be tried within reasonable time by the national courts. The Respondent rejected all the allegations of the Applicants and argued that this

was not an Application for a fair trial but rather a request to be released so that charges against the Applicants could not proceed in the local jurisdiction. The Respondent argued that no human rights issues arose in the Application.

The Court held that this case was brought before the Court due to the alleged prolonged and undue delay in finalising the case of the alleged kidnapping and abduction of the Applicants. Therefore, the Court would not investigate the circumstances of the alleged kidnapping or abduction of the Applicants, but instead deal with the allegations that the Applicants had not been tried within a reasonable time and that they were not provided with legal aid.

Regarding the alleged violation of Article 7 of the African Charter on account of alleged prolonged and undue delay in finalising the cases at the national courts, the Court noted how the Applicants first submitted their case to the High Court of Tanzania on 19 June 2006. The Court also noted that when their Application to the Court was filed on 23 July 2013, their matter was still pending in the domestic courts of the Respondent. The Court assessed what would be determined as reasonable time under Article 7(1)(d) of the Charter by using the same criteria as used by the European Court of Human Rights. These three criteria are: the complexity of the case, the behaviour of the applicant, and the behaviour of the national judicial authorities.

- Regarding the complexity of the case, the Court assessed jurisprudence of the European Court. This case law dictates that complexity is determined by certain factors, including, the nature of the facts that are to be established, the number of accused persons and witnesses, the international elements, the joinder of the case to other cases and the intervention of other persons in the procedure. The Court did not accept the Respondent's submission that the complexity was due to the number of accused persons. The Court held that the delay had nothing to do with the complexity of the case and was therefore unjustified.
- Regarding the conduct of the Applicants, the Respondent submitted that the defence counsel added to delays as he did not appear in court. However, the Court stated that the Respondent did not show the extent to which the defence counsel delayed proceedings and that there was no evidence that the defence action was aimed at delaying the process. Therefore, the Court also dismissed the Respondent's submission that the Applicant's were partly responsible for the delay.
- Regarding the conduct of the domestic judicial authorities, the Court stated that there is a special duty upon authorities of domestic courts to ensure that there is not unnecessary delay. The Court states that Judges also have a duty to ensure that judicial proceedings comply with the reasonable time requirements. Therefore, the Court concluded that the delay was unreasonable due to the lack of due diligence on the part of the national judicial authorities.

Therefore, the Court found the Respondent in breach of Article 7(1)(d) of the African Charter, which guarantees the right to be tried within a reasonable time.

Regarding the alleged violation of Article 7 on account of the alleged failure to provide the Applicants with legal aid, the Court noted that, based on the facts, the Applicants had always been represented by counsel. It is not clear whether, if they did not have counsel, whether the Respondent would have provided counsel, but the Court noted that the most important factor is that they had legal counsel. However, the Court also noted that when the Applicants filed their Application before the Court, they did not have legal counsel, and the Respondent was aware of this fact. The Court noted the importance placed on the provision of legal aid by the African Commission, the United Nations Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. The Court also noted the case law of the European Court of Human Rights which has established four factors in determining whether the case requires legal aid. These factors are: the seriousness of the offence, the severity of the potential sentence, the complexity of the case, and the social and personal situation of the defendant. Due to the serious nature of the charges against the Applicants, the Court held that the Respondent was

under an obligation to provide them with legal aid, or at least inform the Applicants of their right to legal aid when it became clear they were no longer represented. Therefore, the Court held that the Respondent failed to comply with its obligations under the African Charter to provide the Applicants with legal representation.

Reparations

The Court held that it will provide some kind of reparation in the present judgement and will decide on other forms of reparation in a further judgement, taking into consideration the submissions of the Parties on the matter.

Costs

The Court held that it will rule on the issues of costs in its judgement regarding other forms of reparations.

The Court also held that:

- there has been a violation of Article 7(1)(c) and (d) of the Charter by the Respondent;
- ordered the Respondent to provide legal aid to the Applicants;
- ordered the Respondent to take all necessary measures within a reasonable time to expedite and finalise all criminal appeals by or against the Applications in the domestic courts; and
- ordered the Respondent to inform the Court of the measures taken within six months of this judgement.

This judgement was signed on the 18th March 2016.

Commentary

According to the Court, reparations for this case are still pending. There has been no response from the Court regarding a request for further information about the necessary measures the Respondent was ordered to take.