

333/06 : Southern Africa Human Rights NGO Network and Others / Tanzania

Summary of Facts

1. The Secretariat of the African Commission on Human and Peoples' Rights, (the Secretariat) received a Communication on 17th November 2006 from the Southern Africa Human Rights NGO Network-Tanzania and its member organisations (the Complainants).¹

2. The communication is submitted against the United Republic of Tanzania (hereafter referred to as the Respondent State), State Party² to the African Charter on Human and Peoples' Rights (the African Charter). The communication is submitted under [Article 55](#) of the African Charter.

3. The Complainants submit that on 22nd June 1994, the High Court of Tanzania rendered a decision in the case of *R v. Mbushuu alias Dominic Mnyaroje and Kalai Sangula*, (the Mbushuu' case) where it found that the death penalty in Tanzania is unconstitutional on the grounds that the way the sentence is executed (by hanging) violates the right to dignity of a person as protected under Article 13.6.d of the Constitution of the United Republic of Tanzania and constitutes an inherently cruel, inhuman and degrading treatment outlawed by Article 13(6)(e) of the same.

4. As a result of the above reasoning, Hon. Justice Mwalusa sentenced the accused persons (*Mbushuu alias Dominic Mnyaroje and Kalai Sangula*) to life imprisonment instead of the compulsory capital punishment for the crime of murder.

5. The Complainants further submit that the Tanzanian Government³ appealed the decision of the High Court before the Court of Appeal. They state that on 30th January 1995, the Hon. Justices of the Court of Appeal: Makame, Ramadhan and Lubuva overturned the High Court decision rendered by Justice Mwalusa and found that the death penalty is constitutional because it is saved by claw back clauses provided in the Tanzanian Constitution.

6. The Court of Appeal held that the death penalty is permissible under international human rights instruments, has effective deterrence effect, is accepted by the public, is economically cheaper to execute than to serve a life imprisonment and is compatible with the Constitutions and practices of other State Parties to the African Charter. The Court further held that in the event of a conflict between domestic law and international law, the domestic law prevails.

7. The Complainants refuted each of the grounds of the decision rendered by the Court of Appeal on 30th January 1995.

Complaint

8. The Complainants allege that the decision of the Tanzanian Court of Appeal is a violation of [Article 4](#) of the African Charter.

9. The Complainants request the African Commission to declare that the Court of Appeal's decision violates [Article 4](#) of the African Charter and that the circumstances of death penalty executions in Tanzania by hanging violates other relevant articles and other international norms against torture recognised by the African Commission.

Procedure

10. The complaint, dated 17th November 2006, was received at the Secretariat on 25th November 2006.

11. During the 40th Ordinary Session of the African Commission held in Banjul, The Gambia, from 15th to 29th November 2006, the African Commission considered the communication and decided to be seized of it.

12. By Note Verbale ACHPR/LPROT/COMM/333/2006/RWE dated 21st December 2006, the Secretariat informed the Respondent State of this decision and requested it to provide, within three months from the date of notification, its submissions on the admissibility of the communication.

13. By letter ACHPR/LPROT/COMM/333/2006/RWE dated 21st December 2006, the Secretariat also informed the Complainants of this decision and requested it to forward its submissions on the admissibility of the communication within three months.

14. On 8th May 2007, the Secretariat received a Note Verbale CHD 87/738/01/04 forwarding submissions on admissibility from the Respondent State.

15. By Note Verbale ACHPR/LPROT /COMM/333/2006/SN dated 18th July 2007, the Secretariat acknowledged receipt of the Respondent State's submissions on admissibility and informed the latter of its decision during the 41st Ordinary Session to defer its decision on admissibility of the case in order to study the Respondent State's submissions on admissibility.

16. By letter ACHPR/LPROT /COMM/333/2006/SN dated 16th July 2007, the Secretariat transmitted the Respondent State's submissions on admissibility to the Complainants and informed the latter of the African Commission's decision during the 41st Ordinary Session to defer its decision on admissibility in order to study the Respondent State's submissions.

17. By letter ACHPR/LPROT/COMM/333/06/TZ, dated 11th December 2008, both parties were informed by the Secretariat that the African Commission deferred its decision on admissibility to its 45th Ordinary Session in order to allow both parties submit additional arguments on admissibility.

18. During the 45th Ordinary Session of the African Commission, the communication was deferred to the 46th Ordinary Session.

19. On 5th March 2009, the Respondent State submitted additional arguments on admissibility.

20. By Note Verbale ACHPR/COMM/333/06/TZ/0.2/148.09, dated 18th March 2009, the Secretariat acknowledged receipt of the Respondent State's additional submissions.

21. By letter ACHPR/COMM/333/06/TZ/0.1/147.09, dated 18th March 2009, the Secretariat forwarded the Respondent State's additional submissions on admissibility to the Complainants, and requested the latter to submit their additional submissions on admissibility.

22. By letter ACHPR/COMM/333/06/TZ/0.2/864.09 dated 5th November 2009, the Secretariat sent a reminder to the Complainant requesting for its additional submissions on admissibility, including clarifications on specific issues such as the delay in bringing the matter to the African Commission.

23. By letter ACHPR/COMM/333/06/TZ/0.3/938.09 dated 3rd December 2010, the Secretariat informed the Complainants of the African Commission's decision to defer the decision on the admissibility of the communication during its 46th Ordinary Session to the 47th Ordinary Session, pending additional information that was requested.

Law

Admissibility

Submissions on Admissibility

Complainant's submissions on Admissibility

24. The Complainants submit that they have fulfilled all the requirements under [Article 56](#) of the Charter, including the fact that all domestic legal remedies have been exhausted. They indicate that the Tanzanian Court of Appeal is the highest and final court in the country.

25. The Complainants further submit that the case has neither been heard nor decided by any other international or regional body, and call on the African Commission to act on the Complaint with urgency because death penalty convicts or persons awaiting trial on crimes punishable by compulsory death penalty in the country may be subjected to suffer death by hanging.

Respondent State's submissions on admissibility

26. The Respondent State indicates in its submissions that the list containing the names of the other members who are joint authors of the communication was not communicated to them.

27. The Respondent State affirms that the Court of Appeal is the highest court of the land, adding that this Court did find that the death penalty is provided for by [Article 30\(2\) \(c\)](#) of the Constitution and that it is not a claw back clause.

28. The State further asserts that the 14th Constitutional Amendment (the Amendment) expunged some of the so called ‘ claw back’ clauses, and that this Amendment did not oust the legislative powers of the National assembly to enact laws. It also states that the Amendment did not oust the powers of the Court to interpret the Constitution and other enactments of the National Assembly by virtue of the rules of interpretation. According to the Respondent State therefore, the Amendment did not in any way render the judgment of the Court of Appeal outdated, adding that Article 30 gives room for the Court to interpret laws of the land as it did.

29. The Respondent State submits that the death penalty is still a lawful punishment in Tanzania, and that the decision of the Court of Appeal will continue to be respected because it is the highest Court in the land. It adds that, even though the State Party is bound by international instruments it has ratified, domestic laws will still prevail to serve specific situations.

Complainants’ additional submissions on admissibility

30. In their additional submissions on admissibility, the Complainants reiterate the fact that they have fulfilled all the requirements under [Article 56](#) of the African Charter.

31. The Complainants submit that [Article 56.1](#) has been fulfilled because a signed copy of the list of the authors was attached to the Complaint brought before the African Commission.

32. They further submit that the requirement under [Article 56.2](#) has also been met because the Court of Appeals’ decision of 30th January 1995 constitutes a violation of [Article 4](#) of the African Charter.

33. With respect to [Article 56.3](#), the Complainants submit that it has been met because the communication is not written in an insulting language.

34. They state that the communication is in line with [Article 56.4](#) because it is not based exclusively on news disseminated through the mass media, but rather on Court judgments and on the past and present jurisprudence on the death penalty.

35. The Complainants state further that the requirement under [Article 56.5](#) has been complied with, because they have exhausted all local remedies. They elaborate on this by explaining that they took the matter to the Appeal Court of Tanzania, which is the highest Court in the land, before bringing it to the African Commission.

36. The Complainants further state that they have fulfilled [Article 56.6](#) of the African Charter because the communication was brought to the African Commission within a reasonable period of time, after the Court of Appeal’s decision on the case.

37. Finally, the Complainants aver that the communication is in line with [Article 56.7](#) because it has not been submitted to any other international body for settlement.

Respondent State’s additional submissions on admissibility

38. The Respondent State made additional submissions on admissibility addressing the requirements in [Articles 56\(2\)](#), [56\(5\)](#) and [56\(6\)](#) of the African Charter.

39. The Respondent State refutes the Complainants’ submission that they have fulfilled [Article 56.2](#) of the African Charter. According to the Respondent State, the Complainants have not demonstrated the extent to which the communication is in conformity with the provisions of the African Charter.

40. They state that, apart from citing [Article 4](#) which deals with the right to life, they have not indicated any other provisions in relation to torture which is the basis of their communication. In the absence of specific provisions related to torture, the Respondent State submits that the communication is “wild, vague, and hence incompatible with the provisions of the Charter and it violates Article 56(2)”.

41. With regard to [Article 56.5](#), the Respondent State disputes the fact that local remedies have been exhausted. It submits that the accused persons in the *Mbushuu’ case* were charged and convicted of

murder, and sentenced to life imprisonment instead of death in the High Court, pursuant to the provisions of Section 196 and 198 of the Penal Code Cap 16 of the Laws of Tanzania.

42. The Respondent State submits further that the Appellant in the *Mbushuu*' case, that is, the State, appealed to the Court of Appeal of Tanzania, through Criminal Appeal no 142 of 1994, and the Court of Appeal ruled on a death sentence, instead of life imprisonment, arguing that death sentence is constitutional.

43. Furthermore, the Respondent State submits that the Complainants did not exhaust local remedies available under Article 30(4) of the Constitution of Tanzania and Section 4 of the Basic Rights and Duties Act.⁴

44. In contending the Complainants' fulfilment of [Article 56.6](#), the Respondent State submits that this communication is based on the *Mbushuu*' case decided fifteen years ago, adding that the Complainants have not made any efforts to exhaust local remedies since then.

45. In its final observations, the Respondent State requests that the communication be found inadmissible by the African Commission based on the aforementioned grounds.

Analysis of the African Commission on admissibility

46. This communication is submitted pursuant to [Article 55](#) of the African Charter which allows the African Commission to receive and consider communications, other than from State Parties. [Article 56](#) of the African Charter provides that the admissibility of communications submitted pursuant to [Article 55](#) is subject to seven conditions which must all be met.

47. In the communication before the African Commission, the Complainants aver that they have complied with all the requirements under [Article 56](#). However, the State disagrees, arguing that, the Complainants have not complied with [Articles 56\(2\)](#), [56\(5\)](#) and [56\(6\)](#).

48. The African Commission will now proceed to determine whether these sub-articles under [Article 56](#) raised by the Respondent State have indeed not been complied with. Nevertheless, the Commission would also analyse compliance with the, other sub-articles of [Article 56](#) that are not in contention.

49. In terms of [Article 56.1](#) of the Charter, "communications should indicate their authors, even if the latter requests anonymity". In the communication before the African Commission, the Respondent State submits that it was disadvantaged by not seeing the list of the other members who are the joint authors of the communication. It is important to note that the Complainants did attach a list of the joint authors of the communication in Annexure I of the complaint to the attention of the African Commission, which was forwarded to the Respondent State. The communication in the opinion of the African Commission thus clearly shows the name of the authors. In this regard, the requirement of [Article 56.1](#) has been fulfilled.

50. [Article 56.2](#) requires that, "The communication be compatible with either the African Charter or the Constitutive Act of the OAU (now the Constitutive Act of the AU)". This sub-article is subject to scrutiny because the Respondent State raised an objection to it. The State argues that the Complainants have only cited [Article 4](#) of the African Charter which deals with the right to life, and that they have not indicated any other provisions in relation to torture which is the basis of their communication. It goes further to describe the communication as "wild, vague and hence not compatible with the provisions of the Charter...".

51. This Commission notes that, one of its primary considerations under [Article 56.2](#) is whether there has been *prima facie* violation of human rights guaranteed by the African Charter. Furthermore, as was its position in [Mouvement des réfugiés mauritaniens au Sénégal v Senegal](#),⁵ the Commission is only concerned with whether there is preliminary proof that a violation occurred. Therefore, in principle, it is not mandatory for the Complainant to mention specific provisions of the African Charter that have been violated.

52. In the communication before the African Commission, the Complainants have alleged violation of [Article 4](#) of the African Charter, meaning they have alleged the violation of a right by the Respondent State. The determination whether other rights have been violated or the extent to which they have been violated is not relevant because such an analysis is required only at the merits stage. Based on this, the African Commission finds that [Article 56.2](#) has been fulfilled.

53. [Article 56.3](#) requires that, “communications are not written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union”. According to this Commission, looking at the alleged facts of this communication, there is no evidence of insulting or disparaging language. Thus, [Article 56.3](#) is complied with.

54. [Article 56.4](#) requires that, “the communication should not be based exclusively on news disseminated through the mass media”. This communication has not portrayed any indication of information coming from the media before this Commission. The Complainants’ submissions have been supported by Court judgments, national laws and reports on which the Complainants relied. In this regard, the African Commission holds that [Article 56.4](#) has been duly complied with.

55. [Article 56.5](#) requires that, “communications be sent to the Commission only after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged”. It has become an established principle in international law that a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before it is dealt with at the international level.⁶ This requirement safeguards the role of domestic courts to decide the matter before it is brought to any international adjudication body.

56. The Respondent State in this communication is of the view that the Complainants have not complied with this requirement. It argues that the accused persons in the *Mbushuu’ case* were charged and convicted of murder, and sentenced to life imprisonment instead of death pursuant to the provisions of Section 196 and 198 of the Penal Code Cap 16 of the Laws of Tanzania.

57. It further argues that the Complainants did not exhaust local remedies available under Article 30(4) of the Constitution of Tanzania and Section 4 of the Basic Rights and Duties Act.

58. According to this Commission, the argument by the Respondent State that the Complainants have not exhausted local remedies because the “accused persons in the *Mbushuu’ case* were charged and convicted of murder, and sentenced to life imprisonment in the High Court, instead of death pursuant to the provisions of Section 196 and 198 of the Penal Code Cap 16 of the Laws of Tanzania,” cannot be sustained because the premise of exhausting local remedies according to the practice and purpose of [Article 56.5](#) only requires that judicial domestic avenues should be exploited before a communication is brought to the Commission. In the present communication, there is evidence that the matter was considered and decided upon by the highest Court in the Respondent State prior to its submission to this Commission.

59. This Commission also notes that, the ruling on life imprisonment in the *Mbushuu’ Case* was made in the High Court on the ground that the death penalty in Tanzania is unconstitutional. The Appellant not being satisfied with the decision of the High Court, appealed to the Court of Appeal which found that the death penalty is constitutional because it is saved by claw back clauses provided in the Tanzanian Constitution. In this regard therefore, the Complainants in the present communication brought the matter before the Commission after the Court of Appeal had pronounced on the death penalty.

60. Concerning the argument that the Complainants have not exhausted local remedies because they did not avail themselves to the remedies provided by Article 30(4) of the Constitution of Tanzania, as well as the Basic Rights and Duties Act, it is imperative for the African Commission to verify the content of these Laws to determine whether remedies provided therein are sufficient and effective remedies.

61. Article 30(4) of the Constitution of the United Republic of Tanzania⁷ provides that:
“Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article; and the state authority may enact legislation for the purposes of –

1. regulating procedure for instituting proceedings pursuant to this Article;
2. specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article;
3. ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution.

62. On the other hand, Section 4 of the Basic Rights and Duties Act, ⁸ provides for the right to apply to the High Court for redress. It stipulates that: “If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.”

63. Looking at the content of both Article 30(4) of the Tanzanian Constitution and Section 4 of the Basic Rights and Duties Act, they are all geared towards the option of bringing matters to the High Court for redress. This option was exploited because the matter was considered by the High Court before later referred to the Court of Appeal.

64. Furthermore, the ‘remedies’ referred to in [Article 56.5](#) include all judicial remedies that are easily accessible for justice. The Commission in [INTERIGHTS and others v Mauritania](#), ⁹ declared: ‘The fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.’^{47¹⁰}

65. In this regard, what is important to the African Commission in determining whether local remedies were exhausted is whether judicial remedies indeed exist, and if so, whether they were explored by the Complainants. On this ground, the Respondent State’s reliance on the provisions of Article 30(4) of the Constitution of Tanzania and Section 4 of the Act is not enough to conclude that the Complainants did not exhaust local remedies.

66. Based on the above reasoning, this Commission holds that local remedies have been exhausted by the Complainants in compliance with [Article 56.5](#) of the African Charter.

67. [Article 56.6](#) of the Charter states that, “communications received by the Commission will be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter.” The Respondent State asserts that the Complainants have not complied with this requirement because “this matter was decided fifteen years ago...”.

68. The African Charter does not specifically state what it means by “reasonable time”, as opposed to Article 46(1(b) of the *American Convention on Human Rights* (the American Convention), which provides for a six months period. ¹¹ In the absence of this specification, the Commission has always ruled based on the contexts and characteristics of each case.

69. In [Michael Majuru v Zimbabwe](#), ¹² for instance, the communication was submitted to the African Commission twenty-months (22) after the Complainant allegedly fled the Respondent State without approaching the Courts therein. As reasons for delay, he argued without substantiating that he had been undergoing psychotherapy while in South Africa. He further indicated that he did not have the financial means to bring the case before the Commission, and that he was afraid for the safety of members of his family.

70. In the above communication, the African Commission held that the communication was not submitted within a reasonable time period envisaged in [Article 56.6](#) because, “the arguments advanced by the Complainant as impediments for his late submission of the complaint do not appear convincing.” It added that, “Even if the Commission accepts that he fled the country and needed time to settle, or that he was concerned for the safety of his relatives, twenty two (22) months after fleeing the country is clearly beyond a reasonable man’s understanding of reasonable period of time.” ¹³

71. Similarly, in [Darfur Relief and Documentation Centre v Republic of Sudan](#), ¹⁴ the African Commission held that a period of twenty nine (29) months (2 years and 5 months) between the time when the High Court dismissed the matter and when the communication was submitted to the African Commission is unreasonable, particularly because the Complainants did not give any compelling reason to explain the delay. It stated that, “Where there is a good and compelling reason why a Complainant does not submit his Complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a Complainant an opportunity to be heard. In the present case, there is no sufficient reason given as to why the communication could not be submitted within a reasonable period.” ¹⁵

72. However, in [Mr Obert Chinhamo v Zimbabwe](#), ¹⁶ the communication was submitted to the African Commission ten months after the Complainant allegedly fled from his country. Due to the

circumstances in this case, the Commission decided that the communication complied with [Article 56.6](#), stating that; “The Complainant is not residing in the Respondent State and needed time to settle in the new destination, before bringing his Complaint to the Commission. Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the Complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable.”¹⁷

73. As portrayed in the facts of the communication before this Commission, the judgment of the Court of Appeal was delivered on 30th January 1995, and the communication was brought to the Commission on 17th November 2006. Even though the State indicates that the Complainants took fifteen years before bringing the matter to the African Commission, according to the latter’s calculation, it took the Complainants exactly eleven years. The question of whether eleven years falls within the meaning of reasonable time would have to be assessed by this Commission.

74. The Commission underscores the fact that, in the submissions of the Complainants, there is no substantiation as to why it took them so long to bring the matter to the Commission after exhausting local remedies. It is the opinion of this Commission that, delays such as this could be prompted by different circumstances, including attempts to request for Presidential clemency and awaiting response or judicial reviews.

75. This Commission notes that it requested the Complainants to provide additional information to explain the delay, and no response was provided.

76. In the absence of any explanation whatsoever from the Complainants regarding the long period of time that it took before the matter was brought to the African Commission, the latter observes that, given the nature of the present communication, there has been an unreasonable delay. In view of this, it holds that the communication was not submitted within a reasonable period of time and therefore does not comply with [Article 56.6](#) of the African Charter.

77. [Article 56.7](#) states that, “The Commission does not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the OAU or the provisions of the present Charter.” There is no evidence in this communication that would prompt the Commission to believe that the matter has been settled by any international body. Moreover, this sub-Article has not raised any contention on the part of the Respondent State. Accordingly, the African Commission holds that the requirement under [Article 56.7](#) has been duly fulfilled.

Decision of the African Commission

78. In view of the foregoing, the African Commission decides:

- That this Communication does not comply with [Article 56.6](#) of the African Charter, and therefore declares it inadmissible;
- To transmit its decision to the parties in accordance with [Rule 119\(1\) of its Rules of Procedure](#);
- To Publish this decision in its 28th Activity Report.

Done at the 47th Ordinary Session, held from 12th to 26th May 2010, in Banjul, The Gambia.

Footnotes

1. The member organisations of SANGONET are; the Legal and Human Rights Centre, the Women’s Legal Aid Centre, DOLASED, Women in Law and Development in Africa, the Centre for Human Rights Promotion, the National Organisation for Legal Assistance, the Youth Partnership Countrywide and the Children Education Society.

2. Ratified on 18th February 1984.

3. The Appellant in the Mbushuu’ case before the matter was brought to the African Commission.

4. Article 30(4) of the Constitution of the United Republic of Tanzania provides that: “Subject to the other

provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article; and the state authority may enact legislation for the purposes of - (a) regulating procedure for instituting proceedings pursuant to this Article; (b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article; (c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution." While Section 4 of the Basic Rights and Duties Act,⁴¹ provides for the right to apply to the High Court for redress. It stipulates that: "If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

5. [Communication 162/97](#).

6. A.A. Cacado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* 1 (1983)

7. The Constitution of Tanzania is available at <http://www.lrct.or.tz/documents/REPUBLIC.pdf>

8. The Basic Rights and Duties Enforcement Act (Cap 3 R.E. 2002), available at <http://www.lrct.or.tz/documents/DUTIES.pdf>

9. [Communication 242/2001](#)

10. [Note above para. 27](#).

11. See also Article 26 of the European Convention on Human Rights (the European Convention).

12. [Communication 308/05](#).

13. [Note above, para. 110](#).

14. [Communication 310/05](#).

15. [Note above, 78 and 79](#).

16. [Communication 307/2005](#).

17. [Note above, para. 88 and 89](#).