

TANZANIA / JUDGMENT

ouko v kenya communication 232 of 1999 2000 achpr 27 6 november 2000

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23 October – 6 November 2000 Communication No. 232/99 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS Twenty-Eighth Ordinary Session 23 October – 6 November 2000 JOHN D. OUKO v. KENYA DECISION BEFORE: CHAIRMAN: E.V.O. Dankwa VICE CHAIRMAN: K. Rezag-Bara COMMISSIONERS: A. Badawi El Sheikh, Isaac Nguema, N. Barney Pityana, H. Ben Salem, Florence Butegwa, A. Raganayi Chigovera, Vera M. Chirwa, Jainaba Johm Citation: Ouko v. Kenya, Comm. 232/99, 14th ACHPR AAR Annex V (2000-2001) Publications IHRDA, Compilation of Decisions on Communications of the African : Commission On Human and Peoples' Rights Extracted from the Commission's Activity Reports 1994-2001, at 144 (2002); Documents of the African Commission on Human and Peoples' Rights, Vol. 2, at 275 (Malcolm D. Evans & Rachel Murray eds., 2009); (2000) AHRLR 135 (ACHPR 2000) RAPPORTEUR 26th Session: Commissioner Ben Salem 27th Session: Commissioner Ben Salem 28th Session: Commissioner Ben Salem SUMMARY OF FACT

1. The Complainant claims to be a Student's Union leader at the University of Nairobi, Kenya.
2. He alleges that he was forced to flee the country due to his political opinions.
3. He mentions the following as issues which led to his strained relations with the government and to his arrest and detention and eventually to his fleeing the country:
 - (a) The demand for the setting up of a Judicial Commission of Inquiry into the murder of his late uncle and former Kenyan Minister of Foreign Affairs, Mr. Robert Ouko;
 - (b) His condemnation of the seeming government involvement in the murder of his predecessor at the Students' Union, Mr. Solomon Muruli;
 - (c) His condemnation of corruption, nepotism and tribalism in government;
 - (d) His condemnation of the frequent closure of public universities.
4. Prior to his fleeing the country, he was arrested and detained without trial for 10 months at the notorious basement cells of the Secret Service Department headquarters in Nairobi.

5. The detention facility was a two by three metre basement cell with a 250 watts electric bulb, which was left on throughout his ten months detention.
6. The Complainant alleges that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.
7. The Complainant claims that he fled the country on 10th November 1997 to Uganda, where he initially sought political asylum but was denied.
8. The Complainant alleges that since he could not obtain any protection in Uganda, he had to leave to the Democratic Republic of Congo (DRC) in March 1998, and has been residing there to date.
9. The Complainant claims to be living presently in Aru, North-East of the Democratic Republic of Congo.
10. The Complainant further alleges that until August 1998, when the war broke out in the DRC, he was under the United Nations High Commissioner for Refugees' (UNHCR) assistance programme.
11. Since the said war started, leading to the evacuation of UNHCR staff, he has been living in a very desperate and despicable situation. COMPLAINT The Complainant alleges violations of Articles 5, 6, 9, 10 and 12 of the African Charter. PROCEDURE
12. At its 26th ordinary session held in Kigali, Rwanda, the Commission decided to be seized of the communication and requested the Secretariat to notify the parties.
13. On 18th January 2000, letters were dispatched to the parties notifying them of the Commission's decision.
14. On 23rd May 2000, during the 27th ordinary session held in Algeria, the Secretariat of the Commission received a letter from the Complainant stating, among other things, that he has been in Kampala for medical reasons since November 1999. In addition, he informed the Commission of his ordeals in the Democratic Republic of Congo, including his being kidnapped and forced to work as a computer operator for the rebels in Kisangani.
15. At its 27th ordinary session held in Algeria, the Commission examined the case and declared it admissible and requested parties to furnish it with arguments on the merits of the case.
16. On 12th July 2000, the Secretariat communicated the Commission's decision to the parties. LAW ADMISSIBILITY

17. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by Article 56 of the Charter. The applicable provision in this particular case is Article 56(5) of the Charter, which provides inter alia "communications relating to Human and Peoples' Rights...received by the Commission shall be considered if they...are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged..."
18. The facts of this case reveal the following: The Complainant is no longer in the Republic of Kenya; The above condition is not based on his voluntary will - he has been forced to flee the country because of his political opinions and Student Union activities; An attestation dated 30th October 1999, issued by one Mr. Tane Bamba, Head of Sub Office of the United Nations High Commissioner for Refugees, indicates that the Complainant "is recognised as a refugee Under UNCHR mandate in accordance with the provisions of the OAU Convention of September 10th, 1969 to which he satisfied."
19. Relying on its case law (see communication 215/98 - Rights International/Nigeria), the Commission finds that the Complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life, and his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugee. The Commission therefore declared the communication admissible based on the principle of constructive exhaustion of local remedies. MERITS
20. The Complainant alleges that prior to his fleeing the country, he was arrested and detained for 10 months without trial at the notorious basement cells of the Secret Service Department headquarters in Nairobi.
21. The Respondent State Party has not contested this claim. In fact, it has not responded to the many requests made by the Secretariat of the Commission. In this circumstance and following its well laid down precedent on this, the Commission accepts the facts of the Complainant as the facts of the case and finds the Respondent State in violation of Article 6 of the Charter. Article 6 provides: Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his liberty except for the reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.
22. The Complainant claims that the detention facility had a 250 watts electric bulb, which was left on throughout his ten months detention. Furthermore, that throughout his period of detention, he was denied bathroom facilities and was subjected to both physical and mental torture.
23. The Commission finds the above condition, which the Complainant was subjected to in contravention of the Respondent State Party's obligation to guarantee to the Complainant the right to the respect of his dignity and freedom from inhuman and degrading treatment under Article 5 of the Charter. Article 5 provides: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.

All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

24. Such condition and treatment also runs contrary to the minimum standards contained in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly, Principles 1 and 6.
25. Principle 1 provides: All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. Principle 6 on the other hand states: No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.
26. Although the Complainant has claimed a violation of his right to freedom from torture, he has not substantiated on this claim. In the absence of such information, the Commission cannot find a violation as alleged.
27. The Complainant alleges that he was forced to flee his country because of his political opinions. He details some of the events that led to his strained relationship with the government. Article 9 of the African Charter provides: Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.
28. The above provision guarantees to every individual the right to free expression, within the confines of the law. Implicit in this is that if such opinions are contrary to laid down laws, the affected individual or government, has the right to seek redress in a court of law. Herein lies the essence of the law of defamation. This procedure has not been followed in this particular instance. Rather the government has opted to arrest and detain the Complainant without trial and to subject him to series of inhuman and degrading treatments. The Commission finds this in violation of Article 9 of the Charter.
29. The Complainant claims that being a victim of political persecution, he has been deprived of his right to freedom of association guaranteed by Article 10 of the Charter. The Commission notes that the Complainant was a Student Union leader before fleeing the country.
30. The Respondent State Party has not refuted this fact. The Commission therefore finds the persecution of the Complainant and his subsequent flight to the Democratic Republic of the Congo to have greatly jeopardised his chances of enjoying his right to freedom of association guaranteed under Article 10 of the Charter. Article 10 states: Every individual shall have the right to free association provided that he abides by the law
31. The Complainant claims that his rights to freedom of movement and to egress and ingress have been violated. Taking the circumstances of the case into consideration, the Commission finds this claim to have been substantiated and therefore finds the Respondent State in violation of Article 12 of the Charter. Article 12 provides: Every individual shall have

the right to freedom of movement and residence within the borders of a state provided he abides by the law. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality. FOR THESE REASONS, THE COMMISSION finds the Republic of Kenya in violation of Articles 5, 6, 9, 10 and 12 (1) and (2) of the African Charter on Human and Peoples' Rights. Urges the Government of the Republic of Kenya to facilitate the safe return of the Complainant to the Republic of Kenya, if he so wishes. Done at the 28th Ordinary Session held in Cotonou, Benin from 23rd October to 6th November 2000.

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