

TANZANIA / JUDGMENT

b v kenya communication 283 of 2003 2004 achpr 54 4 june 2004

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21 May - 4th June 2004 Communication No. 283/2003 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS Thirty-Fifth Ordinary Session 21 May - 4th June 2004 B v. KENYA DECISION BEFORE: CHAIRPERSON: Salimata Sawadogo VICE CHAIRPERSON: Yassir Sid Ahmed El Hassan COMMISSIONERS: Mohammed Abdulahi Ould Babana, Andrew R Chigovera, Vera M Chirwa, E.V.O. Dankwa, Angela Melo, Jainaba Johm, Sanji Mmasenono Monageng, Bahame Tom Mukirya Nyanduga, M. Kamel Rezag-Bara Citation: B v. Kenya, Comm. 283/2003, 17th ACHPR AAR Annex VI (2003-2003) Publications: Documents of the African Commission on Human and Peoples' Rights, Vol. 2, at 612 (Malcolm D. Evans & Rachel Murray eds., 2009); (2004) AHRLR 67 (ACHPR 2004) RAPPORTEUR 34th Ordinary Session – Commissioner Nyanduga 35th Ordinary Session – Commissioner Nyanduga SUMMARY OF FACTS

1. The communication is submitted by a Complainant who requests anonymity and presents the facts of the case as follows:
2. The Complainant alleges that on 30th September 2003, the Anti-Corruption Committee presented a report on corruption in the judiciary to the Chief Justice of Kenya in the presence of the press. The Report also known as the Ringera Report reveals shocking and endemic corruption in the judiciary and further lists the names of the Judges alleged to have been involved in corrupt and unethical practices in the course of performing their duties.
3. On 4th October 2003 during a press conference, the Chief Justice without naming the judges is alleged to have given the said judges a two-week ultimatum to resign or face trial. Two days later, the Constitutional Affairs Assistant Minister is reported to have reiterated the deadline issued by the Chief Justice and warned that judges who ignore the deadline would face tribunals and prosecution for crimes committed.
4. The Complainant states that the Kenya Magistrates and Judges Association was quoted in the press as saying “we urge the judicial administration to inform those affected so that they can decide on their next course of action not forgetting the need for confidentiality”. However, the Complainant claims that over the following several days none of the judges named in the report were informed of their presence on the list nor of the allegations leveled against them.

5. The Complainant avers that on 14th October 2003 it was reported through a six o'clock news broadcast that the President had appointed two tribunals to investigate the twenty-three judges whose names were announced during the broadcast as well as their suspension. The Complainant asserts that this is the first time that the judges learnt of their presence on the list and of their immediate suspension. The announcement however did not contain details of the allegations made against each judge. It is however reported in the Daily Nation Newspaper on 18th October 2003 that the police would question some of the judges before they appear before the tribunals and it is only during those interrogations they will be informed of the accusations against them and their statements taken.
6. The Complainant alleges that as of 17th October 2003, the judges had still not received details of the allegations made against them despite continued press coverage of the matter. Although maintaining their innocence, some of the named judges tendered their resignations or sought retirement.
7. The Complainant further submits that the Chair of the Law Society of Kenya on 18th October 2003 announced through the press that the Society would in two weeks' time release its report containing a list of judges other than those named in the Ringer Report.
8. The Complainant on the whole submits that failure to advise the judges mentioned in the Ringera Report of the allegations against them and to give them an opportunity to accept or dispute the allegations coupled with varied threats and warnings amounts to harassment and hounding of judges thereby undermining the principles of security of tenure and the independence of the judiciary.
9. Furthermore, the Complainant claims that the manner in which the whole matter was dealt with violates Articles 7 and 26 of the African Charter as well as other international human rights instruments namely the UN Basic Principles on the Independence of the Judiciary, the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights COMPLAINT
10. The Complainant alleges a violation of Articles 7 and 26 of the African Charter on Human and Peoples' Rights. PROCEDURE
11. The communication was faxed and received at the Secretariat of the African Commission on 21st October 2003. The Complainant also requested the African Commission to take Provisional Measures under Rule 111 of the Rules of the African Commission to ensure that the process of removal of judges does not interfere with independence of the judiciary and the right to a fair hearing.
12. The Secretariat of the African Commission on 24th October 2003 forwarded a copy of the communication as well as a draft Appeal Letter to the Chair of the African Commission and requested him to take necessary action.

13. By email dated 28th October 2003, the Chair of the African Commission wrote advising the Secretariat that since the matter would be handled as a communication at the African Commission's forthcoming 34th Session, an Appeal Letter should not be sent to the government of Kenya until after the African Commission had examined the matter and determined what course of action to take.
14. On 31st October 2003, the Secretariat of the African Commission wrote to the Complainant acknowledging receipt of the communication.
15. At its 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission examined the communication and decided to be seized of the matter.
16. On 4th December 2003, the parties to the communication were informed accordingly and requested to forward their written submissions on admissibility of the communication within 3 months.
17. On 15th March 2004, the parties to the communication were reminded to forward their written submissions on admissibility to the Secretariat.
18. By email dated 16th March 2004, the Secretariat received a letter from the Complainant withdrawing the matter as she believed that the matter was now being addressed by the Respondent State.
19. On 25th March 2004, the Secretariat received the Respondent State's submissions on admissibility and acknowledged receipt of the same on 26th March 2004.
20. By letter dated 26th March 2004, the Secretariat acknowledged receipt of the Complainant's letter withdrawing the communication and also forwarded a copy of the Respondent State's submissions on admissibility.
21. At its 35th Ordinary Session held in Banjul, The Gambia, the African Commission considered this communication and decided to close the file. RESPONDENT STATE'S SUBMISSIONS ON ADMISSIBILITY
22. The Respondent State provides a background against which it undertook the judicial reforms which have in part given rise to this communication. They argue that a well functioning judicial system is crucial to improving governance, combating corruption and consolidating the democratic order, thereby fostering economically sustainable development. Therefore, a judicial system with integrity should be free from political and external interference. Furthermore, judicial independence must be balanced by accountability in order to facilitate transparency within the system and control of corruption.

23. It is submitted by the Respondent State that the tendency towards corruption and abuse of power among certain members of the judiciary in Kenya has been lamented over time. As such, one of the key objectives of the Kenyan government has been to undertake judicial reform in order to develop an impartial, independent, accountable and effective judiciary that is able to improve governance and advance development in the country.
24. The Respondent State contends that the communication does not meet the requirements in Article 56(2), (4) and (5) of the African Charter.
25. It is submitted that the communication is substantially based on newspaper reports and is therefore not founded on factual realities of the case contrary to Article 56(4) of the African Charter.
26. The Respondent State further submits that the Complainant did not even attempt to exhaust local remedies in their case as required by Article 56(5) of the African Charter. In this regard, the Respondent State argues that the national legal framework in Kenya is adequate to address the concerns raised by the Complainant and should have therefore been utilised. For instance, the concerns raised by the Complainant could have been addressed through, the constitutional provisions or national statutes like the Public Officer Ethics Act 2003, The Anti Corruption and Economic Crimes Act 2003. Furthermore, local judicial action and remedy is available to the judges, should any of the procedures adopted be deemed illegal or in any case ultra vires.
27. The Respondent State reports that the judges are not on trial as understood but that special investigative tribunals were set up to determine issues touching upon the behaviour and ability of the judges implicated to perform the functions of their office. 23 judges from both the Court of Appeal and High Court of Kenya were involved and were investigated within 14 days of the presentation of the Ringera Report. The Tribunals started sitting on 9th and 16th February 2004.
28. Confidentiality was assured for the affected judges in the initial stages and at all crucial times. Only broad categories of alleged offences were highlighted in the media. The Respondent State argues that it was therefore possible for a judge to privately and conscientiously place him/herself into any of the categories and make a personal decision to resign or appear before the tribunals. Consequently, majority of the judges mentioned opted for early retirement with full benefits as a result.
29. In any case, the Respondent State argues, that the Judges had the option within the laws to challenge the process before the High Court should they be aggrieved by it but none of the said judges opted for the judicial remedy.

30. The Respondent State maintains that the domestic legislation of Kenya is in consonance with both the letter and spirit of international law including the UN Basic Principles on the Independence of the Judiciary and asks the African Commission to declare the communication inadmissible. REASONS GIVEN BY THE COMPLAINANT FOR WITHDRAWING THE COMMUNICATION
31. The Complainant wrote to inform the African Commission that they received information that the Registrar and Chief Justice did not authorise the leaking of the names of the implicated judges to the press and that this particular matter was now being investigated by the judiciary. Furthermore, the issue of a fair trial in light of the publicity created prior to the suspension of the judges had been raised before the Tribunals and that the matter was being handled and could end up with the Constitutional courts of Kenya.
32. It is for this reason that the Complainant wishes to withdraw the communication. The African Commission takes note of the withdrawal of the communication by the Complainant and for this reason decides to close the file. Done at the 35th Ordinary Session held in Banjul, The Gambia, from 21st May to 4th June 2004.
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