

UGANDA / JUDGMENT

Akena & 3 Others v Uganda Communications Commission & 3 Others (Miscellaneous Application 84 of 2019) [2023] UGHC 340 (21 February 2023)

[2023] UGHC 340

COURT

High Court of Uganda

BEFORE

Ajiji, J

CASE / FILE NUMBER

Miscellaneous Application 84 of 2019

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THE REPUBLIC OF UGANDA THE HIGH COURT OF UGANDA AT LIRA MISCELLAENOUS APPLICATION NO.084 OF 2019 (ARISING FROM MISC. CAUSE NO.02 OF 2019)

- 1. AKENA PATRICK ROLEX
- 2. OTTO BILLE
- 3. OSENDIRO CHARLES
- \$4. \quad OJOK\$ <table>

WALTER.....

VERSUS

- 1. UGANDA COMMUNICATIONS COMMISSION
- 2. ATTORNEY GENERAL
- 3. MILTON ODONGO.....
- 4. JOEL TUBANONE

RULING**BEFORE: HON. JUSTICE ALEX MACKAY AJIJI**

This application was brought by way of Notice of motion against the Respondent seeking for orders that; seek leave from this Honorable court, to file reference for preliminary ruling at the East African court of Justice, under Article 29,31 and schedule 4 and 41 of the East African community Act, 2013 is compliant with Articles 6,7 and 8 of the East African Community Treaty, stay of proceedings in Misc Cause No.02/2019 and costs.

This application is supported by the affidavit of the applicant Akena Patrick Rolex but briefly are that; the applicant is a journalist currently affiliated to Unity Fm, that the applicant is among the three other applicants who were suspended from work by the 1st Respondent after covering series of corruption, that the applicants work place unity Fm was closed by security agents of the 2nd Respondent and the 1st Respondent through a directive to the management of the Unity Fm, that the 1st Respondent cited section 29, 31 & the 4th schedule of the Act and 41 of the Uganda Communications Act, 2013, that the applicant therefore seek a referral to the East African court of

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Justice for the said sub-regional court to make a preliminary ruling, on whether section 29, 31 & the 4th schedule of the Act and 41 of the Uganda Communications Act, 2013 are compliance with the East African Community Act under Articles 6,7 and 8 of the East African Community Treaty to which Uganda is a state party and costs to be in the cause.

Representation

The applicants are represented by Ms Walyemera & Co. Advocates while the 1st Respondent is represented by the Department of legal Affairs Uganda Communications Commission, 2nd and 3rd and 4th Respondents are represented by Attorney General Chambers,

The applicants' counsel three issues for determination to wit;

- 1. Whether the applicants matter should be referred to the East African Court to determine whether the sections invoked by the 1st Respondent are consistent with the East African Treaty?
- 2. What are the Remedies available

Arguments for counsel for the Applicants

Counsel for the applicant submitted that Article 34 of the East African Treaty states that "Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the

question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question". He further submitted that the 2nd and 3rd

Respondents in their reply state that the Applicants did not raise the issue to refer to the East African court and neither does the application raise questions of interpretation or Application of the

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EAC Treaty. He contends that in their application, the Applicants seek for a declaration that the Acts of the Respondents are contrary to the International treaties that Uganda is party. He further contends that it is immaterial that the Applicants did not raise the need for the interpretation or the application of the EAC Treaty in the main Application but these are matters will guide in determination.

Arguments of the counsel for the Respondents

In reply counsel for the Respondents submitted that the applicants in order to buttress their application for reference are relying on Article 34 of the EAC Treaty and they submit that the application doesn't raise any question concerning the interpretation of the provisions of the EAC Treaty or the validity of the regulations, directives, decisions or actions of the community, for this Honourable Court to make reference to the EACJ.

They further submit that nowhere in the application of the applicants do they seek reference to the EACJ concerning interpretation as to whether sections 29, 31, 41 and 4th schedule of the UCC Act, are in compliance with Articles 6,7 and 8 of the of the EAC Treaty. They further submit that the declaratory orders sought by the Applicants against cruel, inhuman or degrading manner is an issue that can be competently handled by the Honourable Court.

They prayed this application is dismissed with costs since it lacks merit and the Applicant be ordered to proceed with the main Application

Court's determination

The law

Article 34 Preliminary Rulings of National Courts Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application

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of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the matter.

Article 27 Jurisdiction of the Court 1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty: Page 14 of 31 Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such jurisdiction conferred by the Treaty on Organs of Partner States. 2. ...

Article 33 Jurisdiction of National Courts (1). Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States. (2). Decisions of the Court on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter.

The High court of Uganda is a court of record with unlimited Jurisdiction under Article 139 of the Constitution of which this application has been filed for the declaratory orders to seek leave from this Honorable court, to file reference for preliminary ruling at the East African court of Justice, under Article 29,31 and schedule 4 and 41 of the East African community Act, 2013 is compliant with Articles 6,7 and 8 of the East African Community Treaty, stay of proceedings in Misc Cause No.02/2019 and costs.

This court has a discretion to do so and therefore before it does so, am of the opinion that the decision in the case of Attorney General of the Republic of Uganda Vs Tom Kyahurwenda case No. 1 of 2014 that In order to answer the question, by what courts is the treaty to be interpreted? the Court deemed it important that to

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examine the meaning and purpose of Article 34 of the Treaty which provides for the mechanism of the "preliminary reference".

Article 34 shows that if "a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall"... The departure point is that a question has to be raised before "any court or tribunal" and not any other entity. In determining what "any court or tribunal" is, for purposes of the mechanism of preliminary reference, the Court draws inspiration from the jurisprudence of the European Court of Justice [« ECJ »], which is also in possession of the mechanism. In the *Pretore di Salo v. Persons Unknown*, the ECJ held that it: Page 16 of 31 [h] as jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature. (see, Case 14/86 [1987] ECR 2545).

Inspired by the above ruling, this Court opines that for a national to be considered a "court or tribunal" for purposes of preliminary reference, the entity should possess the following attributes: established by law; have permanent existence; endowed with compulsory jurisdiction; have ability to entertain procedures inter partes; apply rules of law; and, be endowed with functional independence.

Article 34 of the Treaty further provides that where a court or tribunal is faced with "... the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall [emphasis mine], if it considers that a ruling on the question is

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necessary to enable it to give judgment, request the Court to give a preliminary ruling on the matter". The provision uses the emphatic word "shall". In the general scheme of legal drafting, the use of the word "shall" would presuppose that when the national courts or tribunals are faced with a question of interpretation, application or validity, they have no option, but to refer the matter to this Court.

In the instant case, the applicant submitted that the 2^{nd} and 3^{rd} Respondents in their reply state that the Applicants did not raise the issue to refer to the East African court and neither does the application raise questions of interpretation or Application of the EAC Treaty. He contends that in their application is proper within this court and there is a question to be answered.

In reply counsel for the Respondent contends that there is no question to be answered and all the prayers and orders sought in the main application can be handled by this court.

I totally I agree with counsel for the Respondents in this issue as the questions raised can be fully answered by this court and handled and I don't see it necessary to forward the same to the EACJ for preliminary ruling In the case of Attorney General of the Republic of Uganda Vs Tom Kyahurwenda supra, the use of the phrase in Article 34 of the Treaty, "...if it considers it necessary that a ruling on the question is necessary to enable it to give judgment..." would appear to give credence to the view held by both the Secretary General and Kenya that the national courts or tribunals have "a wide margin of appreciation", to decide whether or not to refer the matter to this Court for interpretation and application of the Treaty.

It is incumbent upon this Court to determine the scope of discretion afforded to national courts and tribunals in Article 34 is justifiable and therefore I decline to

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grant the same as this court doesn't see it necessary to refer this matter and each of party to bear their own costs.

I do so order.

Dated and delivered at Lira this

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ALEX MACKAY AJIJI JUDGE

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