



Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights)

versus

Kenya

Summary of the Complaint

1. On 22 September 2009, the Secretariat of the African Commission on Human and Peoples' Rights (hereinafter the Secretariat) received a Complaint from the Federation of Women Lawyers Kenya and the International Center for the Legal Protection of Human Rights (the Complainants), representing Priscilla Njeri Echaria (hereinafter the Victim).
2. The Complaint is submitted against the Republic of Kenya (hereinafter the Respondent State or Kenya), State Party to the African Charter on Human and Peoples' Rights (the African Charter).
3. The Complainants submit that the Victim was married in 1964 to Mr. Peter Echaria, a Kenyan diplomat who served in Moscow, Washington D C and Addis Ababa before returning to Kenya. They state that due to the diplomatic status of Mr. Peter Echaria, the Victim was not allowed to work.
4. The Complainants also indicate that the above mentioned marriage ended by divorce sometime in 1990.
5. According to the Complainants, in November 1987, the Victim petitioned the High Court requesting that their matrimonial property be divided equally between her and the husband. In 1993, the High Court granted an order to the effect that the property acquired during the subsistence of the marriage, be divided equally between the Victim and Mr. Peter Echaria, as the Victim had made an indirect contribution to the acquisition of the property. The property in question is a farm called Tigoni Farm, comprising 118 acres.
6. The Complainants submit that in 2001, Mr. Peter Echaria appealed against the decision of the High Court to the Court of Appeal and in February 2007, the Court of Appeal set aside the ruling of the High Court and reduced the Victims share of the matrimonial property to a quarter of the assets.
7. The Court of Appeal being the highest court in Kenya, the Complainants contend that the Victim has no further recourse before a Kenya Court.

Articles alleged to have been violated

8. The Complainants allege violation of Articles 2, 3, 14, 18(3) and 19 of the African Charter.

Prayers of the Complainants

9. The Complainants urge the African Commission to:

- a) Find violations of the Charter Articles enumerated above and
- b) Recommend to the Respondent State to enact legislation aimed at effecting the property rights of married women before a specific time.

Procedure

10. The Complaint dated 10 September 2009, was received at the Secretariat of the African Commission on 22 September 2009. By letter dated 29 September 2009, the Secretariat acknowledged receipt of the Complaint and informed the Complainant that it would be considered for seizure during its 46th Ordinary Session.
11. During its 46th Ordinary Session held in Banjul, the Gambia from 11 – 25 November 2009, the African Commission considered the Communication and decided to be seized thereof. The parties were accordingly informed of this decision and requested to submit their arguments on Admissibility.
12. On 15 April 2010, the Submission of the Respondent State on Admissibility was received at the Secretariat of the African Commission which acknowledged receipt by Note Verbal dated 7 May 2010 wherein the State was also informed that the Complainant's Submissions would be forwarded to it as soon as they were received at the Secretariat.
13. By letter dated 7 May 2010, the Complainants were requested to forward their submissions on Admissibility within three months of the notification. Respondent State's Submissions on Admissibility were equally forwarded to the Complainants.
14. By letter and Note Verbale dated 16 June 2010, both parties were informed that the African Commission had, during its 47th Ordinary Session held in Banjul, The Gambia, decided to defer consideration of the Communication to its 48th Ordinary Session. The Complainants were again reminded to forward their Submissions on Admissibility to the Secretariat failing which it would proceed with consideration of the Communication.
15. On 23 September 2010, the Complainants' Submissions on Admissibility were received at the Secretariat and a letter acknowledging receipt of the said Submissions was forwarded to them on the same day.
16. The African Commission by Note Verbale dated 23 September 2010, forwarded the Complainants' Submissions to the Respondent State and requested the latter to forward its observations in response.
17. By letter and Note Verbale respectively dated 14 and 15 December 2010, both parties were informed of the African Commission's decision to defer consideration of the Communication to its 49th Ordinary Session, in order to allow the Secretariat draft a decision on the Admissibility of the Communication.

The Law on Admissibility

18. The Admissibility of Communications submitted pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the same Charter.

The Complainants' Submission on Admissibility

19. The Complainants submit that the present Communication fulfils all the Admissibility requirements set out in Article 56 of the African Charter. Regarding Article 56(5) in particular on the exhaustion of local remedies, they aver that the Victim initially filed her case before the High Court of Kenya where she received a favourable decision. This decision was subsequently overruled on appeal by a full bench of the Appeal Court of Kenya. The full bench of the Kenya Appeal Court being the court of final instance in all legal matters in Kenya, the Complainants argue that they have exhausted local remedies and urge the African Commission to declare the Communication admissible.

The Respondent State's Submissions on Admissibility

20. In its response to the Submissions of the Complainants, the Respondent State contends that the Communication does not adhere to the requirements of Article 56 of the African Charter and should therefore be declared inadmissible.

21. The Respondent State submits that the Complainants have failed to exhaust available local remedies. According to them, there were multiple domestic remedies open to the Complainants following the decision of the Kenyan Court of Appeal. They could, the State maintains, file an Application for Review before the same court if they were not satisfied with the Court's decision. To support this position, the Respondent State cites the case of *Mahinda-v-Kenya Power and Lighting Company Ltd*¹ and *Musiara-v-Ntimama*² wherein the Kenyan Court of Appeal declared itself competent to re-open an appeal that it had already determined in order to among other things, avoid real injustice in exceptional circumstances.

22. The Respondent State further argues that other than making an Application for Review in the Court of Appeal, the Victim could apply for enforcement of her rights under Section 84 (1) of the Kenyan Constitution to the High Court of Kenya which has original jurisdiction to enforce the aforementioned Section of the Constitution.

23. The Respondent State also contends that the Complainants failed to exhaust available quasi-judicial remedies by not bringing their case before the Public Complaints Standing Committee or the Kenya National Commission on Human Rights; an independent human rights institution established by an Act of Parliament in accordance with the Paris Principles with a wide jurisdiction to hear matters such as the one brought by the Complainants before the African Commission.

24. The Respondent State finally submits that as per the principles of public international law, the interpretation of laws by national courts is binding on international tribunals and therefore concludes that the decision of the Kenyan Court of Appeal is binding on the African Commission except there is evidence of systematic human rights violation, which the Complainants have failed to prove in this case. According to the Respondent State, it is only in situations where there is evidence of systematic violations by the state that international tribunals such as the African Commission may have jurisdiction to hear disputes arising from such violations. The Respondent State thus urges the African Commission to declare the Communication inadmissible.

Complainants' Supplementary Submissions on Admissibility

25. In response to the Respondent State's Submissions, the Complainants maintain that the requirements of Article 56 have been fully complied with and that the arguments of the Respondent State regarding the exhaustion of local remedies rule are untenable.

26. Regarding the Respondent State's argument that the Complainants could have filed an Application for Review to the Kenyan Court of Appeal, they submit, citing jurisprudence of the African Commission, that the generally accepted meaning of local remedies, which must be exhausted prior to any Communication/Complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.

27. The Complainants maintain that an Application for Review to the Kenyan Court of Appeal is a discretionary remedy; which remedy under broadly accepted principles among international tribunals is a discretionary remedy which need not be exhausted. They note that the above notwithstanding, the Kenyan Court of Appeal has itself declared that the remedy of an Application for Review is not an accessible remedy. They cite the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*, wherein the Kenyan Court of Appeal stated that it had no jurisdiction to re-open, re-hear and then recall its earlier decision and substitute it with another.⁵ They further cite *Mahinda v Kenya Power Lighting* (earlier relied on by the Respondent State) wherein the Kenyan Court of Appeal affirmed that its power to re-open an appeal is highly limited and only reserved for exceptional circumstances. They maintain that the present case is not an exceptional one for which an application for review would be necessary.

28. Regarding the argument of the Respondent State that the Victim could have instituted a fundamental rights application under section 84 of the Kenyan Constitution, the Complainants submit that a fundamental rights application is an exceptional or extraordinary remedy that the Victim was not required to pursue in order to satisfy the requirement of Article 56(5).

29. The Complainant also submits that the Victim did not have to submit a complaint to the Kenyan Human Rights Commission or to the Public Complaints Standing Committee, as asserted by the State Party. They argue that these bodies are not judicial bodies and are thus not effective remedies which must be exhausted. They cite *Cudjoe v Ghana* wherein the African Commission held that the internal remedy to which article 56(5) refers entails a remedy sought from courts of a judicial nature’.

30. On Respondent State’s argument that the African Commission has no jurisdiction to hear the Complainants’ matter because the judgment of the Kenyan Court of Appeal is binding on it, the Complainants submit that they do not request that the Commission review the interpretation of law established by the Kenyan Court of Appeal, but that the African Commission should evaluate the judgment of the Court of Appeal with respect to their obligations under the African Charter and the other international conventions to which Kenya is a party. According to the Complainants, because their submission specifically concerns the interpretation and application of the Charter in relation to the Victim’s case, the Commission has jurisdiction to hear the matter.

Decision of the African Commission on the Respondent State’s Challenge to its competence

31. Before delving into the Admissibility of this Communication it is important to deal with the issue raised by the Respondent State on the competence of the African Commission to hear this matter.

32. The Respondent State is of the view that the decision of the Kenyan Court of Appeal is binding on the African Commission. According to the Respondent State, it is only in situations where there is evidence of a systematic violation of human rights by a state that international tribunals can have the competence to entertain the matter. Since there is no such evidence that there are systematic violations or discrimination on the basis of sex and gender by Kenyan courts, the Respondent state argues that the African Commission is precluded from hearing the matter.

33. The jurisdiction of international judicial and quasi-judicial bodies commonly has four attributes or facets; personal jurisdiction, material jurisdiction, temporal jurisdiction and territorial jurisdiction. The competence of the African Commission to determine the present communication will therefore be assessed within the framework of these attributes of jurisdiction.

34. Regarding its personal jurisdiction or *ratione personae*, the African Commission is competent to determine Communications directed against a State Party to the African Charter by someone competent to do so. The Republic of Kenya is a State Party to the African Charter having ratified same on 23 January 1992. The Complainants are competent to bring the case before the African Commission because the only requirement for doing so in this respect, that is, the disclosure of identity has been met as indicated in paragraph 1 above. The personal jurisdiction of the African Commission is therefore not called into question.

35. It would appear that what is mainly contested by the Respondent State is the material jurisdiction (*ratione materiae*) of the African Commission. The African Commission has jurisdiction over a Communication in this respect, which alleges the violation of rights guaranteed in the African Charter. The subject matter of the Communication must relate to the violation of a right protected in the African Charter and the Complainant is only required to establish a *prima facie* violation.⁷ In assessing whether a *prima facie* case exists, the African Commission only needs to be satisfied that the facts before it point to likelihood that a right protected in the African Charter has been violated. There is no requirement in the African Charter for evidence of systematic violations to be adduced for a *prima facie* case to exist.

36. Whether a national court has handed down a judgment in a matter is immaterial to the determination of the existence of a *prima facie* case before the African Commission. What matters is whether such

judgment is in conformity with a state's obligations under the African Charter. In assessing the compatibility of the ruling of a national court with the African Charter, the African Commission does not act as an appellate body with powers to overrule the decisions of national courts but simply discharges its mandate of ensuring compliance by a State Party, with the provisions of the African Charter in its interpretation and application of the law.

37. In the present Communication, the Complainants allege violations of specific articles of the African Charter, the provisions of which they deem the Kenyan Court of Appeal failed to take into consideration in their application of the law.⁸ Because the Communication specifically hinges on the interpretation and application of particular provisions of the African Charter with regards to the Victim's case, the African Commission is satisfied that a prima facie case exists which it can determine without the necessity to require a systematic pattern of violations.

38. The alleged violations complained of occurred at a time when the African Charter was in force in Kenya and the African Commission's temporal jurisdiction (or *ratione temporis*) is therefore unquestionable. The violations are also alleged to have occurred in Kenyan territory thereby confirming the African Commission's territorial or *ratione loci* jurisdiction.

39. Having regard to all the above, the African Commission finds that it has jurisdiction to entertain the present Communication.

The African Commission's Analysis on Admissibility

40. The Admissibility of Communications submitted to the African Commission is governed by the seven requirements set out in Article 56 of the African Charter. According to the Respondent State, the Communication is inadmissible because the Complainants have failed to exhaust local remedies. The Complainants on the other hand maintain that the Communication meets all the admissibility requirements and should be declared admissible.

41. Although the Admissibility of the Communication is only contested on the issue of the exhaustion of local remedies, the African Commission will proceed to analyze the conformity of the Communication with all the requirements of Article 56.

42. Article 56(1) requires that Communications submitted to the African Commission be considered if they "indicate their authors even if the latter requests anonymity". The Authors of this Communication have been disclosed as the International Center for the Protection of Human Rights (Interights) and the Federation of Women Lawyers Kenya. The address and contact information of the Complainants has also been disclosed as well as the name of the Victim. These facts remain uncontested by the Respondent State. The African Commission is satisfied that the authors of the Communication are indicated and accordingly holds that the requirement of Article 56(1) has been complied with.

43. According to Article 56(2) of the African Charter, Communications, in order to be admissible must be compatible with the Charter of the Organization of African Unity (now Constitutive Act of the African Union) or with the African Charter. The parties have not made Submissions on this issue. The African Commission finds no incompatibility in the Communication with the above instruments and is thus satisfied that the requirement of article 56(2) has been fully complied with.

44. Article 56(3) states that Communications shall be considered if they are not written in disparaging or insulting language directed against the state concerned and its institutions or to the African Union. Both parties have not made any submissions on this point. The African Commission finds that there is no use of disparaging or insulting language in the Communication and is therefore satisfied that the requirement of Article 56(3) has been complied with.

45. Article 56(4) of the African Charter provides that Communications must not be based exclusively on news disseminated through the mass media. The present Communication is based on information provided by the Complainants and corroborated by the Respondent State. There is no evidence that any of

the information provided is based on news disseminated through the media and the African Commission consequently finds that the requirement of Article 56(4) has been met.

46. Article 56(5) requires that Communications be submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

47. The Complainants submit that all available local remedies have been exhausted since the Kenyan Court of Appeal had passed a final decision on the Victim's case. The Kenyan Court of Appeal being the most superior Court in Kenya at the time, the Complainants maintain that there are no more local remedies to be exhausted.

48. The Respondent State on the other hand argues that Complainants have failed to meet this requirement since there are numerous judicial and quasi-judicial local remedies in existence which were not utilized. Regarding judicial remedies, the Respondent State maintains that the Victim could submit an application for Review to the Kenyan Court of Appeal if she was not satisfied with the Court's decision. The Respondent State also argues that the Victim could have submitted an Application in terms of Section 84 of the Kenyan Constitution to the High Court which has original jurisdiction to enforce fundamental rights as provided for in the Constitution, when these rights have been violated.

49. It is also argued by the Respondent State that the Victim could pursue available quasi-judicial remedies by lodging her claim in bodies like the Kenya National Commission on Human Rights and the Public Complaints Standing Committee which are empowered to hear matters such as those raised by the Complainants in the present Communication.

50. The Complainants have submitted counter arguments to the issues raised by the Respondent State reproduced here in paragraphs 26 – 30 above.

51. The practice of the African Commission as articulated in its information Sheet No 3 on Communication Procedures is very clear on the fact that a Complainant, in order to meet the exhaustion of local remedies requirement, must take his/her case to the highest judicial authority of a State Party. The African Commission notes that the Kenyan Court of Appeal was, at the time this Communication was brought before it, the Court of final jurisdiction in Kenya. It also notes that the Respondent State does not dispute the fact that this court had entertained the Victim's case and handed down a binding final decision without any possibility of appeal. It is therefore clear that the Victim's case was entertained by the most superior court in Kenya.

52. The question that remains to be answered is whether the Complainants were required to have recourse to other local remedial avenues after the Court of Appeal's decision in order to meet the requirement of Article 56(5) of the African Charter. An assessment of the nature of local remedies required to be exhausted before a Complaint can be submitted to the African Commission is necessary in order to provide a satisfactory answer to the above question.

53. The African Commission has held in *Alfred Cudjoe v Ghana*¹⁰ and reaffirmed in *Good v Botswana*¹¹ that the internal remedy to which Article 56(5) refers entails a remedy sought from courts of a judicial nature. The Commission has also maintained that such a remedy must not be subordinated to the discretionary power of public authorities;¹² thereby affirming that only mandatory local remedies are required to be exhausted.

54. In the present Communication, the Respondent State argues that the Kenyan Court of Appeal was not approached to review its decision on the Victim's case. The Respondent State cites authorities wherein the Kenyan Court of Appeal has affirmed its inherent power to review its own decision under exceptional circumstances.¹³ The Complainants equally cite authorities where the same court has stated that its residual powers to reopen an appeal are highly limited and is only reserved for exceptional circumstances.¹⁴ From the arguments of both parties, it is clear that the Court of Appeal is not under any legal obligation to review its own decisions. It is therefore apparent that the power of the court to review its own decisions is purely discretionary and not mandatory and such review cannot as such be considered

an available local remedy.

55. The Respondent State also argues that the Victim failed to submit an application to the High Court in terms of Section 84 of the Constitution in order to enforce her fundamental rights. The African Commission agrees with the Complainants that the Victim was not required to take this step in order to meet the requirement of Article 56(5). It is an established principle in human rights law that when a remedy has been attempted, use of another remedy which has essentially the same objective is not required.¹⁵ The Kenyan Court of Appeal was very well in a position to protect the right that the Victim would have sought to be protected through a fundamental rights application to the High Court. The remedy was thus exceptional and the victim cannot be required to have engaged in forum shopping in order to meet the requirement of article 56(5).

56. Regarding Respondent State's argument that the Victim could have submitted a complaint to the Kenyan Human Rights Commission or the Public Complaints Standing Committee, the jurisprudence of the African Commission is clear on the issue. As stated in paragraph 48 above, the remedy to which Article 56(5) refers entails a remedy sought from courts of a judicial nature. The Kenyan Human Rights Commission and the Public Complaints Standing Committee are quasi-judicial bodies which the African Commission has held in *Cudjoe v Ghana*¹⁶ to not constitute judicial remedies. It follows that the Victim was not required to approach this body in order to meet the exhaustion requirement under the African Charter.

57. It is evident from all the above that all remedies that fall within the realm of 'local remedies' in the African Charter have been duly exhausted and the African Commission holds that the requirement of Article 56(5) has been adhered to.

58. According to Article 56(6), Communications shall 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 present Communication was received at the Secretariat of the African Commission on the 22 September 2009 and was dated 10 September 2009. From the parties' submissions, local remedies were exhausted in February 2007 when the Kenyan Court of Appeal handed down its judgment. This gives an interval of thirty one (31) months between the date local remedies were exhausted and the submission of the Communication to the African Commission. The question that therefore falls for determination is whether a period of thirty one months can be considered reasonable in the circumstances of the case.

59. Unlike in the other regional human rights instruments, notably the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms which all consider the period of six months¹⁷, as a reasonable period within which Complaints must be submitted after the exhaustion of local remedies, the African Charter has no such period. The African Commission by virtue of its mandate under Article 45 of the Charter therefore interprets this provision on a case by case basis taking cognizance of its duty to promote and protect human rights as laid down in the Charter.

60. The African Charter empowers the African Commission to, in interpreting the provisions of the Charter, draw inspiration from various sources of law including legal precedents, doctrine, customs and practices consistent with international norms on human rights.¹⁸ Accordingly, the African Commission in interpreting the provision of Article 56 (6) in *Michael Mujuru v Zimbabwe*¹⁹ stated as follows:

Going by the practice of similar regional human rights institutions, such as the Inter-American Commission and Court and the European Court, six months seem to be the usual standard. This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice

61. In the present Communication, the Complainants have made no submissions to explain why the Communication could not be submitted earlier than thirty one months. Submitting a Communication

thirty one months after local remedies were exhausted without any reason to explain such a wide interval is clearly unreasonable and the African Commission therefore finds no compelling reason why this Communication should meet the requirement of Article 56(6).

62. According to Article 56(7) of the African Charter, Communications, in order to be admissible must not deal with cases which have been settled by the States, in accordance with the principles of the United Nations, or the Charter of the OAU or the African Charter. In the present case, the Communication has not been settled in accordance with any of these international principles and as a result, the African Commission finds that the requirement of Article 56(7) has been fulfilled by the Complainants.

Decision of the African Commission on Admissibility

63. Based on the above, the African Commission decides:

- 1) To declare the Communication inadmissible for failing to comply with the provisions of Article 56(6) of the African Charter;
- 2) To notify its decision to the parties and attach the Communication to its Annual Activity Report in accordance with Rule 107(3) of its Rules of Procedure

Done in Banjul, the Gambia, 05 November 2011

FOOTNOTES

1 (2005) 2 EA 102 (CAK)

2 (2005) 1 EA 317 (CAK)

3 Respondents State cites the case of *Serbian Loans*, PCIJ, Ser. A. nos 20-1, Fisheries Case, ICJ Reports (1951) to support its position.

4 Communication 242/01 *Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme/ Islamic Republic of Mauritania* 17th Annual Activity Report at para 27.

5 (2007) Eklr, per Bosire JA, cited in page 5 of Complainant's Submission on Admissibility.

6 Communication 221/98 (1999)

7 A person is presumed to have presented a prima facie violation under the African Charter when the facts presented in a complaint show that a human rights violation has likely occurred. See African Commission on Human and Peoples' Rights, Information Sheet No 3: Communication Procedure

8 Complainants specifically allege violation of Articles 2, 3, 14 and 18(3) of the African Charter.

9 See Information Sheet No 3 on Communication Procedures of the African Commission available on www.achpr.org.

10 Communication 221/98 (1998 – 1999) 12th Activity Report ACHPR. para 14

11 Communication 313/05 (2010) 28th Activity Report ACHPR. para 88

12 Communication 48/90 - *Amnesty International v Sudan*, 50/91 *Comité Loosli Bachelard v Sudan*, 52/91 *Lawyers Committee for Human Rights v Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa v Sudan* (1999), para 31

13 See no 2 above

14 See no 5 above.

15 See decision of the European Court of Human rights in *Wójcik v. Poland*, App. no. 26757/95

16 See no 9 above.

17 See articles 56 (1) b & 36(1) respectively of the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Rights and Freedoms.

18 See articles 60 & 61 of the African Charter.

19 Communication 308/05(2008) 25th Activity Report, ACHPR. Para 109. The Commission declared this Communication inadmissible on account of the fact that it was submitted 22 months after the Complainant fled Zimbabwe and no convincing reason was put forth to explain such delay.