**Heading: Case Summary: Application No 001/2012 Frank David Omary and Others v The United Republic of Tanzania**

**By Harriet Page**

Periodically, ARC reviews the jurisprudence before the African Court of Human and Peoples’ Rights. In respect of Application No 001/2012 David Omary and Others v The United Republic of Tanzania, please see the case summary prepared by Harriet Page on behalf of ARC.

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Background

The Application was brought by nationals of The United Republic of Tanzania. The Respondent, The United Republic of Tanzania, is a State Party to the African Charter on Human and Peoples’ Rights and the Protocol, and has also made the declaration required under Article 34 (6) of the Protocol.

The Applicants alleged in 2003 that the Respondents failed to implement the commitments agreed to upon the dissolution of the East African Community which was agreed by the Presidents of Tanzania, Uganda and Kenya in a Mediation Agreement in 1984. It required, among other stipulations, the payment of reparations on the assets and liabilities of the EAC, as well as the pensions and severance benefits of the ex-employees by the Respondent.

In 2005, the Parties reached an amicable settlement in the High Court. However, it was repudiated by the Applicants who argued that it had not been fully respected by the Respondent. The High Court dismissed the Applicants case in 2010 on the grounds that it was incompetent. However, due to the tension generated by the case, the Court of Appeal ordered that the case be re-examined by another Judge of the High Court. In May 2011, the High Court once again dismissed the case on the grounds that there was no outstanding amount to be paid.

Upon this decision of the High Court, the Applicants remained in front of the Court premises, later sending representatives to see the Chief Justice of Tanzania to find a way forward. Subsequently, the Applicants claim that the Respondent sent an elite force of the Tanzanian Police to disperse them. The Applicants claim that the Police started to beat them severely using police batons and sprayed them with itching water. The Applicants claim that several people were injured.

Application

The Application was lodged before the African Court on Human and Peoples’ Rights on 27th January 2012. The Applicants alleged that the non-payment of their entire pension and severance benefits by the Respondent was a violation of several provisions of the Universal Declaration of Human Rights (“the Declaration”). The Applicants also alleged that the brutality and humiliation they endured at the hands of the police was also a violation of the Declaration. There are therefore two allegations of human rights violations in this case.

The Respondent replied to the Application by stating that the case had not invoked the jurisdiction of the Court and that it be dismissed. Nonetheless, the Respondent also argued that in any event, it had not violated any articles of the Declaration. The Respondent also objected to the admissibility of the Application on several grounds.

Decision

The Court ruled that it had jurisdiction *ratione materiae, ratione personae* and *temporis* to hear the case.

The Court considered the admissibility of the Application under six of the seven requirements under Article 56, in response to the Respondent’s six objections. The Court overruled the objections raised by the Respondent in regards to the following requirements:

1. The identity of the Applicants
2. Compatibility of the Application with the Constitutive Act of the African Union and the Charter
3. Admissibility of the Application on the grounds that it is based exclusively on news disseminated from the mass media

However, the Court held that on both counts of violation (the claim for compensation and the allegation of police brutality), the Applicants had not exhausted local remedies. This was due to the fact that the Applicants had not exhausted domestic courts, particularly the Court of Appeal in respect of the claim of compensation. Also, the Applicants had not demonstrated that they had taken any measures at all in relation to exhausting local remedies with respect to the allegation of police brutality.

The Court did not address the issue of unreasonable delay in filling the Application, due to the conclusion that the Applicants had not exhausted local remedies.

Thus, on these grounds, the Court by a majority of nine to one:

* Overruled the Respondent’s objection to its jurisdiction
* Declared that it had jurisdiction to hear the Application

Subsequently, the Court unanimously declared this Application inadmissible. It sustained the Respondent’s objection to the admissibility of the Application due to the Applicant’s failure to exhaust local remedies with respect to alleged violations relating to claims for compensation and with respect to the alleged police brutality.

The Court also ruled that each Party shall bear its own cost.

Dissenting Opinion of Judge Ouguergouz

Although Judge Ouguergouz was in favour of rejecting the Application, the Judge dissented from the Court ruling that it had jurisdiction to hear the Application. The Judge argues that the Court ought to have rejected the Application on the basis that the Court did not have jurisdiction *ratione temporis* to deal with the alleged violations of human rights with respect to the claims of compensation. The Judge argued that it ought to have only considered the admissibility of the application with regard to the alleged violations of the rights of the Applicants in relation to the alleged police brutalities of 23rd May 2011.

The Judge comments that the Respondent State only deposited the Article 34(6) declaration concerning individual petition to the Court on 9th March 2010. Therefore, if the Court is seized with an individual application against the Respondent State which alleges the violation of a right founded on facts which occurred before 9th March 2010, the Court does not in principle have jurisdiction to deal with such an allegation.

The Judge argues that the decisions of the High Court on 19th September 2008 and 30th January 2009, demonstrate that there was already a complaint and therefore a dispute as to the payment of pension and severance benefits by the Respondent State, suggesting that the Respondent State had violated its obligation to the Applicants at this point. Thus, the Judge concludes that the act which instigated the alleged violation of certain provisions of the Declaration occurred prior to the entry into force of the optional declaration of compulsory jurisdiction by the Respondent State on 9th March 2010.

The Judge was in favour of the Court’s decision to declare the Application inadmissible due to the Applicant’s failure to exhaust local remedies with regards to the alleged police brutalities of 23rd May 2011.

Comment

It is important to note that this is one of the few cases before the AfCHPR which has not been dismissed for lack of jurisdiction due to the Respondent not having deposited the requisite declaration under Article 34 (6) of the Protocol.

In an interesting objection, the Respondent relied upon Article 3 (1) of the Protocol, which provides that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned,” The Respondent relied upon Article 3(1) in seeking to argue that the Court did not have *ratione materiae* jurisdiction as the Applicants had only cited provisions within the Universal Declaration of Human Rights. The Application did not concern the interpretation and application of any human rights instrument ratified by Tanzania and therefore, it was argued by the Respondent, the Application did not fall within the provisions of Article 3(1) of the Protocol and Rule 26 of the Rules. The issue at stake for the Court was whether or not the Universal Declaration is a human rights instrument for the protection of human rights that can be taken into consideration within the meaning of Article 3(1) of the Protocol.

The Court noted that the Universal Declaration of Human Rights is a resolution adopted by the UN General Assembly and is not ratified by States. The Court noted that the Declaration has attained the status of customary international law and is a *grund norm*. The Court ruled that reference by the Applicants to the Declaration to allege a violation has no effect on its jurisdiction as long as the alleged violation is also provided for by a treaty ratified by the State concerned. In this instance, the rights alleged to have been violated were all guaranteed in the African Charter which the Respondent had ratified on 11 June 1976. The Court therefore ruled that it had jurisdiction *ratione materiae* to hear the case.

This author believes that if the Court had held that the Declaration could not be taken into consideration within the meaning of Article 3(1) of the Protocol, it could have led to potentially dangerous consequences for future judgements, and perhaps the undermining of the Declaration before the AfCHPR. The Court still caveated its decision by stating that the alleged violations also need to be provided for in a treaty ratified by the State concerned.