231/99 : Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) / Burundi

Summary of Facts

1. Lawyers Fabien Segatwa, Moussa Coulibaly and Cédric Vergauwen, respectively called to the bars of Burundi, Niger and Brussels and members of ‘‘Avocats Sans Frontières’’ in Burundi, and acting on behalf of Mr Gaetan Bwampamye, currently detained at the Mpimba Prison (Bujumbura) present the facts of the case as follows:

2. On 25th September 1997, Mr Gaëtan Bwampamye was sentenced to death by the Criminal Chamber of the Appeal Court of Ngozi after being convicted for having (in Ruhoro, on 21 October 1993, as author, co-author or accomplice) incited the population to commit crimes, and for having (under the same circumstance, organised as attack geared towards provoking massacres), set up barricades with a view to hindering the enforcement of public order, all of which are offences under Articles 212, 417 and 425 of the Penal Code of Burundi.

3. On 2nd October 1997, he filed an appeal with the Supreme Court of Burundi. In support of his appeal, he invoked six grounds, including the violation of Article 75 of the Penal Procedure Code of Burundi, Article 14 paragraph 3(d) of the International Covenant on Civil and Political Rights, as well as Article 51 of Decree No. 100/103 of 29th August 1979, defining the status of the profession of lawyers. According to the complainants, the latter argument was invoked by the accused to denounce the fact that he was denied the services of his counsel during the public prosecution’s closing address and that, in spite of his request for assistance, he was compelled to prepare his own defence.

4. The Complainants assert that on 3rd June 1997, the Criminal Chamber of the Court of Appeal closed the hearing of the witnesses, and on account of the volume of the case, decided to adjourn the hearing to 20th August 1997.

5. During the hearing of 20th August 1997, the prosecution refused to make its closing address, arguing that it needed more time to study the contents of the statement of the defence counsel. The Criminal Chamber therefore decided to adjourn the case to 25 September 1997. On that day, the counsel for the defence was unable to attend the hearing due to ill health. Despite the repeated requests of Mr Bwampanye for the case to be adjourned to another date, the Chamber decided to hear the prosecution, and compelled the accused to defend himself, without the assistance of his lawyer. The verdict sentencing him to death was rendered that same day at the end of the submissions.

6. The Complainants point out that the Supreme Court had rejected this argument, which the accused had invoked before it. The accused had wanted the ruling of the Ngozi Court of Appeal quashed on the grounds that insofar as the court is concerned, the law does not obligate the judge to designate a lawyer, but he may do so.

7. The Supreme Court continues in the following terms “further, whereas for the specific case in question, the accused has always been assisted by a lawyer, the evidence being that his lawyer had already submitted his 19 page written arguments on 20th August 1997, that has no furthermore they had already pleaded together in the public hearing, whereas in the face of such situation, the plaintiff justification in saying that the judge should have designated a lawyer for him whereas he already had one who had already accomplished all the essential duties expected of a lawyer; that consequently, this argument is also to be rejected” .

8. This line of argument of the Supreme Court is challenged by the complainants who raise a certain number of points of law, including *inter alia*, the ignorance according to them by the said court of the principles of the right of defence and judicial assistance. They claim that, this ruling of the Supreme Court is not only contrary to the provisions of Article 73 of Burundi’s Criminal Procedure Code which unequivocally establishes the right to judicial assistance but also the general principle of oral submissions in criminal proceedings.

9. They assert on the one hand that “whilst it is customary for a lawyer to communicate his pleas to the prosecution before the closing address of the latter, no written rule requires him to do so”. On the

other hand, the complainants assert that “the lawyer is obviously never bound by the contents of a statement of defence deposited before the hearing. Such a statement therefore is not exhaustive and may only be confined to certain aspects of the case and not focus on issues that the defence intends to elaborate on later at the bar. Counsel for the defence may also renounce certain arguments contained in his note, depending on for instance the issues raised by the prosecution. This freedom is at the very core of the rights of the defence. Before any decision, they assert, there is the unconditional right to oral submissions and freedom of speech” .

10. The Complainants assert that this same freedom of speech was accorded to the prosecution, and recall that the “prosecutor is never bound by the written closing speeches of his office.” The principle is furthermore established by the old saying that “the written word is not, as free as the spoken word”. They vehemently assert, that in indicating in its judgement that the lawyer had already submitted a 19-page statement of defence and that in this respect, he had accomplished all the fundamental duties of a lawyer”, the Court ignores all the principles that have just been set forth and, consequently, authorises a blatant violation of the rights of the defence in general and the rights of judicial assistance in particular”.

11. On the basis of the foregoing, the Complainant whilst stressing that the aim of the present complaint is to highlight the above-mentioned violations, call on the Commission to rule that:

1. By refusing Mr Gaetan Bwampamye the assistance of his legal counsel to plead his case, the Criminal Chamber of the Ngozi Court of Appeal held a hearing which was not equitable under the African Charter on Human and People’s Rights and all the relevant international instruments.
2. To establish the violation by the Republic of Burundi of the rights enshrined in the Charter more specifically, the violation of of the Charter and the general principles on the rights of the defence;
3. To report its findings to the parties concerned and to the Assembly of Heads of State and Government of the OAU.

Procedure

12. The communication is dated 11th April 1999. It was sent to the Secretariat by E-mail.

13. On account of the fact that the judgement of the Ngozi Court of Appeal (a major piece written in Kirundi) was still being translated, the communication could not be brought before the Commission during its 25thh Ordinary Session held in Bujumbura, in May 1999. Towards the end of the said Session however, the plaintiffs forwarded to the Secretariat the outstanding documents, thus enabling it to complete the file on the communication and bring the matter before the 26thSession of the Commission.

14. At its 26th Session, the Commission heard from the representatives of Mr Bwampamye who had come to present their position on the matter. After a long debate, the Commission reached a decision to be seized of the communication. Mr Bwampamye was represented by the following lawyers: Segatwa Fabien, Seydou Doumbia and Boubine Toure (all of them being members of Avocats Sans Frontières.

15. On 13th December 1999, the Secretariat informed the parties of this decision and a letter signed by the Chairman of the Commission, requesting a stay of execution was addressed to the Burundian Head of State.

16. On 15th February 2000, the Burundi office of Avocats Sans Frontières acknowledged receipt of the letter of 13th December 1999, addressed to it by the Secretariat without, however, communicating its observations as regards the admissibility of the communication.

17. At its 27th Ordinary Session held in Algiers, Algeria, the Commission examined the case and declared it admissible and requested the parties to furnish it with arguments on its merits. It also requested the Chairman of the Commission to repeat its earlier appeal for stay of execution pending the determination of the communication.

18. The above decision was communicated to parties on 1st August 2000.

19.During its 28th Session, the Respondent State and Counsel for the complainant presented their written and oral submissions before the Commission.

Law

Admissibility

20. Article 56.5 of the Charter stipulates that “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…”

21. It is apparent from an examination of the documents appended to the dossier that the verdict handed down on 25thSeptember 1997, by the Ngozi Court of Appeal, sentencing Mr Gaëtan Bwampamye to death was confirmed on 5 October of the same year by the Supreme Court of Burundi. The Commission notes, consequently, that the domestic remedies had been duly exhausted. For these reasons, it declares the communication admissible.

22. In its oral submission, the respondent state argued that the Complainant had not exhausted other local remedies which include "le recours dans l' interet de la loi", revision and the plea for pardon.

23. The Commission however holds the view that the Complainant could only benefit from the first two remedies at the initiative of the Ministry of Justice and also as a result of discovery of new facts that may lead to reopening the file. With regard to the plea for pardon, it is not a judicial remedy but serves to affect the execution of a sentence. For these reasons the Commission maintains its decision on admissibility.

Merits

24. Article 7 (1) (c) of the Charter states: “Every individual shall have the right to have his cause heard. This comprises…the right to defence, including the right to be defended by counsel of his choice".

25. In its verdict of 5th October 1997, the Supreme Court of Burundi adjudged and stated: “Whereas this Court is of the view that the law implies no obligation on the part of the judge to nominate a lawyer, though he may do so; Whereas in the case under consideration, the accused had always been assisted by a lawyer, proof being that his 19 page written plea of 20th August was filed by his lawyer; and that they had appeared together at the public sitting; Whereas, in view of such situation, the appellant has no reason to claim that the judge should appoint a lawyer for him, since he already had one who had performed all essential functions of a lawyer for him; this procedure is, therefore, also hereby rejected…”

26. The Commission recalls that the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all. The Commission shall examine the verdict of the Ngozi Court of Appeal, as well as that of the Supreme Court in light of the above criteria.

27. The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner. In the case under consideration, it is expected of the Commission to attend to the first aspect, that is, observation of the rule of equality of the means utilised by the defence and the prosecution.

28. The right to defence also implies that at each stage of the criminal proceedings, the accused and his counsel should be able to reply to the indictment of the public prosecutor and should, in any case, be the last to intervene before the court retires for deliberations.

29. The Ngozi Court of Appeal had on 25th September 1997, handed down a verdict sentencing Mr Bwampamye to death, thereby following the prayer of the public prosecutor, paying no heed to the accused's prayer for adjournment of the case, pleading the absence of his lawyer. The Commission holds the view that the judge should have upheld the prayer of the accused, in view of the irreversible character of the penalty involved. This was all the more imperative considering that during the 20th August 1997 hearing, he had upheld the arguments of the prosecutor who had refused to proceed with his pleading claiming that he needed time to study the written plea presented by counsel for the accused. The criminal court then decided to adjourn the case to 25 September 1997. The Commission holds that by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial.

30. The Supreme Court, in its verdict, upholds the position of the lower court judge in refusing to designate a defence lawyer as follows: "… this Court is of the view that the law implies no obligation on the part of the judge to nominate a lawyer, though he may do so" . The Commission emphatically recalls that the right to legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case.

31. In its consideration of what appears to be the liberty allowed the judge under Burundian law to designate or not to designate a defence lawyer for the accused, the Commission recalls the fundamental principle enshrined in Article 1 of the Charter, that not only do the States Parties recognise the rights, obligations and freedoms proclaimed in the Charter, they also commit themselves to respect them and take measures to give effect to them. In other words, if a State Party fails to ensure respect for the rights contained in the African Charter, this constitutes a violation of the said Charter. (See communication 74/92 para. 35 [sic][1]. It is apparent, consequently, that Burundian legislation, in this regard, does not comply with the country's treaty obligations emanating from its status as a State party to the African Charter. The court's argument flies in the face of a well-known general legal principle, which states that "no one may profit from his own turpitude" . The argument should furthermore be rejected because by considering the various instruments cited in his opening statement by counsel for the accused, the court, though admittedly it does not state a position on them, had become aware of the country's obligations as regards human rights, especially the provisions of the International Covenant on Civil and Political Rights and, subsequently, those of the African Charter on Human and Peoples' Rights. By upholding the position of the appellate judge, the court ignored the obligation of courts and tribunals to conform to international standards of ensuring fair trial to all.

Holding

For these Reasons, the Commission Holds a violation of Article 7(1) (c) of the African Charter. Requests Burundi to draw all the legal consequences of this decision; and to take appropriate measures to allow the reopening of the file and the reconsideration of the case in conformity with the laws of Burundi and the pertinent provision of the African Charter on Human and People's Rights. Calls on Burundi to bring its criminal legislation in conformity with its treaty obligations emanating from the African Charter.

Cotonou, Benin, 23rd October to 6th November 2000.

Footnotes

1. Editor's note: The English language version is generally of shorter length (26 paragraphs in all) and less detailed than the French language version (41 paragraphs).