263/02 : Kenyan Section of the International Commission of Jurists, Law Society or Kenya and Kituo Cha Sheria / Kenya

Summary of Facts

1. The Complainants are Kenya Section of the International Commission of Jurists (1st complainant), Law Society of Kenya (2nd complainant) and Kituo Cha Sheria (3rd complainant), all based in the Republic of Kenya.

2. The Complaint was received at the Secretariat of the Commission on 18th October 2002 and is against the Republic of Kenya a State Party to the African Charter on Human and Peoples' Rights (the African Charter) since 1991.

3. According to the Complainants, the Constitution of Kenya Review Act Chapter 3 A of the Laws of Kenya (the Review Act) sets up the Constitution [of Kenya] Review Commission (CKRC) to facilitate the comprehensive review of the Constitution by the people of Kenya and for connected purposes.

4. Pursuant to the provisions of the Constitution of Kenya Review Act and in exercise of the rights conferred upon it by Section 79 of the Constitution of Kenya and Article 9.2 of the African Charter, the 1st Complainant submitted a written memorandum on the Judiciary and Human Rights in Kenya to the CKRC.

5. The 1st Complainant also facilitated an examination of the Kenya Judiciary by a panel of eminent jurists drawn from the Commonwealth, which in turn presented its views in a form of a written memorandum to the CKRC. Among other things, the written memorandum highlighted the fact that from the programme of consultation, the advisory panel concluded that as constituted, the Kenyan judicial system suffered from a serious lack of public confidence and was generally perceived as being in need of fundamental structural reform.

6. The 2nd and 3rd Complainants submitted written memoranda pursuant to their mandate and in exercise of rights conferred upon them by Section 79 of the Constitution of Kenya and Article 9.2 of the African Charter. In the memoranda, presentations were also made on how the Kenyan judicial system could be improved.

7. In September 2002, the CKRC published a draft report of its work, which collated the views submitted by Kenyans in terms of the Review Act. In so far as the legal system was concerned, the CKRC reported, among other things, that many Kenyans submitted that they had lost confidence in the judiciary as a result of corruption, incompetence and lack of independence. To this end, the CKRC recommended the inclusion of several basic principles of a fair and acceptable judicial system into the draft Constitution.

8. After the publication of the report, Justice Moijo Ole Keiwua, a judge of the Court of Appeal of Kenya and Justice Vitalis Juma, a Judge of the High Court, jointly sought leave before the High Court of Kenya to file Judicial Review proceedings against the CKRC and its chairperson, Professor Yash Pal Ghai.

9. Amongst other things, the judicial review proceedings sought an order of *certiorari* for the quashing of the decision and/or proposals actual or intended and/or recommendations of the CKRC and Professor Ghai concerning and touching on the Kenyan Judiciary contained in the CKRC report.

10. On 26th September 2002, Justice Andrew Hayanga, judge of the High Court issued an order granting leave of Court to file a Judicial Review. The Complainants allege that the effect of this order was that in terms of Order 53 of the Civil Procedure Rules of Kenya it doubled as a staying order on further proceedings subject to the review application. 10. Subsequent to this ruling, the Complainants

allege that High Court barred the CKRC, its Chairperson and a national forum yet to be constituted known as the National Constitutional Conference from discussing or making any suggestions in relation to any provisions touching upon the Judiciary.

11. On 30th September 2002 the CKRC published its Bill of the Constitution of Kenya in terms of the Review Act and further issued a notice that the National Constitutional Conference would be held in early November 2002.

12. The Complainants allege that the existence of the suit by the Judges and the staying orders granted by the High Court of Kenya pose an effective and immediate threat to the denial of a new constitutional review process which will result in the denial of a new constitution that protects all human rights to which all Kenyans are entitled under the African Charter and these rights have been proposed to be guaranteed in the new Constitution of Kenya.

13. The Complainants allege that the following Articles of the African Charter have been violated: Articles 1, 7(1) (a), 9(2) and46 of the African Charter.

14. The communication was sent by DHL and was received at the Secretariat of the African Commission on 18th October 2002.

15. At its 33rd Ordinary Session, the African Commission considered the communication and decided to postpone its decision on seizure pending receipt of the following information from the Complainants -:

- Status of the work of the Constitution of Kenya Review Commission (CKRC) bearing in mind the major developments that had taken place in relation to constitutional review process in Kenya;
- Whether or not the Complainants cannot challenge the staying orders granted by the High Court before a court of superior jurisdiction in Kenya because from the facts presented on the file, it is evident that the matter is still before the High Court of Kenya.

16. On 29th August 2003, a letter was sent to the Complainants reminding them to provide the information requested for by the African Commission.

17. On 4th November 2003, the Complainants transmitted a written response to the additional information requested for by the African Commission.

18. During the 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the Complainants made oral submissions urging the African Commission to be seized with the matter. The African Commission considered the complaint and decided to be seized thereof.

19. On 4th December 2003, the Secretariat wrote informing the parties to the communication that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within 3 months.

20. By letter and Note Verbale dated 15th March 2004, the parties to the communication were reminded to forward their written submission on admissibility of the communication.

21. On 25th March 2004, the Secretariat of the African Commission received the Respondent State's written submissions on admissibility.

22. By Note Verbale dated 26th March 2004, the Secretariat of the African Commission acknowledged receipt of the Respondent State's submissions on admissibility and forwarded the same to the Complainant by fax.

23. On 2nd April 2004, the Secretariat of the African Commission received the Complainants' written submissions on admissibility.

24. By letter dated 6th April 2004, the Secretariat of the African Commission acknowledged receipt of the Complainants' submissions on admissibility and forwarded a copy of the same by DHL to the Respondent State.

25. At its 35th Ordinary Session held in Banjul, the Gambia from 21 May to 4 June 2004, the African Commission decided to defer further consideration on admissibility of the matter to its 36th Ordinary Session because the Complainants undertook to provide the African Commission with information in respect of Miscellaneous Case No. 1110 of 2002 - Justice Ole Keiwua and Justice Vitalis Juma versus In the Matter of Prof. Yash Pal Ghai and two others which was heard in the High Court of Kenya.

26. By Note Verbale dated 15th June 2004 addressed to the Respondent State and by latter carrying the same date address to the Complainant, both parties were informed of the African Commission's decision.

27. By letter dated 23rd September 2004, the Complainant was reminded to submit the information they undertook to submit during the 35th Ordinary Session of the African Commission.

28. At its 36th Ordinary Session held from 23rd November to 7th December in Dakar, Senegal, The African Commission considered the communication and declared it inadmissible.

Law

Admissibility

29. The African Commission was seized with the present communication at its 34th Ordinary Session which was held in Banjul, The Gambia from 6th to 20th November 2003. Both the Respondent State and the Complainants have presented their written arguments on admissibility of the communication.

30. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with Article 55 of the African Charter.

31. The Respondent State contends that the requirements of Article 56.5 have not been met by the Complainants. Article 56.5) of the African Charter provides:

Communications ... received by the African Commission shall be considered if they: (5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

32. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and is premised on the principle that the Respondent State must first have an opportunity to redress by its own means and within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

33. The Complainants submit that the circumstances that gave rise to this communication are peculiar. It is based on a suit that was instituted by a Judge of the High Court and a Judge of the Court of Appeal with the aim of defeating the rights of Kenyan citizens to contribute to the constitution making process in the country.

34. Therefore, the Complainants claim that exhausting local remedies in this case would be impossible and inordinately convoluted because the judiciary is compromised and severely lacking in independence. Furthermore, the Complainants argue that the said judges who instituted the matter are arguably representative of all the members of the judiciary and as such it would be virtually impossible to obtain a fair hearing from the same judiciary.

35. In applying the rule of exhausting domestic remedies, the African Commission often requires the Complainant to provide information on attempts made to exhaust local remedies. [1]

36. While considering the file for seizure at its 33rd Ordinary Session, the African Commission realised that the Complainants were bringing a matter that was evidently still before the High Court of Kenya. Consequently, the African Commission deferred being seized with the communication and sought clarification on developments that had taken place with respect to the whole constitutional review process upon which some aspects of this communication was based. In addition, the African Commission sought information from the Complainants as to whether or not they could not challenge the staying orders that had been granted by the High Court before a court of superior jurisdiction in Kenya.

37. In their response to the clarifications sought by the African Commission, the Complainants argued that it would not be possible for them to be admitted as interested parties in the suit without leave of court. They stated that leave is granted at the discretion of the judge and under the circumstances they were apprehensive that leave would not be granted. Furthermore, they argued that they could not practically enforce any right of appeal against orders obtained in a suit in which the primary Respondent/Appellant had boycotted the court's jurisdiction; And even if the primary Respondents had defended the suit, the Complainants submitted that the likelihood of enforcing their rights as interested parties at Appeal Court would have been unsuccessful because the Court of Appeal through Justice Moijo ole Keiwua was itself a party to a suit in the nature of a class action.

38. The Complainants argued further that the principle that they want the African Commission to settle is whether judges can hear matters that actually affect them.

39. In their subsequent submissions on admissibility the Complainants informed the African Commission that indeed they went ahead together with other members of the civil society in Kenya to make an application moving court as 'ordinary citizens and taxpayers' to join them as interested parties in the suit against the CKRC and the Chair of the CKRC. Their"application" to be joined as interested parties in the judicial review application was allowed.

40. Quite evidently from the situation described above, the Complainants eventually approached the courts even though they believed that no member of the judiciary in Kenya would make a decision against the interests of their fellow 2 judges. However, such concerns should have been eliminated when the judges actually granted the application in their favour.

41. The African Commission is of the view that it is incumbent on the Complainants to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainants to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences. In this regard, the African Commission would like to refer to the decision of the Human Rights Committee in *A v Australia*[2] in which the Committee held that "mere doubts about the effectiveness of local remedies or prospect of financial costs involved did not absolve the author from pursuing such remedies".

42. The African Commission would be setting a dangerous precedent if it were to admit a case based on a Complainant's apprehension about the perceived lack of independence of a country's domestic institutions, in this case the Judiciary. More so, where, as in this case, the Complainants have not adduced ample evidence to demonstrate the validity of their apprehensions. Furthermore, the Complainants have not even tested the principle that they wish the African Commission to settle before the domestic courts; and by so doing they are in essence asking the African Commission to take over the role of the domestic courts, a role which clearly does not belong to the African Commission as a treaty body [3]

43. The Respondent State has argued that the issues in the communication have been overtaken by events. Both Justices Moijo ole Keiwua and Vitalis Juma are currently on suspension and are under investigation by a tribunal. They have also indicated that the Application brought by Justices Moijo ole Keiwua & Vitalis Juma against the Chair of the CKRC and the CKRC is for all intents and purposes dead because none of the parties have pursued it.

44. The African Commission has also been made aware that the Respondent State has set up special investigative tribunals to investigate those members of the judiciary that have been implicated as having acted unethically in the performance of their functions. Presented with such information, the African Commission is of the view that the situation as it is now allows the Complainants to approach the domestic courts in Kenya without any apprehension that there will be an unfair adjudication in the matter.

45. Therefore, since the Complainants now have *locus standi* in the judicial review proceedings, they should exhaust the local remedies available and also seize this opportunity to challenge the court orders that were issued by the High Court before a superior court of jurisdiction in Kenya.

Holding

For these reasons, the African Commission in conformity with Article 56.5 of the African Charter declares this communication inadmissible for non-exhaustion of local remedies.

Adopted by the African Commission on Human and Peoples' Rights at its 36th Ordinary Session held from 23 November - 7 December 2004, in Dakar, Senegal.

Footnotes

1. Communication 127/94 Sana Dumbaya/The Gambia.
2. [url= http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument]Communication No. 560/1993[/i], UN Doc CCPR/C/59/D/560/1993 (1997)[/url].
3. Communication 211/98 Legal Resources Foundation/Zambia.